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UNITED STATES REPORTS

VOLUME 400

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1970

(BEGINNING OF TERM)

OCTOBER 6, 1970, THROUGH FEBRUARY 3, 1971

TOGETHER WITH IN-VACATION DISMISSALS AND OPINIONS
OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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.

RETIRED

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

OFFICERS OF THE COURT

JOHN N. MITCHELL, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
E. ROBERT SEAVER, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
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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.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1970

McCANN, DISTRICT ATTORNEY OF MILWAUKEE COUNTY *v.* BABBITZ

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

No. 297. Decided October 12, 1970

310 F. Supp. 293, appeal dismissed.

PER CURIAM.

The appeal is dismissed. *Mitchell* v. *Donovan,* 398 U. S. 427, and *Gunn* v. *University Committee to End the War in Viet Nam,* 399 U. S. 383.

HANEMANN *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 5156. Decided October 12, 1970

Certiorari granted; vacated and remanded to District Court of Appeal of Florida. See: 221 So. 2d 228.

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 District Court of Appeal of Florida, First District, for consideration in light of *Ashe* v. *Swenson,* 397 U. S. 436.

HALL *v.* UNITED STATES

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

No. 5191. Decided October 12, 1970

Certiorari granted; vacated and remanded to the District Court.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Middle District of Alabama with directions to dismiss the complaint as moot.

LOS ANGELES HERALD-EXAMINER ET AL. *v.* KENNEDY, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL.

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

No. 350. Decided October 12, 1970

Certiorari granted; vacated and remanded to District Court.

PER CURIAM.

The motion of the Chamber of Commerce of the United States for leave to file a brief, as *amicus curiae,* is granted. The motion to defer consideration of the petition for a writ of certiorari is denied.

The petition for a writ of certiorari is granted. The orders of the Court of Appeals are vacated and the case is remanded to the United States District Court for the Northern District of California with directions to dismiss the case as moot. *Sears, Roebuck & Co.* v. *Carpet Layers,* 397 U. S. 655.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions or this petition.

UNITED STATES *v.* MARYLAND SAVINGS-SHARE INSURANCE CORP.

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

No. 160. Decided October 19, 1970

Section 501 (c)(14)(B) of the Internal Revenue Code of 1954, which limits income tax exemption for nonprofit mutual insurers to those organized before September 1, 1957, is not an arbitrary classification violative of due process requirements, Congress having had a rational basis for concluding that an extension of the cutoff date could adversely affect federal programs.

308 F. Supp. 761, reversed.

PER CURIAM.

This is a direct appeal by the United States from a district court judgment holding unconstitutional § 501 (c)(14)(B) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c)(14)(B) (1964 ed., Supp. V), on the ground that it arbitrarily discriminates between Maryland Savings-Share Insurance Corp. (MSSIC), the appellee, and other similar nonprofit, mutual insurers.

MSSIC was established by the Maryland Legislature with the object of insuring the accounts of shareholders of member savings and loan associations. Although first chartered in 1962, it seeks the benefit of § 501 (c)(14)(B), which exempts from tax nonprofit corporations such as appellee but only if organized before September 1, 1957.[1]

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[1] Internal Revenue Code § 501 (c)(14)(B), 26 U. S. C. § 501 (c)(14)(B) (1964 ed., Supp. V), provides:

"(B) Corporations or associations without capital stock organized before September 1, 1957, and operated for mutual purposes and

MSSIC's position is that September 1, 1957, is an arbitrary and unconstitutional cutoff date which must be excised from the section, leaving the section applicable to all corporations of the same nature as itself regardless of the date of their creation. We do not agree.

Prior to 1951, all savings and loan associations were exempt from taxation of income derived from their operations. Also exempt were nonprofit corporations that insured the savings institutions. In 1951, the exemption for savings and loan associations was discontinued, on findings that the industry had developed to a point comparable to that of commercial banks. The exemption for insurers, however, was continued, provided they were already in existence as of September 1, 1951. See Revenue Act of 1951, § 313 (b), 65 Stat. 490; S. Rep. No. 781, 82d Cong., 1st Sess., 22–29; 2 U. S. Code Cong. & Ad. News 1969, 1991–1997 (1951). As of that date three private insurers fell within the scope of the section—two of them in Massachusetts and one in Connecticut. Then, in 1956, a fourth such corporation was organized in Ohio, and four years later Congress moved the cutoff date forward to September 1, 1957. Act of April 22, 1960, 74 Stat. 54.

In 1963, a similar bill, H. R. 3297, 88th Cong., 1st Sess., which would have moved the cutoff date forward to January 1, 1963, for the benefit of MSSIC, passed the House, but was never reported out by the Senate Finance Committee. Testimony before the committee indicated

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without profit for the purpose of providing reserve funds for, and insurance of shares or deposits in—

"(i) domestic building and loan associations,

"(ii) cooperative banks without capital stock organized and operated for mutual purposes and without profit, or

"(iii) mutual savings banks not having capital stock represented by shares."

that continued forward movement of the date might lead to proliferation of state insurers that could hinder the operations and threaten the financial stability of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. See Hearing on H. R. 3297 before the Senate Committee on Finance, 88th Cong., 2d Sess., 9–10 (1964).

Against this background, the District Court's invalidation of § 501 (c)(14)(B) was error. The fact that Congress enacts a statute containing a "grandfather clause," which exempts from the general income tax certain corporations organized prior to a specified date, does not of itself indicate that Congress has made an arbitrary classification. Cf. *Stanley* v. *Public Utilities Comm'n,* 295 U. S. 76 (1935); *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U. S. 502 (1911); *Watson* v. *Maryland,* 218 U. S. 173 (1910); *Sampere* v. *New Orleans,* 166 La. 776, 117 So. 827 (1928), aff'd *per curiam,* 279 U. S. 812 (1929). Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts. *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802, 809 (1969); *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961); *Standard Oil Co.* v. *City of Marysville,* 279 U. S. 582, 586–587 (1929). See also *Watson* v. *Maryland, supra,* at 178. Here the legislative history of H. R. 3297 affirmatively discloses that Congress had a rational basis for declining in 1963 to broaden the exemption by extending the cutoff date of § 501 (c)(14)(B). Just as a State may provide that after a specified date newly established common carriers must obtain state approval before entering into business so as to prevent proliferation of such carriers and excessive use of the State's highways, see *Stanley* v. *Public Utilities Comm'n, supra,* similarly Congress does not exceed its power to tax nor does it violate the Fifth Amendment when it refuses to exempt from tax newly

formed corporations, the multiplication of which might burden otherwise valid federal programs.[2]

Having noted probable jurisdiction by order of October 12, 1970, we now reverse the judgment of the District Court.

So ordered.

MR. JUSTICE HARLAN, considering that the issues in this case are deserving of plenary consideration, would set the case for argument.

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[2] The District Court's reliance on *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U. S. 266 (1936), was misplaced, since, according to the Court in that case, the legislative record contained no affirmative showing of a valid legislative purpose. We thus need not pass upon the continuing validity of *Mayflower*'s holding. We also find unpersuasive MSSIC's remaining argument that it is an instrumentality of the State and hence entitled to exemption from federal taxation under the doctrine of intergovernmental immunity and under § 115 (a)(1) of the Code, 26 U. S. C. § 115 (a)(1). The District Court properly rejected this argument.

UNITED STATES ET AL. *v.* CITY OF CHICAGO ET AL.

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

No. 386. Decided October 19, 1970*

Section 13a (1) of the Interstate Commerce Act does not require a railroad seeking to discontinue its segment of a through passenger train that is operated in conjunction with another railroad to give notice of the proposed discontinuance in States served only by the connecting line.

Nos. 386, 387, 396, and 410, 312 F. Supp. 442, reversed and remanded.

PER CURIAM.

These cases are a sequel to our decision in *City of Chicago* v. *United States,* 396 U. S. 162, last Term. The Chicago & Eastern Illinois Railroad (C&EI) filed a notice under § 13a (1) of the Interstate Commerce Act, 72 Stat. 571, 49 U. S. C. § 13a (1), proposing to discontinue a pair of trains known as the "Georgian," operated by it between Chicago, Illinois, and Evansville, Indiana, and operated in conjunction with trains of the Louisville & Nashville Railroad (L&N) between Evansville, Indiana, and Atlanta, Georgia, crossing Kentucky and Tennessee en route. Part of this litigation grows out of the ICC's approval of the C&EI's discontinuance of the Chicago-Evansville segment of the "Georgian," evidenced by its termination of its investigation.

The L&N also operates the "Hummingbird" between Cincinnati, Ohio, and New Orleans, Louisiana. The

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*Together with No. 387, *United States et al.* v. *Tennessee Public Service Commission et al.,* No. 396, *Louisville & Nashville Railroad Co.* v. *Tennessee Public Service Commission et al.,* and No. 410, *Chicago & Eastern Illinois Railroad et al.* v. *City of Chicago et al.,* also on appeal from the same court.

"Hummingbird" connects with the "Georgian" at Nashville, Tennessee, where coaches and sleepers are transferred between the two trains. Following the ICC's approval of C&EI's discontinuance, the L&N served notice of discontinuance of the "Hummingbird" [1] which the ICC also approved.

In *City of Chicago* v. *United States, supra,* we held that ICC decisions to discontinue such an investigation were reviewable and remanded the cases back to the District Court. That court then ordered consolidation and remanded back to the ICC for further hearings, holding that the notice served by the C&EI on the Governors of Illinois and Indiana and at every station along the Chicago-Evansville run was inadequate because the people of Kentucky, Tennessee, and Georgia, and the Governors of those States were not notified. The "Hummingbird" discontinuance was also remanded to the ICC because of its close relationship with the "Georgian." These appeals followed.

We note jurisdiction and reverse. Section 13a (1) provides:

> "A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change . . . of the operation or service of any train . . . are subject to any provision of the constitution or statutes of any State . . . shall mail to the Governor of each State in which such train . . . operated, and post in every station, depot or other facility served thereby, notice . . . of any such proposed discontinuance or change."

This section, as we read it, required C&EI to give notice in Illinois and Indiana, the only States in

[1] No issue as to the adequacy of the notice given in the L&N proceeding is raised here.

which the line now in controversy has operated. No provision is made in § 13a (1) for notice to States served by connecting railroads which might be affected by a discontinuance.

The dissent finds ambiguity in the phrase "such train" in § 13a (1). It is argued that two interpretations of "such train" are possible: either the train of the C&EI between Chicago and Evansville or the "Georgian" between Chicago and Atlanta. By allowing discontinuance under § 13a (1), however, the ICC must have interpreted "such train" to refer to a train operated by one railroad only; and it was only the Chicago-Evansville discontinuance that was before it at the time. The Commission ruled that: "Copies of the notices were duly served and posted in the manner required by section 13a (1) and our rules and regulations thereunder."[2] 331 I. C. C. 447, 448. We defer on this issue to the definition of "train" given by the administrative agency which has oversight of the problem. See, *e. g., Udall* v. *Tallman,* 380 U. S. 1, 16–17; *Bowles* v. *Seminole Rock Co.,* 325 U. S. 410, 417–418.

It is true that the C&EI and the L&N functioned in close harmony. Discontinuance of service on one line might have a substantial effect on the other. But this relationship is not unique in railroading. Congress is not unaware of the mutual interdependence of railroads. It designed a federal regulatory system that displaced a state regulatory system when the state system could defeat a carrier's attempt to discontinue a train. Hence we think it distorts § 13a (1) to treat it so as to require

[2] The regulation at the time provided for "[a] certificate [stating] that a copy of the notice * * * has been mailed to the Governor and railroad regulatory body of each State in which the subject train or ferry is operated." (49 CFR § 143.5 (j), formerly § 43.5 (j) (see 32 Fed. Reg. 5606)).

the giving of notice to States which had no regulatory power over the carrier.[3]

Accordingly, the decisions in Nos. 386 and 410 are reversed. Since Nos. 387 and 396 were remanded to the Commission solely because of their relation to Nos. 386 and 410, those decisions are also reversed. The causes are remanded to the District Court for review of any questions on the merits which may remain unresolved.

It is so ordered.

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

I think these cases do not lend themselves to summary disposition.

The Chicago & Eastern Illinois Railroad Co. and the Louisville & Nashville Railroad Co. jointly operated

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[3] Until 1958 railroad discontinuances required approval of the appropriate regulatory agency in each of the States in which the line operated. Congress knew of the financial difficulties of the railroads and concluded that the problem of discontinuance had to be removed from its parochial setting where state agencies too often required the "maintenance of uneconomic and unnecessary services and facilities." S. Rep. No. 1647, 85th Cong., 2d Sess., 22. Therefore, Congress vested power over discontinuances in a body aware of the national transportation problems and needs. See generally *City of Chicago* v. *United States,* 396 U. S. 162 (1969), and *Southern R. Co.* v. *North Carolina,* 376 U. S. 93 (1964).

The problem of discontinuance of services as put to the Congress by the Association of American Railroads was described as follows: "[S]uch matters are subject to approval of State regulatory commissions and authority for such discontinuances or abandonments must be obtained within the scope of statutes or procedures under which those State commissions operate." Problems of the Railroads, Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pt. 1, p. 25 (Jan. 13, 1958).

The legislation was responsive to that need and may not be easily construed to do more than track the jurisdiction of a State over the carrier in question.

a train known as the "Georgian" which provided passenger service between Chicago, Illinois, and Atlanta, Georgia. At Evansville, Indiana, between the two terminal points on the "Georgian" run, the railroad companies switched engines and train crews; passengers, however, could remain in the railroad cars and continue through to the end of the run. The Chicago & Eastern Illinois sought ICC approval of its discontinuance of the Chicago-Evansville portion of the run; notice of the proposed discontinuance proceedings was not served on the Governors and residents of the States served by the Evansville-Atlanta portion of the "Georgian" run. After our remand in *City of Chicago* v. *United States,* 396 U. S. 162 (1969), the District Court held that notice of the ICC discontinuance proceedings should have been given to the Governors and residents of all the States served by the "Georgian" run. The Court, in Nos. 386 and 410, now summarily reverses that decision, holding that § 13a (1) of the Interstate Commerce Act, 49 U. S. C. § 13a (1), requires that a carrier seeking to discontinue passenger service give notice only in those States having regulatory authority over the carrier.[1]

[1] Nos. 387 and 396 are appeals by the Government, the ICC, and the Louisville & Nashville Railroad Co. challenging the District Court's holding that the issues involving the discontinuance of the Louisville & Nashville Railroad Co.'s "Hummingbird" train are so factually related to the discontinuance of the "Georgian" run that the "Hummingbird" discontinuance should be remanded in light of the projected reconsideration of the "Georgian" discontinuance. In addition, the Louisville & Nashville Railroad Co., in No. 396, challenges the District Court's action in reinstating the September 6, 1968, restraining order entered by Judge Robson; that restraining order prohibited discontinuance of the "Hummingbird" trains pending resolution of the case in the District Court. On April 3, 1970, this Court stayed the District Court's action in reinstating the earlier restraining order. 397 U. S. 1019. The effect of today's opinion on the status of that restraining order is unclear.

The issue, in my opinion, is not one justifying summary resolution, as an examination of the Court's opinion indicates. The Court relies in the first instance on the absence of an explicit provision in § 13a (1) of the Act for notice to States served by "connecting railroads." However, the statutory provision in question is manifestly highly ambiguous with regard to the scope of the notice obligation in situations where two carriers, though subject to different state regulatory authorities, offer their services to the public in a manner which, from the consumer standpoint, is indistinguishable from passenger service offered by a single carrier. Section 13a (1) provides in relevant part:

> "A carrier or carriers . . . if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train . . . operating from a point in one State to a point in any other State . . . are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train . . . is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. . . ."

Appellants in Nos. 386 and 410 argue that since § 13a (1) accords carriers a right to commence discontinuance proceedings before the ICC if their rights with respect to the operation of train service are subject to any state regulatory authority, the scope of the notice requirement should be limited by the reach of the state regulatory power giving rise, in the first instance, to the carrier's right to go before the ICC. Appellees in

Nos. 386 and 410, for their part, contend that the notice requirement is geared to the areas through which "such train" is operated, not merely the areas reached by a State's regulatory power over the carrier. For my part, I find the language and structure of the statutory provision singularly opaque; and I am not aided in my choice between these competing constructions by the Court's observation that § 13a (1) makes no provision for notice in States served by "connecting railroads."

In view of the structural and linguistic ambiguity of the statutory provision, the Court's reliance on the absence of an explicit reference to carrier arrangements of this sort would carry weight only if the legislative policy underlying § 13a (1) of the Act solidly supported the result reached today. Lacking that, the description of congressional policy in n. 3 of the Court's opinion, *ante,* at 11, hardly warrants the Court's inference in the text of its opinion that the statutory purpose underpinning § 13a (1) is served by a limitation of the notice requirements according to the reach of the State's regulatory power over the carrier filing with the ICC.[2] Indeed, the concern with state regulatory parochialism, and the resulting burden on interstate commerce caused

[2] The disconnected nature of the Court's reasoning is nicely illustrated in n. 3 of its opinion, *ante,* at 11. We are offered two quotations—one from the Senate Report and the other from the Association of American Railroads—as legislative history supporting the Court's construction of § 13a (1). The substance of both clearly supports the view of § 13a (1) as seeking to remedy state regulatory parochialism. Unfortunately, neither quotation speaks to the question put in issue by the Court's rationale for summarily disposing of these cases; *i. e.,* whether the congressional decision to proffer an alternative national forum as a remedy for state parochialism is to be construed solely in light of the carrier interest in escaping state regulatory agencies. Yet the Court, after reciting these quotations, chooses to draw the inference that the statute cannot be easily construed to do more than serve that interest of the carriers. I must respectfully submit that this is a rather obvious *non sequitur.*

by economically wasteful passenger service arrangements, argue with at least equal force for an interpretation of the notice requirements of § 13a (1) as reaching beyond the relatively narrow parochial interests likely to be called forth by only a particular State's participation in a hearing on the discontinuance of multicarrier service.

Apparently, the Court recognizes the inherent ambiguity of the statute. Thus, its opinion finally comes to rest on the principle of deference to the administrative agency's construction of the statute. Suffice it to say that I am not persuaded by the deference argument as applied to the agency's *pro forma* finding of adequate notice in this very litigation where the notice issue evidently was not before the agency at the time of its ruling. See 331 I. C. C. 447, 448.

The above considerations are not meant to reflect any conclusions concerning the merits of the statutory construction issue presented in these cases. To the contrary, my point is simply that, without briefs and oral argument by the parties on the merits of the question, I would refrain from choosing between the conflicting constructions of § 13a (1) pressed upon the Court by the parties. Therefore, I would note probable jurisdiction in Nos. 386 and 410. I would withhold action in No. 387 pending dispositions in Nos. 386 and 410. In No. 396, I would note probable jurisdiction, limited to the questions concerning the District Court's action in reinstating the restraining order of September 6, 1968.

COLOMBO *v.* NEW YORK

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

No. 175. Decided October 19, 1970

Certiorari granted; 25 N. Y. 2d 641, 254 N. E. 2d 340, 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 of New York for further consideration in light of *Waller* v. *Florida,* 397 U. S. 387.

MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment reversed on the ground that the state prosecution is barred by the Double Jeopardy Clause of the Fifth Amendment of the Constitution.

THOMPSON *v.* UNITED STATES

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

No. 5272. Decided October 26, 1970

Certiorari granted; 421 F. 2d 373, vacated and remanded to the District Court.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of Louisiana for consideration of the request contained in the memorandum filed in this Court by the Solicitor General.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, would grant certiorari and reverse the decision below for the reasons stated in his dissenting opinions in *Abbate* v. *United States,* 359 U. S. 187, 201 (1959), and *Bartkus* v. *Illinois,* 359 U. S. 121, 150 (1959).

LINES *v.* FREDERICK ET AL.

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

No. 412. Decided November 9, 1970

A bankrupt wage earner's vacation pay, accrued but unpaid at the time of filing of his petition, does not pass to the trustee in bankruptcy as "property" under § 70a (5) of the Bankruptcy Act.

Certiorari granted; 425 F. 2d 215, affirmed.

PER CURIAM.

This case presents the question of whether a bankrupt wage earner's vacation pay, accrued but unpaid at the time of the filing of his petition, passes to the trustee in bankruptcy as "property" under § 70a (5) of the Bankruptcy Act, 30 Stat. 565, as amended, 11 U. S. C. § 110 (a)(5). The facts are not in dispute. Respondent Frederick, employed by a large manufacturing company, had accrued vacation pay of $137.28 at the time he filed his petition. He could collect this sum either during the annual period when his employer shut down the plant in which he worked, or on final termination of his employment. Respondent Harris had accrued vacation pay of $144.14, which he could draw either on termination or under a conventional voluntary vacation plan of his employer. In each case, the referee in bankruptcy made a "turnover order" requiring the bankrupt to pay to the trustee on receipt all of his accrued vacation pay, less one-half of that part accrued during the 30 days prior to the filing of the petition (the deducted sum being exempt under Cal. Code Civ. Proc. § 690.11 (Supp. 1970)).

The District Court affirmed the referee in both cases, but the Court of Appeals for the Ninth Circuit reversed, holding that accrued but unpaid vacation pay is not "property" under the statute, and therefore finding it

unnecessary to decide whether such accrued pay meets the further statutory requirement of being "transferable." As the Court of Appeals noted, its decision was squarely in conflict with that of the Court of Appeals for the Fifth Circuit in *Kolb* v. *Berlin,* 356 F. 2d 269.

In *Segal* v. *Rochelle,* 382 U. S. 375, 379, we said that "[t]he main thrust of § 70a (5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." But we pointed out that " '[i]t is impossible to give any categorical definition to the word "property," nor can we attach to it in certain relations the limitations which would be attached to it in others.' "

The most important consideration limiting the breadth of the definition of "property" lies in the basic purpose of the Bankruptcy Act to give the debtor a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. The various provisions of the bankruptcy act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act." *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 244–245 (citations omitted).

In *Segal* v. *Rochelle, supra,* the question was whether loss-carryback tax refunds arising out of business losses immediately prior to bankruptcy but not collected until the end of the calendar year were property subject to a turnover order in favor of the trustee. In that case, as in this one, the problem of classification for purposes of the Bankruptcy Act could not be resolved simply by reference to the time when the right to the payment "vested," or to definitions of property drawn from other

areas of the law. The Court looked to the purposes of the Act and concluded that the tax refund claim was "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start that it should be regarded as 'property' under § 70a (5)." 382 U. S., at 380.

Applied to the set of facts before us here, the principles reflected in the earlier cases compel a decision for the bankrupt. In *Segal,* a business had ceased to operate and the task of the trustees in bankruptcy was to marshal whatever assets were left for distribution to the creditors. The tax refund claim, arising out of the operations of the business and specifically out of the losses that had precipitated its failure, was such an asset. By contrast, the respondents here are wage earners whose sole source of income, before and after bankruptcy, is their weekly earnings. The function of their accrued vacation pay is to support the basic requirements of life for them and their families during brief vacation periods or in the event of layoff. Since it is a part of their wages, the vacation pay is "a specialized type of property presenting distinct problems in our economic system." *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 340. Where the minimal requirements for the economic survival of the debtor are at stake, legislatures have recognized that protection that might be unnecessary or unwise for other kinds of property may be required. See, *e. g.,* the Consumer Credit Protection Act, § 301, 82 Stat. 163, 15 U. S. C. § 1671 (1964 ed., Supp. V).

The wage-earning bankrupt who must take a vacation without pay or forgo a vacation altogether cannot be said to have achieved the "new opportunity in life and [the] clear field for future effort, unhampered by the pressure and discouragement of preexisting debt," *Local Loan Co.* v. *Hunt, supra,* which it was the purpose of the statute to provide.

The motion of respondent Harris to proceed *in forma pauperis* is granted. The motion of respondent Frederick to dispense with printing his brief in opposition is granted. The petition for certiorari is granted and the judgment is affirmed.

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

MR. JUSTICE HARLAN, dissenting.

In my view this case is another instance in which the pressure of an overcrowded docket has led the Court to deal summarily with an issue which, if deserving of our attention at all, is deserving of full-dress treatment. Cf. *United States* v. *Maryland Savings-Share Insurance Corp., ante,* p. 4; *United States* v. *Chicago, ante,* p. 8. Moreover, the Court disposes of the case despite the opaqueness of the record and the uncertainty with regard to relevant California law.

Under the terms of respondent Frederick's employment, his employer credited him with one day's vacation pay for each month's work.[1] From September 15, the date of bankruptcy, to December 23, the beginning of the shutdown and the enforced "vacation," Mr. Frederick presumably became entitled to a little over three days' pay. The same amount would have accrued to a person starting work on the date of bankruptcy with no debts or assets, the paradigm of "an unencumbered fresh start." Indeed, the order not only permitted Mr. Frederick a *fresh* start; it gave him a *head* start, to the extent

[1] While neither the stipulated facts nor the opinions below reveal the rate of accrual of vacation pay, I take as true the uncontested representation in Mr. Frederick's petition for review of the referee's order.

of half a day's pay.[2] *Segal* v. *Rochelle,* 382 U. S. 375 (1966), and *Local Loan Co.* v. *Hunt,* 292 U. S. 234 (1934), therefore tend to support the position of the trustee rather than "compel a decision for the bankrupt." *Ante,* p. 20. However, respondents can muster forceful arguments in their support, even on the assumption that the accrued vacation pay was subject to the claims of creditors—a point of California law which the court below found it unnecessary to decide.

Since the question tendered for review is close and has split the courts of appeals, I would set the case for argument.

[2] The case of respondent Harris is similar, but it is complicated by the fact that he could have chosen to forgo his vacation. As he observed in his petition to review the turnover order, the record is silent on whether such a choice would have wiped out his accrued vacation time and left nothing for him to turn over.

ODOM *v.* UNITED STATES

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

No. 300. Decided November 9, 1970

Greater severity of petitioner's second sentence, as Court learned after granting certiorari on issue of retroactivity of *North Carolina* v. *Pearce,* 395 U. S. 711, was based on petitioner's conduct (specifically referred to at resentencing) after the first sentencing; writ is therefore dismissed as improvidently granted.

403 F. 2d 45, certiorari dismissed.

PER CURIAM.

A writ of certiorari was granted in this case on June 22, 1970, 399 U. S. 904, limited to the question of the retroactivity of our decision in *North Carolina* v. *Pearce,* 395 U. S. 711. Since the granting of the writ there has come to the attention of the Court an order of Judge McRae of the United States District Court for the Middle District of Florida, dated July 1, 1970, denying a motion of petitioner Odom to set aside his second sentence as illegally imposed under *Pearce, supra.* The order makes it clear that the greater severity of the second sentence was based on conduct on the part of the petitioner occurring after the time of the original sentencing proceeding, and that the new information was specifically referred to at resentencing. Since it is now apparent that this case does not present the issue of the retroactivity of *North Carolina* v. *Pearce, supra,* the writ is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS.

The question is whether *North Carolina* v. *Pearce,* 395 U. S. 711, should be retroactive. In that case we said that "the factual data upon which the increased

sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, at 726. The information now reported to us by the District Court was never made a part of the record. Hence an issue of retroactivity of *Pearce* is present and I would decide the case on the merits.

Syllabus

NORTH CAROLINA *v.* ALFORD

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14. Argued November 17, 1969—Reargued October 14, 1970—Decided November 23, 1970

Appellee was indicted for the capital crime of first-degree murder. At that time North Carolina law provided for the penalty of life imprisonment when a plea of guilty was accepted to a first-degree murder charge; for the death penalty following a jury verdict of guilty, unless the jury recommended life imprisonment; and for a penalty of from two to 30 years' imprisonment for second-degree murder. Appellee's attorney, in the face of strong evidence of guilt, recommended a guilty plea, but left the decision to appellee. The prosecutor agreed to accept a plea of guilty to second-degree murder. The trial court heard damaging evidence from certain witnesses before accepting a plea. Appellee pleaded guilty, although disclaiming guilt, because of the threat of the death penalty, and was sentenced to 30 years' imprisonment. The Court of Appeals, on an appeal from a denial of a writ of habeas corpus, found that appellee's guilty plea was involuntary because it was motivated principally by fear of the death penalty. *Held:* The trial judge did not commit constitutional error in accepting appellee's guilty plea. Pp. 31–39.

(a) A guilty plea that represents a voluntary and intelligent choice among the alternatives available to a defendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment because it was entered to avoid the possibility of the death penalty. *Brady* v. *United States,* 397 U. S. 742. P. 31.

(b) *Hudson* v. *United States,* 272 U. S. 451, which held that a federal court may impose a prison sentence after accepting a plea of *nolo contendere,* implicitly recognized that there is no constitutional bar to imposing a prison sentence upon an accused who is unwilling to admit guilt but who is willing to waive trial and accept the sentence. Pp. 35–36.

(c) An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his

guilty plea contains a protestation of innocence, when, as here, he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. Pp. 37–38.

(d) The Fourteenth Amendment and the Bill of Rights do not prohibit the States from accepting pleas to lesser included offenses. P. 39.

405 F. 2d 340, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. BLACK, J., filed a statement concurring in the judgment, *post*, p. 39. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 39.

Jacob L. Safron reargued the cause for appellant. With him on the briefs were *Robert Morgan,* Attorney General of North Carolina, and *Andrew A. Vanore, Jr.*, joined in and adopted by the Attorneys General for their respective States as follows: *Joe Purcell* of Arkansas, *David P. Buckson* of Delaware, *William J. Scott* of Illinois, *John B. Breckinridge* of Kentucky, *Joe T. Patterson* of Mississippi, and *Robert L. Woodahl* of Montana; by the Government of the Virgin Islands; and by the National District Attorneys Association.

Doris R. Bray, by appointment of the Court, 394 U. S. 1010, reargued the cause and filed briefs for appellee.

Jack Greenberg, James M. Nabrit III, Michael Meltsner, Norman C. Amaker, Charles Stephen Ralston, Anthony G. Amsterdam, J. LeVonne Chambers, and *James E. Ferguson II* filed a brief for Albert Bobby Childs et al. as *amici curiae.*

MR. JUSTICE WHITE delivered the opinion of the Court.

On December 2, 1963, Alford was indicted for first-degree murder, a capital offense under North Carolina

law.[1] The court appointed an attorney to represent him, and this attorney questioned all but one of the various witnesses who appellee said would substantiate his claim of innocence. The witnesses, however, did not support Alford's story but gave statements that strongly indicated his guilt. Faced with strong evidence of guilt and no substantial evidentiary support for the claim of innocence, Alford's attorney recommended that he plead guilty, but left the ultimate decision to Alford himself. The prosecutor agreed to accept a plea of guilty to a charge of second-degree murder, and on December 10, 1963, Alford pleaded guilty to the reduced charge.

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[1] Under North Carolina law, first-degree murder is punished with death unless the jury recommends that the punishment shall be life imprisonment:

"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." N. C. Gen. Stat. § 14–17 (1969).

At the time Alford pleaded guilty, North Carolina law provided that if a guilty plea to a charge of first-degree murder was accepted by the prosecution and the court, the penalty would be life imprisonment rather than death. The provision permitting guilty pleas in capital cases was repealed in 1969. See *Parker* v. *North Carolina*, 397 U. S. 790, 792–795 (1970). Though under present North Carolina law it is not possible for a defendant to plead guilty to a capital charge, it seemingly remains possible for a person charged with a capital offense to plead guilty to a lesser charge.

Before the plea was finally accepted by the trial court, the court heard the sworn testimony of a police officer who summarized the State's case. Two other witnesses besides Alford were also heard. Although there was no eyewitness to the crime, the testimony indicated that shortly before the killing Alford took his gun from his house, stated his intention to kill the victim, and returned home with the declaration that he had carried out the killing. After the summary presentation of the State's case, Alford took the stand and testified that he had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so.[2] In response to the questions of his counsel, he acknowledged that his counsel had informed him of the difference between second- and first-degree

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[2] After giving his version of the events of the night of the murder, Alford stated:

"I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all."

In response to questions from his attorney, Alford affirmed that he had consulted several times with his attorney and with members of his family and had been informed of his rights if he chose to plead not guilty. Alford then reaffirmed his decision to plead guilty to second-degree murder:

"Q [by Alford's attorney]. And you authorized me to tender a plea of guilty to second degree murder before the court?

"A. Yes, sir.

"Q. And in doing that, that you have again affirmed your decision on that point?

"A. Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty."

murder and of his rights in case he chose to go to trial.[3] The trial court then asked appellee if, in light of his denial of guilt, he still desired to plead guilty to second-degree murder and appellee answered, "Yes, sir. I plead guilty on—from the circumstances that he [Alford's attorney] told me." After eliciting information about Alford's prior criminal record, which was a long one,[4] the trial court sentenced him to 30 years' imprisonment, the maximum penalty for second-degree murder.[5]

Alford sought post-conviction relief in the state court. Among the claims raised was the claim that his plea of guilty was invalid because it was the product of fear and coercion. After a hearing, the state court in 1965 found that the plea was "willingly, knowingly, and understandingly" made on the advice of competent counsel and in the face of a strong prosecution case. Subsequently, Alford petitioned for a writ of habeas corpus, first in the United States District Court for the Middle District of North Carolina, and then in the Court of Appeals for the Fourth Circuit. Both courts denied the writ on the basis of the state court's findings that Alford voluntarily

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[3] At the state court hearing on post-conviction relief, the testimony confirmed that Alford had been fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty. Since the record in this case affirmatively indicates that Alford was aware of the consequences of his plea of guilty and of the rights waived by the plea, no issues of substance under *Boykin* v. *Alabama*, 395 U. S. 238 (1969), would be presented even if that case was held applicable to the events here in question.

[4] Before Alford was sentenced, the trial judge asked Alford about prior convictions. Alford answered that, among other things, he had served six years of a ten-year sentence for murder, had been convicted nine times for armed robbery, and had been convicted for transporting stolen goods, forgery, and carrying a concealed weapon. App. 9–11.

[5] See n. 1, *supra*.

and knowingly agreed to plead guilty. In 1967, Alford again petitioned for a writ of habeas corpus in the District Court for the Middle District of North Carolina. That court, without an evidentiary hearing, again denied relief on the grounds that the guilty plea was voluntary and waived all defenses and nonjurisdictional defects in any prior stage of the proceedings, and that the findings of the state court in 1965 clearly required rejection of Alford's claim that he was denied effective assistance of counsel prior to pleading guilty. On appeal, a divided panel of the Court of Appeals for the Fourth Circuit reversed on the ground that Alford's guilty plea was made involuntarily. 405 F. 2d 340 (1968). In reaching its conclusion, the Court of Appeals relied heavily on *United States* v. *Jackson,* 390 U. S. 570 (1968), which the court read to require invalidation of the North Carolina statutory framework for the imposition of the death penalty because North Carolina statutes encouraged defendants to waive constitutional rights by the promise of no more than life imprisonment if a guilty plea was offered and accepted. Conceding that *Jackson* did not require the automatic invalidation of pleas of guilty entered under the North Carolina statutes, the Court of Appeals ruled that Alford's guilty plea was involuntary because its principal motivation was fear of the death penalty. By this standard, even if both the judge and the jury had possessed the power to impose the death penalty for first-degree murder or if guilty pleas to capital charges had not been permitted, Alford's plea of guilty to second-degree murder should still have been rejected because impermissibly induced by his desire to eliminate the possibility of a death sentence.[6] We noted

[6] Thus if Alford had entered the same plea in the same way in 1969 after the statute authorizing guilty pleas to capital charges had been repealed, see n. 1, *supra,* the result reached by the Court of Appeals should have been the same under that court's reasoning.

probable jurisdiction. 394 U. S. 956 (1969). We vacate the judgment of the Court of Appeals and remand the case for further proceedings.

We held in *Brady* v. *United States,* 397 U. S. 742 (1970), that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment. *Jackson* established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See *Boykin* v. *Alabama,* 395 U. S. 238, 242 (1969); *Machibroda* v. *United States,* 368 U. S. 487, 493 (1962); *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927). That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage. The standard fashioned and applied by the Court of Appeals was therefore erroneous and we would, without more, vacate and remand the case for further proceedings with respect to any other claims of Alford which are properly before that court, if it were not for other circumstances appearing in the record which might seem to warrant an affirmance of the Court of Appeals.

As previously recounted, after Alford's plea of guilty was offered and the State's case was placed before the judge, Alford denied that he had committed the murder but reaffirmed his desire to plead guilty to avoid a possible death sentence and to limit the penalty to the 30-year maximum provided for second-degree murder.

Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind. The plea usually subsumes both elements, and justifiably so, even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment. See *Brady* v. *United States, supra,* at 748; *McCarthy* v. *United States,* 394 U. S. 459, 466 (1969). Here Alford entered his plea but accompanied it with the statement that he had not shot the victim.

If Alford's statements were to be credited as sincere assertions of his innocence, there obviously existed a factual and legal dispute between him and the State. Without more, it might be argued that the conviction entered on his guilty plea was invalid, since his assertion of innocence negatived any admission of guilt, which, as we observed last Term in *Brady,* is normally "[c]entral to the plea and the foundation for entering judgment against the defendant . . . ." 397 U. S., at 748.

In addition to Alford's statement, however, the court had heard an account of the events on the night of the murder, including information from Alford's acquaintances that he had departed from his home with his gun stating his intention to kill and that he had later declared that he had carried out his intention. Nor had Alford wavered in his desire to have the trial court determine his guilt without a jury trial. Although denying the charge against him, he nevertheless preferred the dispute between him and the State to be settled by the judge in the context of a guilty plea proceeding rather than by a formal trial. Thereupon, with the State's telling evidence and Alford's denial before it,

the trial court proceeded to convict and sentence Alford for second-degree murder.

State and lower federal courts are divided upon whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt. Some courts, giving expression to the principle that "[o]ur law only authorizes a conviction where guilt is shown," *Harris* v. *State,* 76 Tex. Cr. R. 126, 131, 172 S. W. 975, 977 (1915), require that trial judges reject such pleas. See, *e. g., Hulsey* v. *United States,* 369 F. 2d 284, 287 (CA5 1966); *United States ex rel. Elksnis* v. *Gilligan,* 256 F. Supp. 244, 255–257 (SDNY 1966); *People* v. *Morrison,* 348 Mich. 88, 81 N. W. 2d 667 (1957); *State* v. *Reali,* 26 N. J. 222, 139 A. 2d 300 (1958); *State* v. *Leyba,* 80 N. M. 190, 193, 453 P. 2d 211, 214 (1969); *State* v. *Stacy,* 43 Wash. 2d 358, 361–364, 261 P. 2d 400, 402–403 (1953). But others have concluded that they should not "force any defense on a defendant in a criminal case," particularly when advancement of the defense might "end in disaster . . . ." *Tremblay* v. *Overholser,* 199 F. Supp. 569, 570 (DC 1961). They have argued that, since "guilt, or the degree of guilt, is at times uncertain and elusive," "[a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty . . . ." *McCoy* v. *United States,* 124 U. S. App. D. C. 177, 179, 363 F. 2d 306, 308 (1966). As one state court observed nearly a century ago, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, . . . [and] [h]e must be permitted to judge for himself in this respect." *State* v. *Kaufman,* 51 Iowa 578, 580, 2 N. W. 275, 276 (1879) (dictum). Accord, *e. g., Griffin* v. *United States,* 132 U. S. App. D. C. 108,

405 F. 2d 1378 (1968); *Bruce* v. *United States,* 126 U. S. App. D. C. 336, 342–343, 379 F. 2d 113, 119–120 (1967); *City of Burbank* v. *General Electric Co.,* 329 F. 2d 825, 835 (CA9 1964) (dictum); *State* v. *Martinez,* 89 Idaho 129, 138, 403 P. 2d 597, 602–603 (1965); *People* v. *Hetherington,* 379 Ill. 71, 39 N. E. 2d 361 (1942); *State ex rel. Crossley* v. *Tahash,* 263 Minn. 299, 307–308, 116 N. W. 2d 666, 672 (1962); *Commonwealth* v. *Cottrell,* 433 Pa. 177, 249 A. 2d 294 (1969). Cf. *United States ex rel. Brown* v. *LaVallee,* 424 F. 2d 457 (CA2 1970).[7]

This Court has not confronted this precise issue, but prior decisions do yield relevant principles. In *Lynch* v. *Overholser,* 369 U. S. 705 (1962), Lynch, who had been charged in the Municipal Court of the District of Columbia with drawing and negotiating bad checks, a misdemeanor punishable by a maximum of one year in jail, sought to enter a plea of guilty, but the trial judge refused to accept the plea since a psychiatric report in the judge's possession indicated that Lynch had been suffering from "a manic depressive psychosis, at the time of the crime charged," and hence might have been not guilty by reason of insanity. Although at the subsequent trial Lynch did not rely on the insanity defense, he was found not guilty by reason of insanity and committed for an indeterminate period to a mental institution. On habeas corpus, the Court ordered his release, construing the congressional legislation seemingly authorizing the commitment as not reaching a case where the accused preferred a guilty plea to a plea of insanity. The Court expressly refused to rule that Lynch had an absolute right to have his

[7] A third approach has been to decline to rule definitively that a trial judge must either accept or reject an otherwise valid plea containing a protestation of innocence, but to leave that decision to his sound discretion. See *Maxwell* v. *United States,* 368 F. 2d 735, 738–739 (CA9 1966).

guilty plea accepted, see *id.*, at 719, but implied that there would have been no constitutional error had his plea been accepted even though evidence before the judge indicated that there was a valid defense.

The issue in *Hudson* v. *United States,* 272 U. S. 451 (1926), was whether a federal court has power to impose a prison sentence after accepting a plea of *nolo contendere,* a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.[8] The Court held

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[8] Courts have defined the plea of *nolo contendere* in a variety of different ways, describing it, on the one hand, as "in effect, a plea of guilty," *United States* v. *Food & Grocery Bureau,* 43 F. Supp. 974, 979 (SD Cal. 1942), aff'd, 139 F. 2d 973 (CA9 1943), and on the other, as a query directed to the court to determine the defendant's guilt. *State* v. *Hopkins,* 27 Del. 306, 88 A. 473 (1913). See generally *Lott* v. *United States,* 367 U. S. 421, 426–427 (1961), *id.,* at 427–430 (Clark, J., dissenting), 21 Am. Jur. 2d, Criminal Law § 497. As a result, it is impossible to state precisely what a defendant does admit when he enters a *nolo* plea in a way that will consistently fit all the cases.

Hudson v. *United States, supra,* was also ambiguous. In one place, the Court called the plea "an admission of guilt for the purposes of the case," *id.,* at 455, but in another, the Court quoted an English authority who had defined the plea as one "where a defendant, in a case not capital, doth not directly own himself guilty . . . ." *Id.,* at 453, quoting 2 W. Hawkins, Pleas of the Crown 466 (8th ed. 1824).

The plea may have originated in the early medieval practice by which defendants wishing to avoid imprisonment would seek to make an end of the matter (*finem facere*) by offering to pay a sum of money to the king. See 2 F. Pollock & F. Maitland, History of English Law 517 (2d ed. 1909). An early 15th-century case indicated that a defendant did not admit his guilt when he sought such a compromise, but merely "that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admittit per finem*)." *Anon.,* Y. B. Hil. 9 Hen. 6, f. 59, pl. 8 (1431). A 16th-century authority noted that a

that a trial court does have such power, and, except for the cases which were rejected in *Hudson*,[9] the federal courts have uniformly followed this rule, even in cases involving moral turpitude. *Bruce* v. *United States*, *supra*, at 343 n. 20, 379 F. 2d, at 120 n. 20 (dictum). See, *e. g.*, *Lott* v. *United States*, 367 U. S. 421 (1961) (fraudulent evasion of income tax); *Sullivan* v. *United States*, 348 U. S. 170 (1954) (*ibid.*); *Farnsworth* v. *Zerbst*, 98 F. 2d 541 (CA5 1938) (espionage); *Pharr* v. *United States*, 48 F. 2d 767 (CA6 1931) (misapplication of bank funds); *United States* v. *Bagliore*, 182 F. Supp. 714 (EDNY 1960) (receiving stolen property). Implicit in the *nolo contendere* cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence.

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defendant who so pleaded "putteth hym selfe in *Gratiam Reginae* without anye more, or by Protestation that hee is not guiltie . . . ," W. Lambard, Eirenarcha 427 (1581), while an 18th-century case distinguished between a *nolo* plea and a jury verdict of guilty, noting that in the former the defendant could introduce evidence of innocence in mitigation of punishment, whereas in the latter such evidence was precluded by the finding of actual guilt. *Queen* v. *Templeman*, 1 Salk. 55, 91 Eng. Rep. 54 (K. B. 1702).

Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea "unless it is satisfied that there is a factual basis for the plea"; there is no similar requirement for pleas of *nolo contendere*, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt. See Notes of Advisory Committee to Rule 11.

[9] *Blum* v. *United States*, 196 F. 269 (CA7 1912); *Shapiro* v. *United States*, 196 F. 268 (CA7 1912); *Tucker* v. *United States*, 196 F. 260 (CA7 1912).

These cases would be directly in point if Alford had simply insisted on his plea but refused to admit the crime. The fact that his plea was denominated a plea of guilty rather than a plea of *nolo contendere* is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law. See *Smith* v. *Bennett,* 365 U. S. 708, 712 (1961); *Jones* v. *United States,* 362 U. S. 257, 266 (1960). Cf. *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U. S. 625, 630–632 (1959). Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. Here the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light

of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, see *McCarthy* v. *United States, supra,* at 466–467 (1969),[10] its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it.[11]

Relying on *United States* v. *Jackson, supra,* Alford now argues in effect that the State should not have allowed

[10] Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, see, *e. g., Griffin* v. *United States,* 132 U. S. App. D. C. 108, 110, 405 F. 2d 1378, 1380 (1968); *Bruce* v. *United States, supra,* at 342, 379 F. 2d, at 119 (1967); *Commonwealth* v. *Cottrell,* 433 Pa. 177, 249 A. 2d 294 (1969); and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. See, *e. g., People* v. *Serrano,* 15 N. Y. 2d 304, 308–309, 206 N. E. 2d 330, 332 (1965); *State* v. *Branner,* 149 N. C. 559, 563, 63 S. E. 169, 171 (1908). See also *Kreuter* v. *United States,* 201 F. 2d 33, 36 (CA10 1952).

In the federal courts, Fed. Rule Crim. Proc. 11 expressly provides that a court "shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

[11] Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, see *Lynch* v. *Overholser,* 369 U. S., at 719 (by implication), although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence. Cf. Fed. Rule Crim. Proc. 11, which gives a trial judge discretion to "refuse to accept a plea of guilty . . . ." We need not now delineate the scope of that discretion.

him this choice but should have insisted on proving him guilty of murder in the first degree. The States in their wisdom may take this course by statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances.[12] But this is not the mandate of the Fourteenth Amendment and the Bill of Rights. The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve.

The Court of Appeals for the Fourth Circuit was in error to find Alford's plea of guilty invalid because it was made to avoid the possibility of the death penalty. That court's judgment directing the issuance of the writ of habeas corpus is vacated and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, while adhering to his belief that *United States* v. *Jackson,* 390 U. S. 570, was wrongly decided, concurs in the judgment and in substantially all of the opinion in this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Last Term, this Court held, over my dissent, that a plea of guilty may validly be induced by an unconstitutional threat to subject the defendant to the risk of death, so long as the plea is entered in open court and the defendant is represented by competent counsel who is aware of the threat, albeit not of its unconstitutionality. *Brady* v. *United States,* 397 U. S. 742, 745–758

[12] North Carolina no longer permits pleas of guilty to capital charges but it appears that pleas of guilty may still be offered to lesser included offenses. See n. 1, *supra.*

(1970); *Parker* v. *North Carolina,* 397 U. S. 790, 795 (1970). Today the Court makes clear that its previous holding was intended to apply even when the record demonstrates that the actual effect of the unconstitutional threat was to induce a guilty plea from a defendant who was unwilling to admit his guilt.

I adhere to the view that, in any given case, the influence of such an unconstitutional threat "must necessarily be given weight in determining the voluntariness of a plea." *Parker* v. *North Carolina,* 397 U. S., at 805 (dissent). And, without reaching the question whether due process permits the entry of judgment upon a plea of guilty accompanied by a contemporaneous denial of acts constituting the crime,[1] I believe that at the very least such a denial of guilt is also a relevant factor in determining whether the plea was voluntarily and intelligently made. With these factors in mind, it is sufficient in my view to state that the facts set out in the majority opinion demonstrate that Alford was "so gripped by fear of the death penalty" [2] that his decision to plead guilty was not voluntary but was "the product of duress as much so as choice reflecting physical constraint." *Haley* v. *Ohio,* 332 U. S. 596, 606 (1948) (opinion of Frankfurter, J.). Accordingly, I would affirm the judgment of the Court of Appeals.

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[1] The courts of appeals have expressed varying opinions on this question. Compare *McCoy* v. *United States,* 124 U. S. App. D. C. 177, 179–180, 363 F. 2d 306, 308–309 (1966); *Bruce* v. *United States,* 126 U. S. App. D. C. 336, 342 n. 17, 379 F. 2d 113, 119 n. 17 (1967); *Griffin* v. *United States,* 132 U. S. App. D. C. 108, 109–110, 405 F. 2d 1378, 1379–1380 (1968); *Maxwell* v. *United States,* 368 F. 2d 735, 739 n. 3 (CA9 1966) (court may accept guilty plea from defendant unable or unwilling to admit guilt), with *United States ex rel. Crosby* v. *Brierley,* 404 F. 2d 790, 801–802 (CA3 1968); *Bailey* v. *MacDougall,* 392 F. 2d 155, 158 n. 7 (CA4 1968); *Hulsey* v. *United States,* 369 F. 2d 284, 287 (CA5 1966) (guilty plea is infirm if accompanied by denial of one or more elements of offense).

[2] *Brady* v. *United States,* 397 U. S., at 750.

FORNARIS *v.* RIDGE TOOL CO. ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 541. Decided November 23, 1970*

1. Title 28 U. S. C. § 1254 (2), which provides for an appeal to this Court from a court of appeals' judgment invalidating a *state* statute on constitutional grounds, does not apply to an appeal involving a Puerto Rico statute.

2. The Court of Appeals should have abstained from invalidating on due process grounds the retrospective application of Puerto Rico's Dealer's Contract Law, since the Puerto Rico Supreme Court, which has not yet authoritatively construed the statute, might be able to do so without reaching the constitutional issue. *Reetz* v. *Bozanich*, 397 U. S. 82.

Appeals dismissed and certiorari granted; 423 F. 2d 563, reversed and remanded.

PER CURIAM.

In 1964 by Act No. 75, the Legislature of Puerto Rico enacted the Dealer's Contract Law which in effect provides that a Puerto Rican dealer's contract with a manufacturer, regardless of any provisions for termination, is renewable indefinitely at the option of the local dealer unless the manufacturer has "just cause" to terminate. Section 1 (d) defines "just cause" as "nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service." If a manufacturer terminates for any other reason he is liable for substantial damages.

This cause was brought by a dealer in a Puerto Rican court for damages for breach of his distributorship contract against Ridge Tool Co., an appellee. It was

*Together with No. 543, *Puerto Rico* v. *Ridge Tool Co. et al.*

removed to the Federal District Court on the basis of diversity of citizenship. That court denied the motion to dismiss which claimed that the Dealer's Contract Law upon which the complaint was based was unconstitutional. The Court of Appeals allowed an interlocutory appeal and held the Dealer's Contract Law unconstitutional. 423 F. 2d 563.[1]

The relations of the federal courts to Puerto Rico have often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto

[1] Appellants invoked 28 U. S. C. § 1254 (2) as the authority for these appeals. That provision provides that a judgment in the Court of Appeals may be brought here "[b]y appeal by a party relying on a *State* statute held by a court of appeals to be invalid as repugnant to the Constitution . . . ." But a Puerto Rican statute is not a "*State* statute" within § 1254 (2). (Emphasis supplied.) It is true that statutes enacted in 1961 require that this Court treat the Puerto Rican courts as the equivalent of state courts for purposes of appeal and certiorari. It is expressly provided in 75 Stat. 417, 28 U. S. C. § 1258, that "[f]inal judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico" may be reviewed by this Court by appeal, or by writ of certiorari, in the situations where that route is available for review of the judgments of the highest courts of the States. Significantly, however, no parallel provision was added to § 1254 (2) to permit appeals here from the courts of appeals by a party relying on a Puerto Rican statute. Whether the omission was by accident or by design, our practice of strict construction of statutes authorizing appeals dictates that we not give an expansive interpretation to the word "State." We see no merit in the argument that we have already done so in our Rule 61 defining "state court" to include the Puerto Rican Supreme Court and "law and statutes of a state" to include "the law and statutes of the Commonwealth of Puerto Rico." That rule was adopted only to implement 28 U. S. C. § 1258 dealing with review by appeal or certiorari of final judgments of the Supreme Court of Puerto Rico. We therefore hold that the appeals are improper and they are dismissed, and accordingly we treat the jurisdictional statements as petitions for writs of certiorari and grant them on that basis. 28 U. S. C. § 2103; *El Paso* v. *Simmons,* 379 U. S. 497, 501–503.

Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be "inescapably wrong." See *Bonet* v. *Texas Co.*, 308 U. S. 463, 471.

The question presented here is akin to that question, for we deal with a rather vague Puerto Rican law that the Supreme Court of Puerto Rico has not authoritatively construed.[2] Only last Term in *Reetz* v. *Bozanich*, 397 U. S. 82, we held that a three-judge federal court should not have proceeded to strike down an Alaska law which, if construed by the Alaska Supreme Court, might be so confined as not to have any constitutional infirmity. We said, "A state court decision here . . . could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." *Id.*, at 86–87.

In this cause the Court of Appeals held that "just cause" placed substantial liability on a manufacturer who had contracts that he could have terminated without liability prior to the new statute. This retrospective impact, the court held, violated "the due process clause of the federal constitution"—without saying whether

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[2] In *McGregor-Doniger, Inc.* v. *Superior Court*, decided March 17, 1970, the Supreme Court referred briefly to the "just cause" provision in the Act:

"It is apparent from the pleadings that the cancellation of the contract in this case 'due to changes we are now making in our sales representation throughout the world' is cause to cancel it, since in the contract it was agreed that it could be cancelled by 30 days' written notice. But it is also clear that such cause or reason is not the 'just cause' which permits the cancellation of a distributorship contract in accordance with the provisions of Law #75, *supra*."

the Fifth or the Fourteenth Amendment was involved.[3] 423 F. 2d, at 566–567.

Whether the Supreme Court of Puerto Rico would give the same broad sweep to "just cause" as did the Court of Appeals is something we do not know. It is conceivable that "just cause" might be judicially confined to a more narrow ambit which would avoid all constitutional questions. We therefore reverse and direct the Court of Appeals to remand the cases to the District Court with instructions to hold its hand until the Puerto Rican Supreme Court has authoritatively ruled on the local law question[4] in light of the federal claims. See *England* v. *Medical Examiners*, 375 U. S. 411, 420.

It is so ordered.

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[3] Art. II, § 7, of the Constitution of Puerto Rico provides that "[n]o person shall be deprived of his liberty or property without due process of law," "life" being excluded because § 7 abolishes the death penalty. That Constitution was approved by Congress. See H. R. Rep. No. 1832, 82d Cong., 2d Sess.; H. R. Rep. No. 2350, 82d Cong., 2d Sess.; S. Rep. No. 1720, 82d Cong., 2d Sess.

[4] Under Puerto Rico's laws its courts have broad powers "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." P. R. Laws Ann., Tit. 32, c. 247, § 2991. That form of remedy reaches a person "interested in" a contract or whose rights are "affected by any statute . . . contract or franchise." *Id.*, § 2992.

ARNOLD TOURS, INC., ET AL. *v.* CAMP ET AL.

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

No. 602. Decided November 23, 1970

Court of Appeals erred in dismissing complaint for lack of standing of petitioner travel agents seeking to invalidate respondent Comptroller of the Currency's ruling that national banks may provide travel services for their customers, as § 4 of the Bank Service Corporation Act "arguably brings a competitor within the zone of interests protected by it." *Data Processing Service* v. *Camp,* 397 U. S. 150.

Certiorari granted; 428 F. 2d 359, reversed and remanded.

PER CURIAM.

Petitioners are 42 independent travel agents doing business in Massachusetts. They ask for declaratory and injunctive relief against the Comptroller of the Currency and the South Shore National Bank. They seek to invalidate a ruling by the Comptroller that, incidental to their banking services, national banks may provide travel services for their customers.[1] Petitioners allege that as a result they have lost substantial business and profits and stand to lose even greater business in the future. They contend the Comptroller exceeded his authority when he authorized national banks to provide travel services.

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[1] Paragraph 7475 of the Comptroller's Manual for National Banks provides: "Incident to those powers vested in them under 12 U. S. C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles, as agent for a local rental service. In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank."

The District Court dismissed the complaint for lack of standing and the Court of Appeals affirmed. 408 F. 2d 1147 (CA1 1969). Following our decisions last Term in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150, and *Barlow* v. *Collins,* 397 U. S. 159, we vacated and remanded the case for reconsideration (397 U. S. 315) and the Court of Appeals reaffirmed its previous decision.

Here, as in *Data Processing,* we are concerned with § 4 of the Bank Service Corporation Act, 76 Stat. 1132, 12 U. S. C. § 1864.[2] In *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors alone from competition.[3] Moreover, we noted a growing trend "toward enlargement of the class of people who may protest administrative action." 397 U. S., at 154. We held that § 4 "arguably brings a competitor within the zone of interests protected by it." *Id.,* at 156. Nothing in the opinion limited § 4 to protecting only competitors in the data-processing field. When national banks begin to provide travel services for their customers, they compete with travel agents no less than they compete with data processors when they provide data-processing services to their customers.[4]

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

[3] The only legislative history of the Bank Service Corporation Act mentioned in the opinion was that § 4 was a " 'response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," S. Rep. No. 2105 [87th Cong., 2d Sess., 7–12] (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." (Supplemental views of Senators Muskie and Clark).' " 397 U. S., at 155.

[4] The final question under *Data Processing,* whether judicial review of the administrative decision has been precluded, was specifically resolved against the Comptroller in that case. 397 U. S., at 157.

Accordingly the writ of certiorari is granted, the judgment is reversed, and the case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

THE CHIEF JUSTICE and MR. JUSTICE HARLAN would set the case for argument.

HICKEL, SECRETARY OF THE INTERIOR *v.* OIL SHALE CORP. ET AL.

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

No. 25. Argued October 22, 1970—Decided December 8, 1970

The General Mining Act of 1872 provided that until a patent issued for a mineral location on lands belonging to the United States "not less than $100 worth of labor shall be performed or improvements made during each year," and that a patent could issue on a showing that the claimant had expended $500 of labor or improvements on the claim. Failure to do the assessment work generally entitled others to relocate the claim. Under the Mineral Lands Leasing Act of 1920 lands theretofore open to location and acquisition of title became available only on a lease basis, but a Saving Clause covered valid claims existent on February 25, 1920, "and thereafter maintained in compliance with the laws under which initiated." All the claims involved in this suit were canceled by the Secretary of the Interior in the early 1930's because the annual assessment work, required by the 1872 Act, had not been performed. In attempting to establish their oil shale claims in Colorado under the 1872 Act, respondents brought this action in the District Court to require the Secretary of the Interior to patent the claims or to expunge his rulings canceling the claims for lack of annual assessment work and to enjoin him from enforcing them. The District Court and the Court of Appeals, ruling in favor of respondents, held that the Department of the Interior had no jurisdiction to cancel the claims. The courts relied on *Wilbur* v. *Krushnic,* 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U. S. 639, where this Court declined to interpret the Mineral Leasing Act as requiring the return to the Government of full possessory rights to lands subject to oil shale claims for defaults in assessment work. The decisions indicated that failure to perform such work made the claims subject to relocation by others but not forfeiture to the Government. *Held:* The Saving Clause of the Mineral Leasing Act makes the United States the beneficiary of all claims that are invalid for lack of assessment work or otherwise, and the Department of the Interior had subject matter jurisdiction to determine whether respondents' claims were "maintained" within the meaning of that clause, including the per-

formance of adequate assessment work. *Krushnic, supra,* and *Virginia-Colorado, supra,* must be confined to situations where there has been substantial compliance with the assessment work. Pp. 51–58.

406 F. 2d 759, reversed and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BLACK, BRENNAN, and BLACKMUN, JJ., joined. BURGER, C. J., and STEWART, J., filed a dissenting statement, *post,* p. 61. HARLAN, WHITE, and MARSHALL, JJ., took no part in the consideration or decision of the case.

Peter L. Strauss argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Kashiwa, S. Billingsley Hill, Thos. L. McKevitt,* and *Edmund B. Clark.*

Fowler Hamilton argued the cause for respondents. With him on the briefs for respondents Oil Shale Corp. et al. were *Richard W. Hulbert* and *Donald L. Morgan. John D. Knodell, Jr., Fred M. Winner,* and *Warren O. Martin* filed a brief for respondents Umpleby et al.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves six groups of claims to oil shale located in Colorado and asserted under the General Mining Act of 1872, 17 Stat. 91, now 30 U. S. C. §§ 22, 26, 28, and 29. Section 28 provides that until a patent issued "not less than $100 worth of labor shall be performed or improvements made during each year." [1] And § 29

[1] Section 28 reads in part:
"On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators,

provides that a patent to the claim could issue on a showing that the claimant had expended $500 worth of labor or improvements on the claim. These claims are not patented and were canceled in the early 1930's on the ground that the amount of labor or improvements specified in § 28 had not been made "during each year." [2]

Some of the claimants in this case applied for patents between 1955 and 1962. The General Land Office rejected the patent applications because the claims had been canceled. On appeal, the Secretary of the Interior, acting through the Solicitor, ruled that these cancellations were effective, later judicial determinations of the invalidity of the grounds for cancellation notwithstanding. *Union Oil Co.,* 71 I. D. 169.[3] These claimants then sought an order to compel the Department to issue the patents. They argued that the Land Office was without authority to cancel the claims when it did and that the Secretary of the Interior had nullified all the contest proceedings in 1935. In the alternative, they sought judicial review of those contest rulings. Respondent Oil Shale Corp. commenced this action in the District Court, not to require the Secretary to

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their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. . . ."

Section 29 reads in part:

"The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the Manager a certificate of the United States Chief Cadastral Engineer that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors . . . ."

[2] For a description of the claims involved in this case see the Appendix to this opinion.

[3] It was admitted that the cancellations may have been erroneous. He declared, however, that the Commissioner of the General Land Office had jurisdiction to make the determinations. Therefore, since the rulings were not appealed from, they were *res judicata,* not subject to attack in 1962.

issue a patent, but to expunge the rulings of the Secretary canceling the claims and to enjoin him from enforcing them. All the cases were consolidated for trial in the District Court. The District Court granted the relief, 261 F. Supp. 954, and the Court of Appeals affirmed, 406 F. 2d 759, both holding that cancellations for lack of assessment work were void because the Department did not have jurisdiction over the subject matter. The case is here on petition for certiorari, which we granted to consider whether *Wilbur* v. *Krushnic,* 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U. S. 639, had been correctly construed and applied to invalidate the Secretary's action in protection of the public domain.

Before we come to a consideration of the *Krushnic* and *Virginia-Colorado* cases it should be noted that in 1920, Congress by enacting § 21 of the Mineral Lands Leasing Act, 41 Stat. 445, 30 U. S. C. § 241 (a), completely changed the national policy over the disposition of oil shale lands. Thereafter such lands were no longer open to location and acquisition of title but only to lease. But § 37 contained a Saving Clause which covered "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." 30 U. S. C. § 193. Respondents contend that their claims fall within that exception.

Respondents assert that a like claim was recognized and approved in the *Krushnic* case. In that case, however, labor in the statutory amount had been performed, including the aggregate amount of $500. The only default was in the failure to perform labor for one year during the period. Mandamus for the issuance of a patent was directed, the Court saying:

> "Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve

> the possessory right, with all the incidents of ownership . . . , as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted." 280 U. S., at 317.

The Court further held that the claims were "maintained" within the Saving Clause of the Leasing Act by a resumption of the assessment work before a challenge of the claim by the United States had intervened.

Virginia-Colorado also involved claims on which labor had been expended except for one year. It was alleged, however, that the claimant had planned to resume the assessment work but for the Secretary's adverse action and that the claims had not been abandoned. The Court held that the claims had been "maintained" within the meaning of the Saving Clause of the Leasing Act of 1920.

Those two cases reflect a judicial attitude of fair treatment for claimants who have substantially completed the assessment work required by 30 U. S. C. § 28. There are, however, dicta both in *Virginia-Colorado* and in *Krushnic* that the failure to do assessment work gives the Government no ground for forfeiture but inures only to the benefit of relocators.

Indeed 30 U. S. C. § 28, which derives from the 1872 Act, as already noted,[4] provides that upon the failure to do the assessment work, "the claim or mine upon

[4] See n. 1, *supra*. For a recent account of the operation of the 1872 Act and the Leasing Act of 1920 see One Third of the Nation's Land, Report by the Public Land Law Review Commission 124–138.

which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made," provided the assessment work has not been "resumed" upon the claim "after failure and before such location." It is therefore argued that so far as the 1872 Act is concerned the failure to do the assessment work concerns not the Government but only "rival or adverse claimants." [5]

The problem in those two cases and the present one concerns the Saving Clause in the Leasing Act which, as noted, makes available for patent "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated." Concededly, failure to maintain a claim made it "subject to disposition only" by leasing by the United States. See § 37 of the 1920 Act, 30 U. S. C. § 193. Hence if we assume, *arguendo,* that failure to do assessment work as provided in the 1872 Act concerned at the time only the claimant and any subsequent relocator, the United States, speaking through the Secretary of the Interior, became a vitally interested party by reason of the 1920 Act. For it was by that Act that Congress reclaimed portions of the public domain so that land might be disposed of by a different procedure (leasing) to the same end (oil shale production [6]) or devoted to wholly

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[5] The regulations provide:

"The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U. S. C. 28), is . . . solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts." 43 CFR § 3420.4.

[6] The value to the Government of the Leasing Act is shown by the magnitude of the interests at stake. We are told that respondent Oil Shale Corp. bid for a lease of 5,120 acres of federal oil shale land in Colorado. 33 Fed. Reg. 16154. The projected

different purposes[7] within the purview of public policy as determined by Congress.

It appears that shortly before 1920 oil shale claims were affected by a speculative fever. Then came a period of calm. By the late forties and continuing into the sixties speculators sought out the original locators or their heirs, obtained quitclaim deeds from them, and thereupon eliminated all other record titleholders by performing assessment work for one year.[8] It appears that 94 of the 98 claims involved in the present litigation were of that character. There is nothing reprehensible in the practice, if the procedure is one which Congress has approved. But the command of the 1872 Act is that assessment work of $100 be done "during each year" and the Saving Clause of § 37 of the 1920 Act requires that for lands to escape the leasing requirement the claims must be "maintained in compliance with the laws under which initiated."

The legislative history of the 1872 Act does not throw much light on the problem. Senator Cole, proponent of that Act, explained, however, that the requirement of assessment work was made to adopt the Spanish law which granted mining titles but subjected them "to what they term denouncement of the title or defeasance of the title upon a failure to work the mine after a certain

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operations were estimated to yield 40 gallons of oil per ton, the royalty being 24¢ per ton. *Id.*, at 16156. The projected mining rate of 66,000 tons per day for 330 days a year would produce an annual royalty of close to $5,230,000. The project life was 20 years.

[7] The lands containing oil shale became open to agricultural and other nonmineral entries including, *inter alia,* those under the Stock-Raising Homestead Act of 1916, 39 Stat. 862, 43 U. S. C. § 291 *et seq.*, to oil and gas and sodium leasing under the 1920 Act, to Indian tribal lands in Utah and to grazing districts under the Taylor Grazing Act, 48 Stat. 1269, 43 U. S. C. § 315 *et seq.*

[8] See n. 3, Appendix, *infra.*

time." Cong. Globe, 42d Cong., 2d Sess., 2459 (1872). While the objective of the 1872 Act was to open the lands "to a beneficial use by some other party," once the original claimant defaulted, the defeasance inevitably accrued to the United States, owner of the fee. On that premise it would seem that the dicta in *Krushnic* and in *Virginia-Colorado* are not valid.

The history of the 1920 Act throws a little light on the problem.

In the Senate there was considerable debate over the addition of the words "including discovery" at the end of § 37, which contains the Saving Clause.

> "Mr. JONES of New Mexico. Suppose we use the words 'including discovery.'
>
> "Mr. SMOOT. Very well; if the Senator desires to insert the words 'including discovery' I shall offer no objection.
>
> "Mr. WALSH of Montana. Mr. President, I was going to say to Senators that to my mind discovery does not necessarily perfect the claim, because the claimant would not be entitled to a patent unless he had performed $500 worth of work, and in a just sense his claim would not be protected.
>
> "Mr. SMOOT. The words 'under such laws' cover everything—the $500 worth of work, discovery, and everything else.
>
> "Mr. WALSH of Montana. But the words 'including discovery,' now proposed, it seems to me, will make it plain.
>
> "Mr. SMOOT. I have no objection to those words going in the bill." 58 Cong. Rec. 4584.[9]

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[9] The amendment was thereupon agreed to. There was no change made in the House in this respect. H. Rep. No. 398, 66th Cong., 1st Sess., 11. And see the Conference Report, H. R. Rep. No. 600, 66th Cong., 2d Sess., 16.

The "perfection" of the claims "under such laws" thus seemingly meant compliance with "everything" under 30 U. S. C. § 28, which taken literally would mean assessment work of $100 "during each year."

If we were to hold to the contrary that enforcement of the assessment work of § 28 was solely at the private initiative of relocators, the "maintenance" provision of § 37 becomes largely illusory, because relocation of oil shale claims became impossible after the 1920 Act. So if enforcement of the assessment work requirement of § 28 were dependent solely on the activities and energies of oil shale relocators, there was no effective enforcement device. While the area covered by the claims might possibly be relocated for wholly different purposes, the likelihood was so remote that the Court of Appeals concluded that: "The old claims were thus sheltered by the [1920] Act." 406 F. 2d, at 763. That meant that a claim could remain immune from challenge by anyone with or without any assessment work, in complete defiance of the 1872 Act.

The Court concluded in *Virginia-Colorado* that the lapse in assessment work was no basis for a charge of abandonment. 295 U. S., at 645–646. We construe that statement to mean that on the facts of that case failure to do the assessment work was not sufficient to establish abandonment. But it was well established that the failure to do assessment work was evidence of abandonment. *Union Oil Co.* v. *Smith,* 249 U. S. 337, 349; *Donnelly* v. *United States,* 228 U. S. 243, 267. If, in fact, a claim had been abandoned, then the relocators were not the only ones interested. The United States had an interest in retrieving the lands. See G. Widman, T. Brightwell, & J. Haggard, Legal Study of Oil Shale on Public Lands 189–193 (1969). The policy of leasing oil shale lands under the 1920 Act gave the United States a

keen interest in recapturing those which had not been "maintained" within the meaning of § 37 of that Act. We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. Defaults, however, might be the equivalent of abandonment; and we now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U. S. C. § 28, is not adequate to "maintain" the claims within the meaning of § 37 of the Leasing Act. To hold otherwise would help defeat the policy that made the United States, as the prospective recipient of royalties, a beneficiary of these oil shale claims. We cannot support *Krushnic* and *Virginia-Colorado* on so broad a ground. Rather, their dicta to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory title" of the claimant, granted by 30 U. S. C. § 26, will not be disturbed on flimsy or insubstantial grounds.

Unlike the claims in *Krushnic* and *Virginia-Colorado,* the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that *Krushnic* and *Virginia-Colorado* control this litigation. We disagree with the dicta in these opinions that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work. We conclude therefore that the judgments below must be reversed.

Respondents rely upon the response of the Department of the Interior to the *Virginia-Colorado* case in

which the Secretary declared the contest in that case to be "void." He also declared that "other Departmental decisions in conflict with this decision are hereby overruled." *Shale Oil Co.*, 55 I. D. 287, 290. This decision, they argue, nullified the previous contest proceedings in which their claims were voided. Moreover, they contend that this administrative rule of 35 years, upon which the Department itself has relied, may not now be retroactively changed. In addition, they claim that these contest decisions, if still valid, are subject to direct judicial review at this time, testing both substantive and procedural errors, such as lack of notice.[10]

These contentions present questions not decided below. Therefore, on remand all issues relevant to the current validity of those contest proceedings will be open, including the availability of judicial review at this time. To the extent that they are found void, not controlling, or subject to review, all issues relevant to the invalidity of the claims will be open, including inadequate assessment work, abandonment, fraud, and the like. Likewise all issues concerning the time, amount, and nature of the assessment work will be open so that the claimants will have an opportunity to bring their claims within the narrow ambit of *Krushnic* and *Virginia-Colorado*, as we have construed and limited these opinions.

Reversed and remanded.

MR. JUSTICE HARLAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[10] The Secretary has held that the old default proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown. *Union Oil Co. of Calif.*, 72 I. D. 313.

APPENDIX TO OPINION OF THE COURT

One group of claims in question was composed of 48 (Bute) claims located by nine individuals between December 1919 and January 1920, shortly before February 25, 1920, the cutoff date for prior valid claims recognized by the Saving Clause of the 1920 Act.[1] The records show an entry in February 1921 of a "Notice in Lieu of Labor."[2] No other entries were made. In 1954, a man by the name of Ertl acquired the claims of two of this group. In 1955, he filed an "Affidavit of Annual Labor" and published a forfeiture notice in the newspaper.[3] In 1956, he acquired a decree in a Colorado court quieting title in him to all interests in all the claims of this group. Another group of 18 (Atlas) claims

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[1] Section 37 of the Act, 30 U. S. C. § 193, reads in part: "The deposits of . . . oil shale . . . herein referred to, in lands valuable for such minerals . . . shall be subject to disposition only in the form and manner provided [in this Act], except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

[2] Congress suspended the $100 labor or improvements requirement for the year 1919. Such suspensions were also allowed by Congress for the years 1933 to 1938, 1942, 1943, 1948, and 1949.

[3] By a provision of the 1872 Act, now 30 U. S. C. § 28, where any of several co-owners has not contributed his share of assessment work, one or more co-owners who have done the work may give the delinquent co-owner notice in writing or by publication for at least once a week for 90 days and if at the end of that time the delinquent fails or refuses to contribute his share, "his interest in the claim shall become the property of his coowners who have made the required expenditures." That federal right is enforceable in state courts. See *Hamilton* v. *Ertl,* 146 Colo. 80, 360 P. 2d 660.

For the history of the law which allows assessment work on one claim to inure to the benefit of a group of claims see *Union Oil Co.* v. *Smith,* 249 U. S. 337, 350–351.

was located in December 1919 by nine individuals. In February 1921, a "Notice in Lieu of Labor" was filed. No other instruments were filed. In 1954, Ertl acquired the interests of two of this group. In July 1955, he filed an "Affidavit of Annual Labor" and published a forfeiture notice. In September, a man named Dutton acquired an interest in the claims of two locators of this group and, in May 1956, Ertl quieted title in himself to the entire group. Another group of 20 (Camp Bird) claims was located in 1920. No instruments were filed regarding annual labor. In 1955, Mr. Dutton acquired the interests of two of the eight locators, and Mr. Ertl acquired the interests of four in 1956. Ertl filed an "Affidavit of Annual Labor" and published a forfeiture notice. Dutton responded and a court quieted title in the two of them, 75% in Ertl and 25% in Dutton.

In January, Ertl transferred all his interest in the above claims to Energy Resources Technology Land, Inc. (ERTL). Mr. Dutton transferred any interest he held in the above claims to ERTL and ERTL conveyed title to 16 of the Bute claims, Nos. 33–48, to Dutton. These 16 claims were eventually purchased by Oil Shale Corp. for $1,536,000. In 1963, Oil Shale leased all of the remaining claims from ERTL for $148,000 per year. Forty-six of the Bute claims, including the 16 purchased by Oil Shale, nine of the Atlas claims and all 20 of the Camp Bird claims are involved in the litigation here.

Another group of 20 claims (Carbon 1–8 and Elizabeth 1–12) passed through several hands, and after notice and forfeiture, as above, is held by Wasatch Development Co. and Joseph Umpleby. Sixteen of these are involved here. Another group of four (SW, NW, NE, & SE) claims has a similar history, and three of those

are involved here. The last group of claims (Oyler 1–4) is the only group in which there has been no claim of forfeiture. All four of these are involved here.

THE CHIEF JUSTICE and MR. JUSTICE STEWART dissent. They believe the Court of Appeals in this litigation correctly construed and applied this Court's decisions in *Wilbur* v. *Krushnic,* 280 U. S. 306, and *Ickes* v. *Virginia-Colorado Development Corp.,* 295 U. S. 639. Accordingly, unless those decisions are to be overruled, they would affirm the judgment before us.

PORT OF BOSTON MARINE TERMINAL ASSN. ET AL. *v.* REDERIAKTIEBOLAGET TRANSATLANTIC

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

No. 99. Argued October 22, 1970—Decided December 8, 1970

Petitioner Terminal Association, a maritime terminal operators conference operating under an agreement approved by the Federal Maritime Commission (FMC), pursuant to § 15 of the Shipping Act, 1916, revised a tariff on file with the agency by shifting the incidence of a wharf demurrage charge from consignees to carriers. When several carriers refused to pay the revised charge, which had not previously been approved by the FMC, the Terminal Association sued the association that represented them and their agents (Shipping Association). The District Court stayed the proceedings to allow the Shipping Association to obtain from the FMC a ruling on the validity of the change. After a hearing, the FMC concluded, on June 23, 1967, that its prior approval of the revised tariff was not necessary under § 15 of the Act. On September 19, 1967, the Shipping Association filed with the Court of Appeals a petition for review which that court dismissed for lateness. On September 4, 1968, respondent, a carrier that had been assessed charges, made application to the FMC for reconsideration (on the basis of a decision this Court rendered after the FMC's ruling), which the FMC returned as untimely filed under its rules. Thereupon respondent, contending that its agent had inadequately represented it in the proceeding brought by the Shipping Association, sought and was allowed to intervene in the still-pending action in the District Court. That court, concluding that the FMC had primary jurisdiction of the subject matter of the dispute and that the District Court did not have jurisdiction to review the FMC's decision, rendered judgment against the Shipping Association and respondent. Respondent appealed. The Court of Appeals reversed on the merits, after concluding that respondent was not a party to the FMC proceeding and was therefore free to seek independent collateral review in the District Court of that agency's order. *Held:*

1. The FMC, the agency responsible under the Shipping Act for supervising conferences of marine terminal operators and

uniquely qualified to consider disputes involving overall conference policies, had primary jurisdiction over the question whether prior administrative approval of the tariff amendment was required. Pp. 68–69.

2. The District Court correctly concluded that it had no authority to review the FMC's decision, which constituted a final order and as such, under the Administrative Orders Review Act, was exclusively reviewable by the Court of Appeals. Pp. 69–71.

3. Respondent, having been represented by its agent in the administrative hearing and having also had every opportunity to participate before the FMC and to seek timely review in the Court of Appeals, cannot collaterally attack the FMC's order. Pp. 71–72.

4. When the case returned to the District Court, the time for review by the Court of Appeals had expired, precluding any judicial review of the FMC decision on the merits. P. 72.

420 F. 2d 419, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

John M. Reed argued the cause and filed briefs for petitioners.

George F. Galland argued the cause and filed a brief for respondent.

Daniel M. Friedman argued the cause for the United States et al. as *amici curiae*. On the brief were *Solicitor General Griswold, Assistant Attorney General McLaren, Deputy Solicitor General Springer, Irwin A. Seibel,* and *Gordon M. Shaw.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The underlying dispute here is whether vessel owners or consignees will pay charges [1] for cargo left on the wharves at the Port of Boston. But the central ques-

[1] The charge involved is "wharf demurrage," the charge assessed when cargo remains on the pier or wharf after five days, the free time at the Port of Boston. See n. 5, *infra.*

tion we face is whether a resolution of this dispute by the Federal Maritime Commission is binding on respondent. We believe that the Court of Appeals was in error in holding that the Commission's determination was not binding. Accordingly, we reverse.

The Port of Boston Marine Terminal Association is a conference of maritime terminal operators acting pursuant to an agreement [2] approved in 1962 by the Federal Maritime Commission.[3] Prior to 1964, the Terminal Association administered a tariff,[4] on file with the Commission, which assessed charges against a consignee whenever cargo remained on a pier or wharf for more than five days.[5] In that year, the Terminal Association, without prior approval of the Commission, shifted the incidence of the tariff so that a daily fee of one-half cent per 100 pounds was charged a carrier-vessel whenever the failure to remove cargo resulted from a strike by longshoremen.

In 1965 there was a longshoremen's strike that caused cargo to be left on the wharves beyond the five-day—free time—limit. Several vessels refused to pay the revised charges; and the Terminal Association brought a state court action for damages and declaratory relief

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[2] Agreement No. 8785. The agreement set out the basic scheme for the protected price fixing engaged in by the terminal operators.

[3] See § 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814.

[4] The basic wharf demurrage charge was assessed against the consignee at a daily rate of 2½ cents per 100 pounds. Under the pre-1964 tariff, if factors beyond the control of the consignee or shipper prevented cargo removal, wharf demurrage would be assessed against the consignee at a daily rate of 1 cent per 100 pounds.

[5] When cargo is brought to the wharf it is considered reasonable for there to be a delay of up to five days before the cargo is loaded on the vessel or taken away by the consignee.

against the Boston Shipping Association,[6] an organization representing vessel owners and their agents. Following removal to the United States District Court, the Shipping Association defended on the grounds that the revised tariff was not within the scope of the 1962 Terminal Association agreement and could not become effective without Commission approval.[7]

The District Court stayed the proceedings to allow the Shipping Association to obtain a ruling by the Commission on the validity of the change. On June 23, 1967, after a full evidentiary hearing, the Commission issued a report and order concluding that prior approval was not necessary because shifting the incidence of the charge did not "constitute a new agreement or a modification to the existing agreement calling for a new . . . rate-fixing scheme not contemplated in the original agreement." [8] The Commission also approved the change in the fee structure insofar as the change affected cargo that was in free time when the strike started but held that it was unreasonable within the meaning of § 17 of the Shipping Act, 46 U. S. C. § 816,[9]

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[6] The members of the Shipping Association, including Furness, Withy & Co., Ltd., Transatlantic's agent at the Port of Boston, were also named as defendants.

[7] See *Volkswagenwerk Aktiengesellschaft* v. *FMC,* 390 U. S. 261 (1968).

[8] *Boston Shipping Assn.* v. *Port of Boston Marine Terminal Assn.,* 10 F. M. C. 409, 414 (1967).

[9] "No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall

to assess charges against the vessel when the cargo was not in free time [10] at the start of the strike.

On September 19, 1967, the Shipping Association petitioned the Court of Appeals for the District of Columbia Circuit for review. But since the petition was filed after the expiration of the 60-day period specified in the Administrative Orders Review Act, 28 U. S. C. § 2344 (1964 ed., Supp. V), the petition was dismissed as untimely. On September 4, 1968, Rederiaktiebolaget Transatlantic, respondent here and one of the carrier-vessels that had been assessed charges, filed an application with the Commission for reconsideration. Transatlantic claimed that it had been represented by an agent [11] in the proceeding brought by the Shipping Association and thus had standing to request a rehearing.

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discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." 46 U. S. C. § 816.

[10] The Commission also held that the shift in the incidence of the charge did not conflict with the rights and duties of a carrier under the regular legally binding tariff. It found a pre-existing duty on the carrier not only to deposit the cargo on the pier but also to arrange for the consignee to have access to the cargo and sufficient time, *i. e.*, free time, to remove it.

[11] Transatlantic's petition for reconsideration stated that "[i]t is represented in Boston by its Agent, Furness, Withy & Co." and that "Furness, Withy is a member of . . . Shipping . . . which, with its member lines, filed the complaint in this proceeding [before the Commission]." The petition further stated that the Terminal Association claimed the sums "from Furness, Withy as agent of petitioner under the disputed tariff provisions."

Transatlantic urged that the Commission's decision was inconsistent with this Court's intervening decision in *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U. S. 261 (1968), in that the Commission had held the tariff change could be effective without prior approval. The Commission did not, however, pass on the claim but returned the petition as untimely under its Rules of Practice and Procedure.[12]

Transatlantic did not seek direct judicial review of the Commission's denial of the application for rehearing. Instead, it moved to intervene [13] in the action still pending in the District Court. Transatlantic argued that its agent had provided inadequate representation and that it would be liable for a substantial portion of any judgment rendered against the agent. Intervention was granted. The District Court refused, however, to review the merits of the Commission's decision and rendered judgment against the Shipping Association and Transatlantic.[14]

Transatlantic, the only defendant to appeal, was more successful in the Court of Appeals for the First Circuit. That court concluded that Transatlantic was not a party to the Commission proceeding and, therefore, was free to seek independent collateral review of the merits of the Commission's order in the District Court. The Court of Appeals also accepted Transatlantic's position on the

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[12] Petitions for reconsideration are required to be filed within "30 days after issuance of a final decision or order by the Commission . . . ." 46 CFR § 502.261.

[13] See Fed. Rule Civ. Proc. 24 (a).

[14] The judgment entered by the District Court did not specify Transatlantic as one of the parties-defendant directly liable to the terminal operators. It did, however, provide that Transatlantic's agent, Furness, Withy & Co., was liable for $10,708.87. It is claimed that Transatlantic will be liable for $8,154.85 of this amount.

merits and reversed,[15] concluding that the Commission's ruling was indeed inconsistent with *Volkswagenwerk*.

I

Transatlantic argues that the District Court erred at the outset in referring the case to the Commission. But this Court recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge. See *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed.[16] When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved. *Whitney National Bank* v. *Bank of New Orleans*, 379 U. S. 411, 425 (1965). *Far East Conference* v. *United States*, 342 U. S. 570, 574–575 (1952).

This is an almost classic case for engaging the doctrine. Plainly, the Federal Maritime Commission is primarily responsible for supervising these conferences of marine terminal operators. Just five years earlier, the Commission approved the very agreement that established the basic pattern of this conference's operation, and the scope of this same agreement was the subject of the

[15] *Port of Boston Marine Terminal Assn.* v. *Boston Shipping Assn., Inc.*, 420 F. 2d 419 (CA1 1970).

[16] *Civil Aeronautics Board* v. *Modern Air Transport*, 179 F. 2d 622, 625 (CA2 1950); 3 K. Davis, Administrative Law §§ 19.01–19.07 (1958); Jaffe, Primary Jurisdiction Reconsidered. The Anti-Trust Laws, 102 U. Pa. L. Rev. 577 (1954).

present dispute. The Commission was uniquely qualified to consider the dispute in light of the overall policies concerning terminal conferences and the conferences' relationship with both carrier-vessels and consignees. The District Court did not err in determining, for purposes of this litigation, that an Article III court, acting on a single, isolated case-and-controversy record in a private suit in which neither the Commission nor the Government was a party, would lack the requisite capacity. *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387, 402–404 (concurring opinion) (CA5 1969).

II

The District Court also concluded correctly that it was without authority to review the merits of the Commission's decision. The Administrative Orders Review Act is explicit: "The court of appeals has exclusive jurisdiction to . . . determine the validity of . . . such final orders of the Federal Maritime Commission . . . ." 28 U. S. C. § 2342 (1964 ed., Supp. V). *Consolo* v. *FMC*, 383 U. S. 607, 613 (1966); *Far East Conference* v. *United States*, 342 U. S. 570, 577 (1952).

It is true that § 31 of the Shipping Act, 46 U. S. C. § 830, states that "except as herein otherwise provided" the procedures governing suits to "enforce, suspend, or set aside, in whole or in part, any order of the [Federal Maritime Commission]" [17] shall be the same as in similar suits in respect of orders of the Interstate Commerce Commission. It is also true that in 1964 Congress provided that when courts refer questions to the Interstate Commerce Commission the referring court shall have

[17] The agency entrusted with the duty of administering the Shipping Act has undergone many reorganizations and concomitant name changes since its creation in 1916.

exclusive jurisdiction to review orders arising from the referral. 28 U. S. C. § 1336 (b).[18]

This Court in *Consolo* pointed out,[19] however, that the requirement of § 31 was subject to special provisions applicable to maritime cases "such as the provision in § 2 of the Administrative Orders Review Act that direct review proceedings shall be conducted in the courts of appeals rather than the district courts." 383 U. S., at 613. See *D. L. Piazza Co.* v. *West Coast Line, Inc.*, 210 F. 2d 947 (CA2), cert. denied, 348 U. S. 839 (1954). Moreover, in the legislative history of the special statute providing for review of cases referred to the Commerce Commission, there is not even a hint that Congress thought of the Maritime Commission while considering the problem. And to make the procedure adopted there applicable to maritime cases would vitiate the scheme of the Administrative Orders Review Act—a scheme designed to ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed. 28 U. S. C. § 2348 (1964 ed., Supp. V).

Transatlantic argues that even if the Administrative Orders Review Act provides the exclusive method for reviewing final orders of the Maritime Commission, the Commission's order here was not a final order. But its argument that the order lacked finality because it had

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[18] "When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral." 28 U. S. C. § 1336 (b).

[19] *Volkswagenwerk,* the basis for Transatlantic's claim that the Commission erred, was referred to the Commission by a district court and the Commission's order was attacked directly in the Court of Appeals. 390 U. S., at 266–267.

no independent effect on anyone and resembled an interlocutory court order denying a motion to dismiss a complaint has the hollow ring of another era.[20] Agency orders that have no independent coercive effect are common. See *Frozen Food Express* v. *United States,* 351 U. S. 40, 44 (1956). Moreover, the relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action. *ICC* v. *Atlantic Coast Line R. Co.,* 383 U. S. 576, 602 (1966); *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 143 (1939).

Here there was no possible disruption of the administrative process; there was nothing else for the Commission to do. And certainly the Commission's action was expected to and did have legal consequences.

The final proffered argument to justify a collateral attack on the Commission's order is that Transatlantic was not a party to the proceeding before the Commission and not bound by the Commission's action. Although Transatlantic was not named as a party, it was in fact represented before the Commission and has previously made numerous claims to party status.[21] In the petition for reconsideration filed with the Commission, it asserted that it had been represented in the administrative evidentiary proceeding through its agent. The claim was also made in support of the motion to intervene in the resumed district court proceeding. There Transatlantic alleged that "at all times" prior to the filing of the petition for reconsideration with the Commission it "had

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[20] See, *e. g., Muskrat* v. *United States,* 219 U. S. 346 (1911). See generally 3 K. Davis, *supra,* §§ 21.01–21.10.

[21] See n. 11, *supra.*

been represented by counsel for" its agent and claimed that this representation was inadequate.

Even if Transatlantic was not a formal party its interests were clearly at stake. And it had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals. It chose not to do so. Certainly, from this posture, it cannot force collateral redetermination of the same issue in a different and inappropriate forum. *United States* v. *Western P. R. Co.*, 352 U. S. 59, 69 (1956).

III

Since the time for Court of Appeals review had run, the decision of the Federal Maritime Commission had become final when the case returned to the District Court. After that return neither the District Court nor any Court of Appeals nor this Court had or has authority to review the merits of that decision.

Reversed.

ATLANTIC CITY ELECTRIC CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 78. Argued November 12, 1970—Decided December 8, 1970*

No. 78, 306 F. Supp. 338, and No. 106, 316 F. Supp. 337, affirmed by an equally divided Court.

James O'Malley, Jr., argued the cause for appellants in No. 78. With him on the briefs were *Louis J. Lefkowitz*, Attorney General of New York, *Walter J. Myskowski, Sheila H. Marshall*, and *Alfred E. Froh. Charles J. McCarthy* argued the cause for appellants in No. 106. With him on the briefs were *Arthur L. Winn, Jr., J. Raymond Clark*, and *Richard J. Hardy.*

Deputy Solicitor General Springer argued the cause for the United States et al. in both cases. With him on the brief were *Solicitor General Griswold, Assistant Attorney General McLaren, Howard E. Shapiro, Edward M. Shulman, William A. Imhof, Robert W. Ginnane*, and *Arthur J. Cerra. Hugh B. Cox* argued the cause for appellees Aberdeen & Rockfish Railroad Co. et al. in both cases. With him on the brief were *William H. Allen* and *Michael Boudin.*

John F. Donelan and *John M. Cleary* filed a brief in No. 106 for the National Industrial Traffic League as *amicus curiae* urging reversal.

PER CURIAM.

The judgments are affirmed by an equally divided Court.

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

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*Together with No. 106, *Alabama Power Co. et al.* v. *United States et al.*, on appeal from the United States District Court for the District of Columbia.

DUTTON, WARDEN *v.* EVANS

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10. Argued October 15, 1969—Reargued October 15, 1970—Decided December 15, 1970

Appellee was convicted of first-degree murder following a trial in which one Shaw testified, over objection, concerning a statement Williams (an alleged accomplice) had made in the prison where both were incarcerated, after Williams' return there from his arraignment, that had it not been for appellee "we wouldn't be in this now." There were 19 other prosecution witnesses, one of whom (another alleged accomplice) gave detailed eyewitness testimony of the crime and the participation of the appellee and Williams therein. Shaw's testimony was admitted under a Georgia statute which, as construed by the Georgia Supreme Court, allows into evidence a coconspirator's out-of-court statement made during the concealment phase of the conspiracy. Following affirmance of the conviction by the Georgia Supreme Court, appellee brought this habeas corpus proceeding in federal court. The District Court denied the writ but the Court of Appeals reversed, holding that the Georgia statute violated appellee's right to confrontation secured by the Sixth and Fourteenth Amendments. Appellee contends that the Georgia hearsay exception is unconstitutional since it differs from the hearsay exception applicable to conspiracy trials in the federal courts, which applies only if the out-of-court statement of a coconspirator was made in the course of and in furtherance of the conspiracy. *Held:* The judgment is reversed. Pp. 80–90; 93–100.

400 F. 2d 826, reversed.

MR. JUSTICE STEWART, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN, concluded that:

1. The coconspirator hearsay exception applied by Georgia is not invalid under the Confrontation Clause of the Sixth Amendment, as applied to the States by the Fourteenth, merely because it does not coincide with the narrower exception applicable in

federal conspiracy trials which results, not from the Sixth Amendment, but from the exercise of this Court's rule-making power respecting the federal law of evidence. Pp. 80–83.

2. In the circumstances of this case the admission into evidence of Williams' statement did not result in any denial of appellee's confrontation right since the out-of-court statement bore indicia of reliability that fully warranted its being placed before the jury. Pp. 83–90.

MR. JUSTICE HARLAN concluded that exceptions to the rule against hearsay must be evaluated, not by the Confrontation Clause (which is not designed to cope with the many factors involved in passing on evidentiary rules), but by the due process standards of the Fifth and Fourteenth Amendments. Thus evaluated, the Georgia statute is constitutional as applied in this case since the out-of-court declaration against interest involved here evinces some likelihood of trustworthiness and its exclusion from evidence is therefore not essential to a fair trial. Pp. 93–100.

STEWART, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and WHITE and BLACKMUN, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined, *post,* p. 90. HARLAN, J., filed an opinion concurring in the result, *post,* p. 93. MARSHALL, J., filed a dissenting opinon, in which BLACK, DOUGLAS, and BRENNAN, JJ., joined, *post,* p. 100.

Alfred L. Evans, Jr., Assistant Attorney General of Georgia, reargued the cause for appellant. With him on the brief were *Arthur K. Bolton,* Attorney General, and *Marion O. Gordon* and *Mathew Robins,* Assistant Attorneys General.

Robert B. Thompson reargued the cause and filed a brief for appellee.

Solicitor General Griswold, by invitation of the Court, argued the cause for the United States as *amicus curiae* on the reargument. With him on the brief were *Assistant Attorney General Wilson, Jerome M. Feit, Beatrice Rosenberg,* and *Roger A. Pauley.*

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join.

Early on an April morning in 1964, three police officers were brutally murdered in Gwinnett County, Georgia. Their bodies were found a few hours later, handcuffed together in a pine thicket, each with multiple gunshot wounds in the back of the head. After many months of investigation, Georgia authorities charged the appellee, Evans, and two other men, Wade Truett and Venson Williams, with the officers' murders. Evans and Williams were indicted by a grand jury; Truett was granted immunity from prosecution in return for his testimony.

Evans pleaded not guilty and exercised his right under Georgia law to be tried separately. After a jury trial, he was convicted of murder and sentenced to death.[1] The judgment of conviction was affirmed by the Supreme Court of Georgia,[2] and this Court denied certiorari.[3] Evans then brought the present habeas corpus proceeding in a federal district court, alleging, among other things, that he had been denied the constitutional right of confrontation at his trial. The District Court denied the writ,[4] but the Court of Appeals for the Fifth Circuit reversed, holding that Georgia had, indeed, denied Evans the right, guaranteed by the Sixth and Fourteenth Amendments, "to be confronted by the witnesses against him." [5] From that judgment an appeal was brought to this Court, and we noted probable jurisdiction.[6] The

[1] The parties agree that this death sentence cannot be carried out. See n. 20, *infra*.

[2] *Evans* v. *State*, 222 Ga. 392, 150 S. E. 2d 240.

[3] 385 U. S. 953.

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

[5] *Evans* v. *Dutton*, 400 F. 2d 826, 827.

[6] 393 U. S. 1076. Since, as will appear, the Court of Appeals held that a Georgia statute relied upon by the State at the trial was unconstitutional as applied, there can be no doubt of the right of appeal to this Court. 28 U. S. C. § 1254 (2).

case was originally argued last Term, but was set for reargument. 397 U. S. 1060.

In order to understand the context of the constitutional question before us, a brief review of the proceedings at Evans' trial is necessary. The principal prosecution witness at the trial was Truett, the alleged accomplice who had been granted immunity. Truett described at length and in detail the circumstances surrounding the murder of the police officers. He testified that he, along with Evans and Williams, had been engaged in switching the license plates on a stolen car parked on a back road in Gwinnett County when they were accosted by the three police officers. As the youngest of the officers leaned in front of Evans to inspect the ignition switch on the car, Evans grabbed the officer's gun from its holster. Evans and Williams then disarmed the other officers at gunpoint, and handcuffed the three of them together. They then took the officers into the woods and killed them by firing several bullets into their bodies at extremely close range. In addition to Truett, 19 other witnesses testified for the prosecution.[7] Defense counsel was given full opportunity to cross-examine each witness, and he exercised that opportunity with respect to most of them.

One of the 20 prosecution witnesses was a man named Shaw. He testified that he and Williams had been fellow prisoners in the federal penitentiary in Atlanta, Georgia, at the time Williams was brought to Gwinnett County to be arraigned on the charges of murdering the police officers. Shaw said that when Williams was returned to the penitentiary from the arraignment, he had asked Williams: "How did you make out in court?" and that Williams had responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." Defense counsel objected to the introduction

[7] Three of these were rebuttal witnesses. There were four defense witnesses, and Evans himself made a lengthy unsworn statement.

of this testimony upon the ground that it was hearsay and thus violative of Evans' right of confrontation. After the objection was overruled, counsel cross-examined Shaw at length.

The testimony of Shaw relating what he said Williams had told him was admitted by the Georgia trial court, and its admission upheld by the Georgia Supreme Court, upon the basis of a Georgia statute that provides: "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." [8] As the appellate court put it:

> " 'The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other.' The defendant, and his co-conspirator, Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt. There was evidence sufficient to establish a prima facie case of conspiracy to steal the automobile and the killing of the deceased by the conspirators while carrying out the conspiracy, and the statement by Williams made after the actual commission of the crime, but while the conspiracy continued was admissible." [9] (Citations omitted.)

This holding was in accord with a consistent line of Georgia decisions construing the state statute. See, *e. g.*, *Chatterton* v. *State*, 221 Ga. 424, 144 S. E. 2d 726,

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[8] Ga. Code Ann. § 38-306 (1954).

[9] *Evans* v. *State*, 222 Ga. 392, 402, 150 S. E. 2d 240, 248.

cert. denied, 384 U. S. 1015; *Burns* v. *State,* 191 Ga. 60, 73, 11 S. E. 2d 350, 358.

It was the admission of this testimony of the witness Shaw that formed the basis for the appellee's claim in the present habeas corpus proceeding that he had been denied the constitutional right of confrontation in the Georgia trial court. In upholding that claim, the Court of Appeals for the Fifth Circuit regarded its duty to be "not only to interpret the framers' original concept in light of historical developments, but also to translate into due-process terms the constitutional boundaries of the hearsay rule." [10] (Footnotes omitted.) The court upheld the appellee's constitutional claim because it could find no "salient and cogent reasons" for the exception to the hearsay rule Georgia applied in the present case, an exception that the court pointed out was broader than that applicable to conspiracy trials in the federal courts.[11]

The question before us, then, is whether in the circumstances of this case the Court of Appeals was correct in holding that Evans' murder conviction had to be set aside because of the admission of Shaw's testimony. In considering this question, we start by recognizing that this Court has squarely held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right . . . made obligatory on the States by the Fourteenth Amendment." *Pointer* v. *Texas,* 380 U. S. 400, 403. See also *Douglas* v. *Alabama,* 380 U. S. 415; *Brookhart* v. *Janis,* 384 U. S. 1; *Barber* v. *Page,* 390 U. S. 719; *Roberts* v. *Russell,* 392 U. S. 293; *Illinois* v. *Allen,* 397 U. S. 337; *California* v. *Green,* 399 U. S. 149. But that is no more than the beginning of our inquiry.

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[10] 400 F. 2d, at 829.

[11] 400 F. 2d, at 830, 831.

I

It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced. In the *Pointer* case itself, we referred to the decisions of this Court that have approved the admission of hearsay:

> "This Court has recognized the admissibility against an accused of dying declarations, *Mattox* v. *United States,* 146 U. S. 140, 151, and of testimony of a deceased witness who has testified at a former trial, *Mattox* v. *United States,* 156 U. S. 237, 240–244. See also *Dowdell* v. *United States, supra,* 221 U. S., at 330; *Kirby* v. *United States, supra,* 174 U. S., at 61. . . . There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses." [12]

The argument seems to be, rather, that in any given case the Constitution requires a reappraisal of every exception to the hearsay rule, no matter how long established, in order to determine whether, in the words of the Court of Appeals, it is supported by "salient and cogent reasons." The logic of that position would seem to require a constitutional reassessment of every established hearsay exception, federal or state, but in the present case it is argued only that the hearsay exception applied by Georgia is constitutionally invalid because it does not identically conform to the hearsay exception applicable to conspiracy trials in the federal courts. Appellee does not challenge and we do not question the validity of the coconspirator exception applied in the federal courts.

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[12] *Pointer* v. *Texas,* 380 U. S., at 407. See also *Salinger* v. *United States,* 272 U. S. 542, 548.

That the two evidentiary rules are not identical must be readily conceded. It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise. *Lutwak* v. *United States,* 344 U. S. 604; *Krulewitch* v. *United States,* 336 U. S. 440. The hearsay exception that Georgia applied in the present case, on the other hand, permits the introduction of evidence of such an out-of-court statement even though made during the concealment phase of the conspiracy.

But it does not follow that because the federal courts have declined to extend the hearsay exception to include out-of-court statements made during the concealment phase of a conspiracy, such an extension automatically violates the Confrontation Clause. Last Term in *California* v. *Green,* 399 U. S. 149, we said:

> "Our task in this case is not to decide which of these positions, purely as a matter of the law of evidence, is the sounder. The issue before us is the considerably narrower one of whether a defendant's constitutional right 'to be confronted with the witnesses against him' is necessarily inconsistent with a State's decision to change its hearsay rules . . . . While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established

> such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *Id.*, at 155–156 (citations and footnote omitted).

These observations have particular force in the present case. For this Court has never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause. To the contrary, the limits of this hearsay exception have simply been defined by the Court in the exercise of its rule-making power in the area of the federal law of evidence.[13] It is clear that the limited scope of the hearsay exception in federal conspiracy trials is a product, not of the Sixth Amendment, but of the Court's "disfavor" of "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U. S. 391, 404. As *Grunewald, Krulewitch,* and other cases in this Court make clear, the evidentiary rule is intertwined, not only with the federal substantive law of conspiracy, but also with such related issues as the impact of the statute of limitations upon conspiracy prosecutions.

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[13] See 18 U. S. C. § 3771. Fed. Rule Crim. Proc. 26 provides:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

See *Hawkins* v. *United States,* 358 U. S. 74.

In the case before us such policy questions are not present. Evans was not prosecuted for conspiracy in the Georgia court, but for the substantive offense of murder.[14] At his trial the State permitted the introduction of evidence under a long-established and well-recognized rule of state law.[15] We cannot say that the evidentiary rule applied by Georgia violates the Constitution merely because it does not exactly coincide with the hearsay exception applicable in the decidedly different context of a federal prosecution for the substantive offense of conspiracy.

II

It is argued, alternatively, that in any event Evans' conviction must be set aside under the impact of our recent decisions that have reversed state court convictions because of the denial of the constitutional right of confrontation. The cases upon which the appellee Evans primarily relies are *Pointer* v. *Texas, supra; Doug-*

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[14] We are advised that at the time of Evans' trial Georgia did not recognize conspiracy as a separate, substantive criminal offense.

[15] The Georgia rule is hardly unique. See, *e. g., Reed* v. *People,* 156 Colo. 450, 402 P. 2d 68; *Dailey* v. *State,* 233 Ala. 384, 171 So. 729; *State* v. *Roberts,* 95 Kan. 280, 147 P. 828. See also 2 F. Wharton, Criminal Evidence § 430 (12th ed. 1955):

"The acts and declarations of a conspirator are admissible against a co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense but also its subsequent concealment. . . .

. . . . . .

"The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission: the conspiracy to commit the crime devolves after the commission thereof into a conspiracy to avoid arrest and implication."

The existence of such a hearsay exception in the evidence law of many States was recognized in *Krulewitch, supra.* 336 U. S., at 444.

las v. *Alabama, supra; Brookhart* v. *Janis, supra; Barber* v. *Page, supra;* and *Roberts* v. *Russell, supra.*

In the *Pointer* case it appeared that a man named Phillips had been the victim of a robbery in Texas. At a preliminary hearing, Phillips "as chief witness for the State gave his version of the alleged robbery in detail, identifying petitioner as the man who had robbed him at gunpoint." 380 U. S., at 401. Pointer had no lawyer at this hearing and did not try to cross-examine Phillips. At Pointer's subsequent trial the prosecution was permitted to introduce the transcript of Phillips' testimony given at the preliminary hearing. Thus, as this Court held, the State's "use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him." 380 U. S., at 403. The *Douglas* case, decided the same day as *Pointer,* involved an even more flagrant violation of the defendant's right of confrontation. For at Douglas' trial the prosecutor himself was permitted to read an "entire document" purporting to be an accomplice's written confession after the accomplice had refused to testify in reliance upon his privilege against compulsory self-incrimination. "The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim." 380 U. S., at 417. In reversing Douglas' conviction, this Court pointed out that the accomplice's reliance upon the privilege against compulsory self-incrimination "created a situation in which the jury might improperly infer both that the statement had been made and that it was true." 380 U. S., at 419. Yet, since the prosecutor was "not a witness, the inference from his reading that [the accomplice] made the statement could not be

tested by cross-examination. Similarly, [the accomplice] could not be cross-examined on a statement imputed to but not admitted by him." *Ibid.*

Brookhart v. *Janis* and *Barber* v. *Page* are even further afield. In *Brookhart* it appeared that the petitioner had been "denied the right to cross-examine at all any witnesses who testified against him," and that, additionally, "there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants . . . who did not testify in court." 384 U. S., at 4. The only issue in the case was one of waiver, since the State properly conceded that such a wholesale and complete "denial of cross-examination without waiver . . . would be constitutional error of the first magnitude . . . ." 384 U. S., at 3. In *Barber* the "principal evidence" against the petitioner was a transcript of preliminary hearing testimony admitted by the trial judge under an exception to the hearsay rule that, by its terms, was applicable only if the witness was "unavailable." This hearsay exception "has been explained as arising from necessity . . . ." 390 U. S., at 722, and we decided only that Oklahoma could not invoke that concept to use the preliminary hearing transcript in that case without showing "a good-faith effort" to obtain the witness' presence at the trial. *Id.*, at 725.

In *Roberts* v. *Russell* we held that the doctrine of *Bruton* v. *United States,* 391 U. S. 123, was applicable to the States and was to be given retroactive effect. But *Bruton* was a case far different from the one now before us. In that case there was a joint trial of the petitioner and a codefendant, coincidentally named Evans, upon a charge of armed postal robbery. A postal inspector testified that Evans had confessed to him that Evans and the petitioner had committed the robbery. This evidence was, concededly, wholly inadmissible against the petitioner. Evans did not testify. Although the trial judge

instructed the jury to disregard the evidence of Evans' confession in considering the question of the petitioner's guilt, we reversed the petitioner's conviction. The primary focus of the Court's opinion in *Bruton* was upon the issue of whether the jury in the circumstances presented could reasonably be expected to have followed the trial judge's instructions. The Court found that "[t]he risk of prejudice in petitioner's case was even more serious than in *Douglas*," because "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." 391 U. S., at 127, 135–136. Accordingly, we held that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." 391 U. S., at 137. There was not before us in *Bruton* "any recognized exception to the hearsay rule," and the Court was careful to emphasize that "we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U. S., at 128 n. 3.

It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.[16] But this Court has never equated the two,[17] and we decline to do so now. We confine ourselves, instead, to deciding the case before us.

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[16] It has been suggested that the constitutional provision is based on a common-law principle that had its origin in a reaction to abuses at the trial of Sir Walter Raleigh. F. Heller, The Sixth Amendment 104 (1951).

[17] See Note, Confrontation and the Hearsay Rule, 75 Yale L. J. 1434:

"Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform

This case does not involve evidence in any sense "crucial" or "devastating," as did all the cases just discussed. It does not involve the use, or misuse, of a confession made in the coercive atmosphere of official interrogation, as did *Douglas, Brookhart, Bruton,* and *Roberts.* It does not involve any suggestion of prosecutorial misconduct or even negligence, as did *Pointer, Douglas,* and *Barber.* It does not involve the use by the prosecution of a paper transcript, as did *Pointer, Brookhart,* and *Barber.* It does not involve a joint trial, as did *Bruton* and *Roberts.* And it certainly does not involve the wholesale denial of cross-examination, as did *Brookhart.*

In the trial of this case no less than 20 witnesses appeared and testified for the prosecution. Evans' counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eyewitness who described all the details of the triple murder and who was cross-examined at great length. Of the 19 other witnesses, the testimony of but a single one is at issue here. That one witness testified to a brief conversation about Evans he had had with a fellow prisoner in the Atlanta Penitentiary. The witness was vigorously and effectively cross-examined by defense counsel.[18] His testimony, which was of peripheral significance at most, was admitted in evidence under a coconspirator exception to the hearsay rule long established under state statutory law. The Georgia statute can

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Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." *Id.,* at 1436. (Footnotes omitted.)

[18] This cross-examination was such as to cast serious doubt on Shaw's credibility and, more particularly, on whether the conversation which Shaw related ever took place.

obviously have many applications consistent with the Confrontation Clause, and we conclude that its application in the circumstances of this case did not violate the Constitution.

Evans was not deprived of any right of confrontation on the issue of whether Williams actually made the statement related by Shaw. Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made. The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.[19]

The confrontation issue arises because the jury was being invited to infer that Williams had implicitly identified Evans as the perpetrator of the murder when he blamed Evans for his predicament. But we conclude that there was no denial of the right of confrontation as to this question of identity. First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know

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[19] Of course Evans had the right to subpoena witnesses, including Williams, whose testimony might show that the statement had not been made. Counsel for Evans informed us at oral argument that he could have subpoenaed Williams but had concluded that this course would not be in the best interests of his client.

whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *California* v. *Green,* 399 U. S., at 161. Evans exercised, and exercised effectively, his right to confrontation on the factual question whether Shaw had actually heard Williams make the statement Shaw related. And the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal.

Almost 40 years ago, in *Snyder* v. *Massachusetts,* 291 U. S. 97, Mr. Justice Cardozo wrote an opinion for this Court refusing to set aside a state criminal conviction because of the claimed denial of the right of confrontation. The closing words of that opinion are worth repeating here:

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prej-

udice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." 291 U. S., at 122.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for consideration of the other issues presented in this habeas corpus proceeding.[20]

It is so ordered.

MR. JUSTICE BLACKMUN, whom THE CHIEF JUSTICE joins, concurring.

I join MR. JUSTICE STEWART's opinion. For me, however, there is an additional reason for the result.

The single sentence attributed in testimony by Shaw to Williams about Evans, and which has prolonged this litigation, was, in my view and in the light of the entire record, harmless error if it was error at all. Furthermore, the claimed circumstances of its utterance are so incredible that the testimony must have hurt, rather than helped, the prosecution's case. On this ground alone, I could be persuaded to reverse and remand.

Shaw testified that Williams made the remark at issue when Shaw "went to his room in the hospital" and asked Williams how he made out at a court hearing on the preceding day. On cross-examination, Shaw stated that he was then in custody at the federal penitentiary in Atlanta; that he worked as a clerk in the prison hospital; that Williams was lying on the bed in his

[20] It was conceded at oral argument that the death penalty imposed in this case cannot be carried out, because the jury was qualified under standards violative of *Witherspoon* v. *Illinois,* 391 U. S. 510. The Court of Appeals for the Fifth Circuit has already set aside, under *Witherspoon,* the death sentence imposed upon Venson Williams, Evans' alleged accomplice. See *Williams* v. *Dutton,* 400 F. 2d 797, 804–805.

room and facing the wall; that he, Shaw, was in the hall and not in the room when he spoke with Williams; that the door to the room "was closed"; that he spoke through an opening about 10 inches square; that the opening "has a piece of plate glass, window glass, just ordinary window glass, and a piece of steel mesh"; that this does not impede talking through the door; and that one talks in a normal voice when he talks through that door. Shaw conceded that when he had testified at Williams' earlier trial, he made no reference to the glass in the opening in the door.

Carmen David Mabry, called by the State, testified that he was with the United States Public Health Service and stationed at the Atlanta Penitentiary. He described the opening in the door to Williams' room and said that it contained a glass "and over that is a wire mesh, heavy steel mesh"; that he has "never tried to talk through the door"; that, to his knowledge, he has never heard "other people talking through the door"; that, during his 11 years at the hospital, the glass has not been out of the door; and that the hospital records disclosed that it had not been out.

I am at a loss to understand how any normal jury, as we must assume this one to have been, could be led to believe, let alone be influenced by, this astonishing account by Shaw of his conversation with Williams in a normal voice through a closed hospital room door. I note, also, the Fifth Circuit's description of Shaw's testimony as "somewhat incredible" and as possessing "basic incredibility." 400 F. 2d, at 828 n. 4.

In saying all this, I am fully aware that the Fifth Circuit panel went on to observe, in the footnote just cited, "[W]e are convinced that it cannot be called harmless." And Justice Quillian, in sole dissent on the direct appeal to the Supreme Court of Georgia, stated, "[I]t obviously was prejudicial to the defendant." 222 Ga.

392, 408; 150 S. E. 2d 240, 251. However, neither the Georgia Superior Court judge who tried the case nor the Federal District Judge who held the hearing on Evans' petition for federal habeas concluded that prejudicial error was present. Also, we do not know the attitude of the Georgia Supreme Court majority, for they decided the issue strictly upon the pronounced limits of the long-established Georgia hearsay rule, 222 Ga., at 402; 150 S. E. 2d, at 248, and presumably had no occasion to touch upon any alternative ground such as harmlessness. I usually would refrain from passing upon an issue of this kind adversely to a federal court of appeals, but when the trial judges do not rule, I would suppose that we are as free to draw upon the cold record as is the appellate court.

I add an observation about corroboration. Marion Calvin Perry, another federal prisoner and one who admitted numerous past convictions, including "larceny of automobiles," testified without objection that he had known Williams and Evans for about 10 years, and Truett for about two years; that he spoke with Williams and Evans some 25 or 30 days prior to the murders of the three police officers; that Williams owed him money; that he and Williams talked by telephone "[a]bout me stealing some cars for him"; that Williams told him that "Alex [Evans] would know what kind of car he [Williams] would want"; that a few days later "me and Alex talked about cars and I told him I didn't want to mess with Venson [Williams]"; that Evans said, "if I got any, he said I could get them for him"; that seven or eight days before the murders Williams asked him by telephone whether he, Perry, "still had the Oldsmobile switch"; that the week of the murders he argued with Evans about how much he should receive for each stolen car; that six days after the murders he saw Evans at a filling station; that they talked about the murders; that "I said if I wanted to know who did it, I would see

mine and your friend"; and that Evans "got mad as hell" and "told me if I thought I knowed anything about it to keep my damn mouth shut."

Another witness, Lawrence H. Hartman, testified that his 1963 red Oldsmobile hardtop was stolen from his home in Atlanta the night of April 16, 1964 (the murders took place on the early morning of April 17). He went on to testify that the 1963 Oldsmobile found burning near the scene of the tragedy was his automobile. There is testimony in the record as to the earlier acquisition by Evans and Williams of another wrecked Oldsmobile of like model and color; as to the towing of that damaged car by a wrecker manned by Williams and Evans; and as to the replacement of good tires on a Chevrolet occupied by Williams, Evans, and Truett, with recapped tires then purchased by them.

This record testimony, it seems to me, bears directly and positively on the Williams-Evans-Truett car-stealing conspiracy and accomplishments and provides indisputable confirmation of Evans' role. The requirements of the Georgia corroboration rule were fully satisfied and Shaw's incredible remark fades into practical and legal insignificance.

The error here, if one exists, is harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18, 21–25; *Harrington* v. *California,* 395 U. S. 250.

MR. JUSTICE HARLAN, concurring in the result.

Not surprisingly the difficult constitutional issue presented by this case has produced multiple opinions. MR. JUSTICE STEWART finds Shaw's testimony admissible because it is "wholly unreal" to suggest that cross-examination would have weakened the effect of Williams' statement on the jury's mind. MR. JUSTICE BLACKMUN, while concurring in this view, finds admission of the statement to be harmless, seemingly because he deems Shaw's testimony so obviously fabricated that no normal jury

would have given it credence. MR. JUSTICE MARSHALL answers both suggestions to my satisfaction, but he then adopts a position that I cannot accept. He apparently would prevent the prosecution from introducing any out-of-court statement of an accomplice unless there is an opportunity for cross-examination, and this regardless of the circumstances in which the statement was made and regardless of whether it is even hearsay.

The difficulty of this case arises from the assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule. I believe this assumption to be wrong. Contrary to things as they appeared to me last Term when I wrote in *California* v. *Green,* 399 U. S. 149, 172 (1970), I have since become convinced that Wigmore states the correct view when he says:

> "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—*i. e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." 5 J. Wigmore, Evidence § 1397, at 131 (3d ed. 1940) (footnote omitted).

The conversion of a clause intended to regulate trial procedure into a threat to much of the existing law of evidence and to future developments in that field is not an unnatural shift, for the paradigmatic evil the Confrontation Clause was aimed at—trial by affidavit [1]—can be

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[1] See *California* v. *Green, supra,* at 179 (concurring opinion): historically, "the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trial by anonymous accusers, and absentee witnesses."

viewed almost equally well as a gross violation of the rule against hearsay and as the giving of evidence by the affiant out of the presence of the accused and not subject to cross-examination by him. But however natural the shift may be, once made it carries the seeds of great mischief for enlightened development in the law of evidence.

If one were to translate the Confrontation Clause into language in more common use today, it would read: "In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him." Nothing in this language or in its 18th-century equivalent would connote a purpose to control the scope of the rules of evidence. The language is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay—the position toward which my Brother MARSHALL is being driven, although he does not quite yet embrace it.

Nor am I now content with the position I took in concurrence in *California* v. *Green, supra,* that the Confrontation Clause was designed to establish a preferential rule, requiring the prosecutor to avoid the use of hearsay where it is reasonably possible for him to do so—in other words, to produce available witnesses. Further consideration in the light of facts squarely presenting the issue, as *Green* did not, has led me to conclude that this is not a happy intent to be attributed to the Framers absent compelling linguistic or historical evidence pointing in that direction. It is common ground that the historical understanding of the clause furnishes no solid guide to adjudication.[2]

A rule requiring production of available witnesses would significantly curtail development of the law of

[2] See *id.,* at 175–179, especially 176 n. 8 (concurring opinion).

evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant. Examples which come to mind are the Business Records Act, 28 U. S. C. §§ 1732–1733, and the exceptions to the hearsay rule for official statements, learned treatises, and trade reports. See, *e. g.*, Uniform Rules of Evidence 63 (15), 63 (30), 63 (31); *Gilstrap* v. *United States*, 389 F. 2d 6 (CA5 1968) (business records); *Kay* v. *United States*, 255 F. 2d 476 (CA4 1958) (laboratory analysis). If the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless. In unusual cases, of which the case at hand may be an example, the Sixth Amendment guarantees federal defendants the right of compulsory process to obtain the presence of witnesses, and in *Washington* v. *Texas*, 388 U. S. 14 (1967), this Court held that the Fourteenth Amendment extends the same protection to state defendants.[3]

Regardless of the interpretation one puts on the words of the Confrontation Clause, the clause is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence. The failure of MR. JUSTICE STEWART'S opinion to explain the standard by which it tests Shaw's statement, or how this standard can be squared with the seemingly absolute command of the clause, bears witness to the fact that the clause is being set a task for which it is not suited. The task is far more appropriately performed under the aegis of the Fifth and

[3] Although the fact is not necessary to my conclusion, I note that counsel for Evans conceded at oral argument that he could have secured Williams' presence to testify, but decided against it. Tr. of Oral Arg. 51, 55.

Fourteenth Amendments' commands that federal and state trials, respectively, must be conducted in accordance with due process of law. It is by this standard that I would test federal and state rules of evidence.[4]

It must be recognized that not everything which has been said in this Court's cases is consistent with this position. However, this approach is not necessarily inconsistent with the results that have been reached. Of the major "confrontation" decisions of this Court, seven involved the use of prior-recorded testimony.[5] In the absence of countervailing circumstances, introduction of such evidence would be an affront to the core meaning of the Confrontation Clause. The question in each case, therefore, was whether there had been adequate "confrontation" to satisfy the requirement of the clause. Regardless of the correctness of the results, the holding that the clause was applicable in those situations is consistent with the view of the clause I have taken.

Passing on to the other principal cases, *Dowdell* v. *United States,* 221 U. S. 325, 330 (1911), held that the Confrontation Clause did not prohibit the introduction of "[d]ocumentary evidence to establish collateral facts,

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[4] Reliance on the Due Process Clauses would also have the virtue of subjecting rules of evidence to constitutional scrutiny in civil and criminal trials alike. It is exceedingly rare for the common law to make admissibility of evidence turn on whether the proceeding is civil or criminal in nature. See 1 Wigmore, *supra,* § 4, at 16–17. This feature of our jurisprudence is a further indication that the Confrontation Clause, which applies only to criminal prosecutions, was never intended as a constitutional standard for testing rules of evidence.

[5] *Reynolds* v. *United States,* 98 U. S. 145 (1879); *Mattox* v. *United States,* 156 U. S. 237 (1895); *Motes* v. *United States,* 178 U. S. 458 (1900); *West* v. *Louisiana,* 194 U. S. 258 (1904); *Pointer* v. *Texas,* 380 U. S. 400 (1965); *Barber* v. *Page,* 390 U. S. 719 (1968); *California* v. *Green,* 399 U. S. 149 (1970).

admissible under the common law." While this was characterized as an exception to the clause, rather than a problem to which the clause did not speak, the result would seem correct. *Brookhart* v. *Janis,* 384 U. S. 1 (1966), and *Smith* v. *Illinois,* 390 U. S. 129 (1968), involved restrictions on the right to cross-examination or the wholesale denial of that right. *Douglas* v. *Alabama,* 380 U. S. 415 (1965), is perhaps most easily dealt with by viewing it as a case of prosecutorial misconduct. Alternatively, I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption. The exclusion of such evidence dates at least from *Tong's Case,* Kelyng 17, 18–19, 84 Eng. Rep. 1061, 1062 (K. B. 1663), and is universally accepted. This theory would be adequate to account for the results of both *Douglas* and *Bruton* v. *United States,* 391 U. S. 123 (1968).

The remaining confrontation case of significance is *Kirby* v. *United States,* 174 U. S. 47 (1899). In that case a record of conviction of three men for theft was introduced at Kirby's trial. The judge instructed the jury that this judgment was prima facie evidence that the goods which Kirby was accused of receiving from the three men were in fact stolen. This Court reversed, holding that since the judgment was the sole evidence of the fact of theft, Kirby had been denied his right of confrontation. In my view this is not a confrontation case at all, but a matter of the substantive law of judgments. Accord, 4 Wigmore, *supra,* § 1079, at 133. Indeed, the *Kirby* Court indicated that lack of confrontation was not at the heart of its objection when it said

that the record would have been competent evidence of the fact of conviction. The correctness of the result in *Kirby* can hardly be doubted, but it was, I think, based on the wrong legal theory.

Judging the Georgia statute here challenged by the standards of due process, I conclude that it must be sustained. Accomplishment of the main object of a conspiracy will seldom terminate the community of interest of the conspirators. Declarations against that interest evince some likelihood of trustworthiness. The jury, with the guidance of defense counsel, should be alert to the obvious dangers of crediting such testimony. As a practical matter, unless the out-of-court declaration can be proved by hearsay evidence, the facts it reveals are likely to remain hidden from the jury by the declarant's invocation of the privilege against self-incrimination.[6] In light of such considerations, a person weighing the necessity for hearsay evidence of the type here involved against the danger that a jury will give it undue credit might reasonably conclude that admission of the evidence would increase the likelihood of just determinations of truth. Appellee has not suggested that Shaw's testimony possessed any peculiar characteristic that would lessen the force of these general considerations and require, as a constitutional matter, that the trial judge exercise residual discretion to exclude the evidence as unduly in-

[6] Quite apart from *Malloy* v. *Hogan,* 378 U. S. 1 (1964), Georgia has long recognized the privilege. The Georgia Constitution of 1877, Art. I, § 1, ¶ VI, provided that: "No person shall be compelled to give testimony tending in any manner to criminate himself," and the same language appears in the present state constitution. Ga. Const. of 1945, Art. I, § 1, ¶ VI. The right had previously been recognized as a matter of common law, even in civil trials. See, *e. g., Marshall* v. *Riley,* 7 Ga. 367 (1849).

flammatory. Exclusion of such statements, as is done in the federal courts, commends itself to me, but I cannot say that it is essential to a fair trial. The Due Process Clause requires no more.

On the premises discussed in this opinion, I concur in the reversal of the judgment below.

MR. JUSTICE MARSHALL, whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join, dissenting.

Appellee Evans was convicted of first-degree murder after a trial in which a witness named Shaw was allowed to testify, over counsel's strenuous objection, about a statement he claimed was made to him by Williams, an alleged accomplice who had already been convicted in a separate trial.[1] According to Shaw, the statement, which implicated both Williams and Evans in the crime, was made in a prison conversation immediately after Williams' arraignment. Williams did not testify nor was he called as a witness. Nevertheless, the Court today concludes that admission of the extrajudicial statement attributed to an alleged partner in crime did not deny Evans the right "to be confronted with the witnesses against him" guaranteed by the Sixth and Fourteenth Amendments to the Constitution. In so doing, the majority reaches a result completely inconsistent with recent opinions of this Court, especially *Douglas* v. *Alabama,* 380 U. S. 415 (1965), and *Bruton* v. *United States,* 391 U. S. 123 (1968). In my view, those cases fully apply here and establish a clear violation of Evans' constitutional rights.

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[1] Shaw had been a witness at Williams' trial; his testimony was fully anticipated and was objected to both before and after its admission.

In *Pointer* v. *Texas,* 380 U. S. 400 (1965), this Court first held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Id.,* at 403. That decision held constitutionally inadmissible a statement offered against a defendant at a state trial where the statement was originally made at a preliminary hearing under circumstances not affording the defendant an adequate opportunity for cross-examination. Indeed, we have since held that even cross-examination at a prior hearing does not satisfy the confrontation requirement, at least where the witness who made the statement is available to be called at trial. *Barber* v. *Page,* 390 U. S. 719 (1968). "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.,* at 725.

In *Douglas* v. *Alabama, supra,* this Court applied the principles of *Pointer* to a case strikingly similar to this one. There, as here, the State charged two defendants with a crime and tried them in separate trials. There, as here, the State first prosecuted one defendant (Loyd) and then used a statement by him in the trial of the second defendant (Douglas). Although the State called Loyd as a witness, an appeal from his conviction was pending and he refused to testify on the ground that doing so would violate his Fifth Amendment privilege against self-incrimination.

Without reaching the question whether the privilege was properly invoked,[2] the Court held that the prosecu-

[2] This same question—which presents a fundamental conflict between a defendant's Sixth Amendment rights and a witness' Fifth Amendment privilege—might have been present here had the State

tor's reading of Loyd's statement in a purported attempt to refresh his memory denied Douglas' right to confrontation. "Loyd could not be cross-examined on a statement imputed to but not admitted by him." 380 U. S., at 419. Of course, Douglas was provided the opportunity to cross-examine the officers who testified regarding Loyd's statement. "But since their evidence tended to show only that Loyd made the confession, cross-examination of them . . . could not substitute for cross-examination of Loyd to test the truth of the statement itself." [3] *Id.*, at 420. Surely, the same reasoning compels the exclusion of Shaw's testimony here. Indeed, the only significant difference between *Douglas* and this case, insofar as the denial of the opportunity to cross-examine is concerned, is that here the State did not even attempt to call Williams to testify in Evans' trial. He was plainly available to the State, and for all we know he would have willingly testified, at least with regard to his alleged conversation with Shaw.[4]

Finally, we have applied the reasoning of *Douglas* to hold that, "despite instructions to the jury to disregard

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called Williams to testify. Under a view that would make availability of a declarant the only concern of confrontation, see *California* v. *Green*, 399 U. S. 149, 172–189 (1970) (HARLAN, J., concurring), the State's right or duty to compel a codefendant's testimony, by timing of trials and use of testimonial immunity, would seemingly have to be decided. See Comment, Exercise of the Privilege Against Self-Incrimination by Witnesses and Codefendants: The Effect Upon the Accused, 33 U. Chi. L. Rev. 151, 165 (1965).

[3] Cf. *Brookhart* v. *Janis*, 384 U. S. 1, 4 (1966).

[4] My Brother STEWART comments that Evans might have brought Williams to the courthouse by subpoena. Defense counsel did not do so, believing that Williams would stand on his right not to incriminate himself. Tr. of Oral Arg. 55. Be that as it may, it remains that the duty to confront a criminal defendant with the witnesses against him falls upon the *State*, and here the State was allowed to introduce damaging evidence without running the risks of trial confrontation. Cf. n. 2, *supra*.

the implicating statements in determining the codefendant's guilt or innocence, admission at a joint trial of a defendant's extrajudicial confession implicating a codefendant violated the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Roberts* v. *Russell,* 392 U. S. 293 (1968), giving retroactive effect in both state and federal trials to *Bruton* v. *United States,* 391 U. S. 123 (1968). Thus Williams' alleged statement, an extrajudicial admission made to a fellow prisoner, could not even have been introduced against Williams if he had been tried in a joint trial with Evans.

The teaching of this line of cases seems clear: Absent the opportunity for cross-examination, testimony about the incriminating and implicating statement allegedly made by Williams was constitutionally inadmissible in the trial of Evans.

MR. JUSTICE STEWART'S opinion for reversal characterizes as "wholly unreal" the possibility that cross-examination of Williams himself would change the picture presented by Shaw's account. A trial lawyer might well doubt, as an article of the skeptical faith of that profession, such a categorical prophecy about the likely results of careful cross-examination. Indeed, the facts of this case clearly demonstrate the necessity for fuller factual development which the corrective test of cross-examination makes possible. The plurality for reversal pigeonholes the out-of-court statement that was admitted in evidence as a "spontaneous" utterance, hence to be believed. As the Court of Appeals concluded, however, there is great doubt that Williams even made the statement attributed to him.[5] More-

[5] After considering Shaw's testimony and other evidence submitted at the trial, the Court of Appeals concluded that Shaw's account of his conversation with Williams was notable for "its basic incredibility." 400 F. 2d 826, 828 n. 4.

over, there remains the further question what, if anything, Williams might have meant by the remark that Shaw recounted. MR. JUSTICE STEWART's opinion concedes that the remark is ambiguous. Plainly it stands as an accusation of some sort: "If it hadn't been for . . . Evans," said Williams, according to Shaw, "we wouldn't be in this now." At his trial Evans himself gave unsworn testimony to the effect that the murder prosecution might have arisen from enmities that Evans' own law enforcement activities had stirred up in the locality. Did Williams' accusation relate to Evans as a man with powerful and unscrupulous enemies, or Evans as a murderer? MR. JUSTICE STEWART's opinion opts for the latter interpretation, for it concludes that Williams' remark was "against his penal interest" and hence to be believed. But at this great distance from events, no one can be certain. The point is that absent cross-examination of Williams himself, the jury was left with only the unelucidated, apparently damning, and patently damaging accusation as told by Shaw.

Thus we have a case with all the unanswered questions that the confrontation of witnesses through cross-examination is meant to aid in answering: What did the declarant say, and what did he mean, and was it the truth? If Williams had testified and been cross-examined, Evans' counsel could have fully explored these and other matters. The jury then could have evaluated the statement in the light of Williams' testimony and demeanor. As it was, however, the State was able to use Shaw to present the damaging evidence and thus to avoid confronting Evans with the person who allegedly gave witness against him. I had thought that this was precisely what the Confrontation Clause as applied to the States in *Pointer* and our other cases prevented.

Although MR. JUSTICE STEWART's opinion for reversal concludes that there was no violation of Evans' right of

confrontation, it does so in the complete absence of authority or reasoning to explain that result. For example, such facts as that Williams' alleged statement was not made during official interrogation, was not in transcript form, and was not introduced in a joint trial—though they differentiate some of the cases—are surely irrelevant. Other cases have presented each of these factors,[6] and no reason is offered why the right of confrontation could be so limited.

Nor can it be enough that the statement was admitted in evidence "under a long-established and well-recognized rule of state law." MR. JUSTICE STEWART'S opinion surely does not mean that a defendant's constitutional right of confrontation must give way to a state evidentiary rule. That much is established by our decision in *Barber* v. *Page, supra,* which held unconstitutional the admission of testimony in accordance with a rule similarly well recognized and long established. However, the plurality for reversal neither succeeds in distinguishing that case nor considers generally that there are inevitably conflicts between *Pointer* and state evidentiary rules. Rather, it attempts to buttress its conclusion merely by announcing a reluctance to equate evidentiary hearsay rules and the Confrontation Clause.[7]

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[6] For example, *Pointer* involved only the second, and that one was not present in either *Bruton* or *Roberts.*

[7] Constitutionalization of "all common-law hearsay rules and their exceptions," *California* v. *Green,* 399 U. S., at 174 (concurring opinion), would seem to be a prospect more frightening than real. Much of the complexity afflicting hearsay rules comes from the definition of hearsay as an out-of-court statement presented for the truth of the matter stated—a definition nowhere adopted by this Court for confrontation purposes. Rather, the decisions, while looking to availability of a declarant, *Barber* v. *Page, supra,* recognize that "cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him," *Pointer* v. *Texas,* 380 U. S., at 404, and that admission in the absence of cross-

The Court of Appeals, however, was not of the view that the Confrontation Clause implies unrelenting hostility to whatever evidence may be classified as hearsay. Nor did that court hold that States must conform their evidentiary rules to the hearsay exceptions applicable in federal conspiracy trials. While it did note that this case does not in reality even involve the traditional hearsay rule and its so-called coconspirators exception,[8] that was not the basis for its decision. Rather, the Court of Appeals found in the admission of an incriminatory and inculpating statement attributed to an alleged accomplice who was not made available for cross-examination what it termed an obvious abridgment of Evans' right of confrontation. Since the State presented no satisfactory justification for the denial of confrontation, cf. *Pointer* v. *Texas,* 380 U. S., at 407, the Court of Appeals

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examination of certain types of suspect and highly damaging statements is one of the "threats to a fair trial" against which "the Confrontation Clause was directed," *Bruton* v. *United States,* 391 U. S., at 136.

[8] Evans was not charged with conspiracy nor could he have been under Georgia law. The "conspiracy" element came in as part of the State's evidentiary law, part of which goes far beyond the traditional hearsay exception even as it exists with regard to the "concealment phase" in some jurisdictions. Indeed, Williams' alleged statement itself negates the notion that Evans had authorized Williams to speak or had assumed the risk in order to achieve an unlawful aim through concert of effort. It is difficult to conceive how Williams could be part of a conspiracy to conceal the crime when all the alleged participants were in custody and he himself had already been arraigned. As this Court stated in *Fiswick* v. *United States,* 329 U. S. 211, 217 (1946), an "admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it." One lower court in Georgia has adopted essentially this reasoning in reversing a conviction where testimony similar to that objected to in this case was admitted. See *Green* v. *State,* 115 Ga. App. 685, 155 S. E. 2d 655 (1967). But see n. 9, *infra.*

held that under *Douglas* v. *Alabama* and this Court's other cases Evans was denied his constitutional rights.

Surely the Constitution requires at least that much when the State denies a defendant the right to confront and cross-examine the witnesses against him in a criminal trial. In any case, that Shaw's testimony was admitted in accordance with an established rule of state law cannot aid my Brethren in reaching their conclusion. Carried to its logical end, justification of a denial of the right of confrontation on that basis would provide for the wholesale avoidance of this Court's decisions in *Douglas* and *Bruton*,[9] decisions which MR. JUSTICE STEWART's opinion itself reaffirms. Indeed, if that opinion meant what it says, it would come very close to establishing in reverse the very equation it seeks to avoid—an equation that would give any exception to a state hearsay rule a "permanent niche in the Constitution" in the form of an exception to the Confrontation Clause as well.

Finally, the plurality for reversal apparently distinguishes the present case on the ground that it "does not involve evidence in any sense 'crucial' or 'devastating.' "

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[9] The Georgia rule involved here, which apparently makes admissible all pre-trial statements and admissions of an alleged accomplice or coconspirator, inevitably conflicts with this Court's decisions regarding the Confrontation Clause. See *Darden* v. *State*, 172 Ga. 590, 158 S. E. 414 (1931), and *Mitchell* v. *State*, 86 Ga. App. 292, 71 S. E. 2d 756 (1952), where confessions of codefendants not on trial were held admissible. Indeed, the Georgia Supreme Court seems to have resolved this conflict in favor of the state rule by erroneously concluding that this Court's decisions are based on the federal hearsay rule concerning "a confession by one of the coconspirators after he has been apprehended." *Pinion* v. *State*, 225 Ga. 36, 37, 165 S. E. 2d 708, 709–710 (1969). See also *Park* v. *State*, 225 Ga. 618, 170 S. E. 2d 687 (1969), petition for cert. filed, November 4, 1969, No. 57, O. T. 1970 (renumbered).

Despite the characterization of Shaw's testimony as "of peripheral significance at most," however, the possibility of its prejudice to Evans was very real. The outcome of Evans' trial rested, in essence, on whether the jury would believe the testimony of Truett with regard to Evans' role in the murder. Truett spoke as an admitted accomplice who had been immunized from prosecution. Relying on Georgia law, not federal constitutional law, the trial judge instructed the jury that "you cannot lawfully convict upon the testimony of an accomplice alone. . . . [T]he testimony of an accomplice must be corroborated . . . . [T]he corroboration . . . must be such as to connect the defendant with the criminal act." The State presented the testimony of a number of other witnesses, in addition to that of the alleged accomplice that tended to corroborate Evans' guilt. But Shaw's account of what Williams supposedly said to him was undoubtedly a part of that corroborating evidence.[10]

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[10] The trial judge's instructions left no doubt that the statement attributed to Williams could provide the necessary corroboration. See Trial Record 412–413. Indeed, the prejudicial impact of Shaw's testimony is graphically revealed simply by juxtaposing two quotations. First, there is characterization in MR. JUSTICE STEWART'S opinion of Shaw's testimony, a characterization that I find fair albeit studiedly mild: "[T]he jury was being invited to infer that Williams had implicitly *identified Evans as the perpetrator* of the murder. . . ." (Emphasis added.) Second, there is the trial judge's charge on corroboration of accomplice testimony: *"Slight evidence* from an extraneous source *identifying the accused as a participator in the criminal act* will be sufficient corroboration of an accomplice to support a verdict." (Emphasis added.) In the light of the charge and on consideration of the whole record of Evans' trial, it is impossible for me to believe "beyond a reasonable doubt" that the error complained of did not contribute to the verdict obtained. *Chapman* v. *California,* 386 U. S. 18, 24 (1967); *Harrington* v. *California,* 395 U. S. 250, 251 (1969).

Indeed, MR. JUSTICE STEWART's opinion does not itself upset the Court of Appeals' finding that the admission of Shaw's testimony, if erroneous, could not be considered harmless. Beyond and apart from the question of harmless error, MR. JUSTICE STEWART undertakes an inquiry, the purpose of which I do not understand, into whether the evidence admitted is "crucial" or "devastating." The view is, apparently, that to require the exclusion of evidence falling short of that high standard of prejudice would bring a moment of clamor against the Bill of Rights. I would eschew such worries and confine the inquiry to the traditional questions: Was the defendant afforded the right to confront the witnesses against him? And, if not, was the denial of his constitutional right harmless beyond a reasonable doubt?

The fact is that Evans may well have been convicted in part by an incriminatory and implicating statement attributed to an alleged accomplice who did not testify and who consequently could not be questioned regarding the truth or meaning of that statement. The Court of Appeals correctly recognized that the Confrontation Clause prohibits such a result, whether the statement is introduced under the guise of refreshing a witness' recollection as in *Douglas* v. *Alabama,* against a codefendant with a limiting instruction as in *Bruton* v. *United States,* or in accordance with some other evidentiary rule as here.

I am troubled by the fact that the plurality for reversal, unable when all is said to place this case beyond the principled reach of our prior decisions, shifts its ground and begins a hunt for whatever "indicia of reliability" may cling to Williams' remark, as told by Shaw. Whether Williams made a "spontaneous" statement "against his penal interest" is the very question that should have been tested by cross-examination of Williams

himself. If "indicia of reliability" are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant against the use of extrajudicial statements not subject to cross-examination and not exposed to a jury assessment of the declarant's demeanor at trial.[11] I believe the Confrontation Clause has been sunk if any out-of-court statement bearing an indicium of a probative likelihood can come in, no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination. Cf. *California* v. *Green,* 399 U. S. 149, 161–162 (1970). Our decisions from *Pointer* and *Douglas* to *Bruton* and *Roberts* require more than this meager inquiry. Nor is the lame "indicia" approach necessary to avoid a rampaging Confrontation Clause that tramples all flexibility and innovation in a state's law of evidence. That specter is only a specter.[12] To decide this case I need not go beyond hitherto settled Sixth and Fourteenth Amendment law to consider generally what effect, if any, the Confrontation Clause has on the common-law hearsay rule and its exceptions, since no issue of such global dimension is presented. Cf. *Bruton* v. *United States,* 391 U. S., at 128 n. 3. The incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his state-

[11] MR. JUSTICE HARLAN answers this question with directness by adopting, to decide this case, his view of due process which apparently makes no distinction between civil and criminal trials, and which would prohibit only irrational or unreasonable evidentiary rulings. Needless to say, I cannot accept the view that Evans' constitutional rights should be measured by a standard concededly having nothing to do with the Confrontation Clause.

[12] See n. 7, *supra.*

ment falls within a genuine exception to the hearsay rule.

In my view, Evans is entitled to a trial in which he is fully accorded his constitutional guarantee of the right to confront and cross-examine all the witnesses against him. I would affirm the judgment of the Court of Appeals and let this case go back to the Georgia courts to be tried without the use of this out-of-court statement attributed by Shaw to Williams.

OREGON *v.* MITCHELL, ATTORNEY GENERAL

ON BILL OF COMPLAINT

No. 43, Orig. Argued October 19, 1970—Decided December 21, 1970*

These original actions involve the constitutionality of three provisions of the Voting Rights Act Amendments of 1970 which (1) lower the minimum age of voters in both state and federal elections from 21 to 18, (2) bar the use of literacy tests (and similar voting eligibility requirements) for a five-year period in state and federal elections in any area where such tests are not already proscribed by the Voting Rights Act of 1965, and (3) forbid States from disqualifying voters in presidential and vice-presidential elections for failure to meet state residency requirements and provide uniform national rules for absentee voting in such elections. *Held:* (1) The 18-year-old minimum-age requirement of the Voting Rights Act Amendments is valid for national elections. (2) That requirement is not valid for state and local elections. (3) The literacy test provision is valid. (4) The residency and absentee balloting provisions are valid. Pp. 117–296.

Relief granted in part and denied in part.

MR. JUSTICE BLACK concluded that:

1. Congress has the authority to permit 18-year-old citizens to vote in national elections, under Art. I, § 4, Art. II, § 1, and the Necessary and Proper Clause, of the Constitution since those provisions fully empower Congress to make or alter regulations in national elections, to supervise such elections, and to set the qualifications for voters therein. Pp. 117, 119–124.

2. But under Art I, § 2, the States have the power to set qualifications to vote in state and local elections, and the whole Constitution reserves that power to the States except as it has been curtailed by specific constitutional amendments. No amendment (including the Equal Protection Clause of the Fourteenth Amendment and the other Civil War Amendments) authorizes Congress' attempt to lower the voting age in state and local elections. Pp. 118, 124–131.

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*Together with No. 44, Orig., *Texas* v. *Mitchell, Attorney General,* No. 46, Orig., *United States* v. *Arizona,* and No. 47, Orig., *United States* v. *Idaho,* also on bills of complaint.

3. The literacy test ban is constitutional under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments, in view of the evidence of racial discrimination that Congress found in various parts of the Nation: racial discrimination resulting from literacy tests, the educational inequality stemming from the "separate but equal" rule, and other racially discriminatory practices. Pp. 118, 131–134.

4. The provisions forbidding States from disqualifying voters in national elections for presidential and vice-presidential electors because they have not met state residency requirements and establishing absentee balloting rules are valid under Congress' broad powers to regulate federal elections and maintain a national government.* Pp. 118, 134.

MR. JUSTICE DOUGLAS concluded that:*

1. The authority of Congress to fix at 18 the minimum age for the civil right of voting in national elections derives from the Equal Protection Clause of the Fourteenth Amendment and the power to "enforce" granted by § 5 of that Amendment. Congress had an adequate basis for concluding that 18-year-olds are mature enough to vote and that to deprive them of the franchise would be a denial of equal protection. Pp. 135–144.

3. The bar against a State's denying the right to vote in any federal, state, or local election because of a literacy test is sustainable as appropriate legislation to enforce the Equal Protection Clause, Congress having concluded that such tests have been used to discriminate against the voting rights of minority groups and that the tests are not necessary to ensure that voters be well informed. Pp. 144–147.

4. The right to vote in national elections is a privilege and immunity of national citizenship and the congressional judgment to ban durational residency requirements in presidential and vice-presidential elections is a manifestly permissible means of enforcing that privilege and immunity under § 5 of the Fourteenth Amendment. Pp. 147–150.

MR. JUSTICE HARLAN concluded that:*

2. The Fourteenth Amendment was not intended to restrict the authority of the States to allocate their political power as they see

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*[NOTE: A numbered category that is used for MR. JUSTICE BLACK's opinion is not repeated below where the opinion being headnoted does not concur or concur in the result with respect to the point involved in that category.]

fit and neither that Amendment nor any other provision of the Constitution authorizes Congress to set voter qualifications in state or local elections. Pp. 154–213.

3. The literacy requirement can be deemed an appropriate means of enforcing the Fifteenth Amendment since Congress could have determined that racial prejudice is prevalent throughout the Nation and that literacy tests unduly lend themselves to discriminatory application. Pp. 216–217.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concluded that:*

1. Congress has the power to forbid the disenfranchisement in national elections of persons over the age of 18 because of their age, in order to enforce the Equal Protection Clause of the Fourteenth Amendment. There was ample evidence to support Congress' conclusion that the exclusion of citizens 18 to 21 years of age from the franchise is unnecessary to promote any legitimate interest the States may have in assuring intelligent and responsible voting. Pp. 239–281.

3. The congressional determination that a nationwide ban on literacy tests was necessary to prevent racial discrimination in voting is amply supported by the legislative record, and the proscription of literacy tests is well within the power of Congress granted by § 2 of the Fifteenth Amendment. Pp. 231–236.

4. There is adequate constitutional basis for the residency provisions of the Act in § 5 of the Fourteenth Amendment, as there is ample justification for the congressional findings that durational residence requirements abridge the right of free interstate migration and that such requirements are not reasonably related to any compelling state interests. Pp. 236–239.

MR. JUSTICE STEWART, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, concluded that:*

2. Congress has no power to confer the right to vote in state or local elections on citizens from the ages of 18 to 21 since under the Constitution only the States have the power to set voting qualifications. Pp. 293–296.

3. The literacy test ban is constitutional under the Enforcement Clause of the Fifteenth Amendment. Pp. 282–284.

4. The residency provisions of the Act are constitutional because Congress, while it does not have general authority to establish qualifications for voting in congressional or presidential elections,

*See note, *supra*, at 113.

does have the power under the Necessary and Proper Clause to protect the privileges of United States citizenship, including the freedom to travel and to change one's residence. Pp. 285–292.

BLACK, J., delivered an opinion announcing the judgments of the Court and expressing his own view of the cases. DOUGLAS, J., filed a separate opinion, *post,* p. 135. HARLAN, J., filed an opinion concurring in part and dissenting in part, *post,* p. 152. BRENNAN, WHITE, and MARSHALL, JJ., filed an opinion dissenting from the judgments in part and concurring in the judgments in part, *post,* p. 229. STEWART, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and BLACKMUN, J., joined, *post,* p. 281.

Lee Johnson, Attorney General of Oregon, argued the cause for plaintiff in No. 43, Orig. With him on the briefs were *Diarmuid F. O'Scannlain,* Deputy Attorney General, *Jacob B. Tanzer,* Solicitor General, and *Al J. Laue* and *Thomas H. Denney,* Assistant Attorneys General. *Charles Alan Wright* argued the cause for plaintiff in No. 44, Orig. With him on the brief were *Crawford C. Martin,* Attorney General of Texas, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *J. C. Davis, W. O. Shultz II,* and *John Reeves,* Assistant Attorneys General.

Solicitor General Griswold argued the cause for defendant in Nos. 43, Orig., and 44, Orig., and for the United States in Nos. 46, Orig., and 47, Orig. With him on the briefs were *Attorney General Mitchell, pro se, Assistant Attorney General Leonard, Peter L. Strauss,* and *Samuel Huntington.*

Gary K. Nelson, Attorney General of Arizona, and *John M. McGowan II,* Special Assistant Attorney General, argued the cause and filed a brief for defendant in No. 46, Orig. *Robert M. Robson,* Attorney General of Idaho, argued the cause for defendant in No. 47, Orig. With him on the brief was *Richard H. Greener,* Assistant Attorney General.

Brief of *amicus curiae* in all cases was filed by *A. F. Summer,* Attorney General, *Delos Burks,* First Assistant Attorney General, *William A. Allain,* Assistant Attorney General, and *Charles B. Henley* for the State of Mississippi. Briefs of *amici curiae* in Nos. 43, Orig., 46, Orig., and 47, Orig., were filed by *Melvin L. Wulf* for the American Civil Liberties Union, and by *John R. Cosgrove* for Citizens for Lowering the Voting Age et al. Brief of *amicus curiae* in Nos. 43, Orig., and 46, Orig., was filed by *William A. Dobrovir, Joseph L. Rauh, Jr., David Rubin, Stephen I. Schlossberg, John A. Fillion, Nathaniel R. Jones, Clarence Mitchell,* and *J. Francis Pohlhaus* for the Youth Franchise Coalition et al. Briefs of *amici curiae* in No. 43, Orig., were filed by *Joseph A. Califano, Jr.,* and *Clifford L. Alexander* for the Democratic National Committee, and by *Messrs. Jones, Mitchell,* and *Pohlhaus* for the Department of Armed Services and Veterans Affairs of the National Association for the Advancement of Colored People. Brief of *amicus curiae* for the State of Indiana in support of plaintiff in No. 44, Orig., was filed by *Theodore L. Sendak,* Attorney General, *Richard C. Johnson,* Chief Deputy Attorney General, and *William F. Thompson,* Assistant Attorney General, joined by the Attorneys General for their respective States, as follows: *Joe Purcell* of Arkansas, *Robert M. Robson* of Idaho, *Jack P. F. Gremillion* of Louisiana, *Clarence A. H. Meyer* of Nebraska, *Warren B. Rudman* of New Hampshire, *Robert Morgan* of North Carolina, *Helgi Johanneson* of North Dakota, *Paul W. Brown* of Ohio, *Gordon Mydland* of South Dakota, *Vernon B. Romney* of Utah, *Slade Gorton* of Washington, *Chauncey H. Browning, Jr.,* of West Virginia, and *James E. Barrett* of Wyoming. Brief of *amicus curiae* in No. 47, Orig., was filed by *Andrew P. Miller,* Attorney General, and *Anthony F. Troy* and *Walter A. McFarlane,* Assistant Attorneys General, for the Commonwealth of Virginia.

MR. JUSTICE BLACK, announcing the judgments of the Court in an opinion expressing his own view of the cases.

In these suits certain States resist compliance with the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, because they believe that the Act takes away from them powers reserved to the States by the Constitution to control their own elections.[1] By its terms the Act does three things. First: It lowers the minimum age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national, for a five-year period. Third: The Act forbids States from disqualifying voters in national elections for presidential and vice-presidential electors because they have not met state residency requirements.

For the reasons set out in Part I of this opinion, I believe Congress can fix the age of voters in national elections, such as congressional, senatorial, vice-presidential

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[1] In Nos. 43, Orig., and 44, Orig., Oregon and Texas, respectively, invoke the original jurisdiction of this Court to sue the United States Attorney General seeking an injunction against the enforcement of Title III (18-year-old vote) of the Act. In No. 46, Orig., the United States invokes our original jurisdiction seeking to enjoin Arizona from enforcing its laws to the extent that they conflict with the Act, and directing the officials of Arizona to comply with the provisions of Title II (nationwide literacy test ban), § 201, 84 Stat. 315, and Title III (18-year-old vote), §§ 301, 302, 84 Stat. 318, of the Act. In No. 47, Orig., the United States invokes our original jurisdiction seeking to enjoin Idaho from enforcing its laws to the extent that they conflict with Title II (abolition of residency requirements in presidential and vice-presidential elections), § 202, 84 Stat. 316, and Title III (18-year-old vote) of the Act. No question has been raised concerning the standing of the parties or the jurisdiction of this Court.

and presidential elections, but cannot set the voting age in state and local elections. For reasons expressed in separate opinions, my Brothers DOUGLAS, BRENNAN, WHITE, and MARSHALL join me in concluding that Congress can enfranchise 18-year-old citizens in national elections, but dissent from the judgment that Congress cannot extend the franchise to 18-year-old citizens in state and local elections. For reasons expressed in separate opinions, my Brothers THE CHIEF JUSTICE, HARLAN, STEWART, and BLACKMUN join me in concluding that Congress cannot interfere with the age for voters set by the States for state and local elections. They, however, dissent from the judgment that Congress can control voter qualifications in federal elections. In summary, it is the judgment of the Court that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections.

For the reasons set out in Part II of this opinion, I believe that Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections. For reasons expressed in separate opinions, all of my Brethren join me in this judgment. Therefore the literacy-test provisions of the Act are upheld.

For the reasons set out in Part III of this opinion, I believe Congress can set residency requirements and provide for absentee balloting in elections for presidential and vice-presidential electors. For reasons expressed in separate opinions, my Brothers THE CHIEF JUSTICE, DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN concur in this judgment. My Brother

HARLAN, for the reasons stated in his separate opinion, considers that the residency provisions of the statute are unconstitutional. Therefore the residency and absentee balloting provisions of the Act are upheld.

Let judgments be entered accordingly.

I

The Framers of our Constitution provided in Art. I, § 2, that members of the House of Representatives should be elected by the people and that the voters for Representatives should have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Senators were originally to be elected by the state legislatures, but under the Seventeenth Amendment Senators are also elected by the people, and voters for Senators have the same qualifications as voters for Representatives. In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed it advisable to do so.[2] This was done in Art. I, § 4, of the Constitution which provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

[2] Article I, § 4, was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections, 2 J. Story, Commentaries on the Constitution of the United States 280–292 (1st ed. 1833). The contemporary interpretation of this compromise reveals that those who favored national authority over national elections prevailed. Six States included in their resolutions of ratification the recommendation that a constitutional amendment be adopted to curtail the power of the Federal Government to regulate national elections. Such an amendment was never adopted.

A majority of the delegates to the Massachusetts ratifying con-

> prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations,* except as to the Places of chusing Senators." (Emphasis supplied.)

Moreover, the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause. See *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). In *United States* v. *Classic,* 313 U. S. 299 (1941), where the Court upheld congressional power to regulate party primaries, Mr. Justice Stone speaking

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vention must have assumed that Art. I, § 4, gave very broad powers to Congress. Otherwise that convention would not have recommended an amendment providing:

"That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution." 2 J. Elliot's Debates on the Federal Constitution 177 (1876).

The speech of Mr. Cabot, one delegate to the Massachusetts convention, who argued that Art. I, § 4, was "to be as highly prized as any in the Constitution," expressed a view of the breadth of that section which must have been shared by most of his colleagues:

"[I]f the state legislatures are suffered to regulate conclusively the elections of the democratic branch, they may . . . finally annihilate that control of the general government, which the people ought always to have . . . ." *Id.,* at 26.

And Cabot was supported by Mr. Parsons, who added:

"They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." *Id.,* at 27.

for the Court construed the interrelation of these clauses of the Constitution, stating:

> "While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.'" 313 U. S., at 315.

See also *Ex parte Siebold,* 100 U. S. 371 (1880); *Ex parte Yarbrough,* 110 U. S. 651 (1884); *Swafford* v. *Templeton,* 185 U. S. 487 (1902); *Wiley* v. *Sinkler,* 179 U. S. 58 (1900).

The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers "argued that the power given Congress in Art. I, § 4, was meant to be used to vindicate the people's right to equality of representation in the House," *Wesberry* v. *Sanders,* 376 U. S. 1, 16 (1964), and that Congress would "'most probably . . . lay the state off into districts.'" And in *Colegrove* v. *Green,* 328 U. S. 549 (1946), no Justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Surely no voter *qualification* was more important to the Framers than the *geographical qualification* embodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate "rotten boroughs," [3] and Congress has in fact used its power to prevent States from electing all Congressmen at large.[4] There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal elections.

Any doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters, should be dispelled by the opinion of this Court in *Smiley* v. *Holm,* 285 U. S. 355 (1932). There, Chief Justice Hughes writing for a unanimous Court discussed the scope of congressional power under § 4 at some length. He said:

> "The subject matter is the 'times, places and manner of holding elections for Senators and Representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . .
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> "This view is confirmed by the second clause of Article I, section 4, which provides that 'the Con-

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[3] See *Wesberry* v. *Sanders,* 376 U. S. 1, 14–16 (1964).

[4] See, *e. g.,* Act of Aug. 8, 1911, 37 Stat. 13.

> gress may at any time by law make or alter such regulations,' with the single exception stated. The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. . . . It 'has a general supervisory power over the whole subject.' " *Id.*, at 366–367.

In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them.[5] A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws. The Voting Rights Act Amendments of 1970 now before this Court

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[5] My Brother STEWART has cited the debates of the Constitutional Convention to show that Ellsworth, Mason, Madison, and Franklin successfully opposed granting Congress the power to regulate federal elections, including the qualifications of voters, in the original Constitution. I read the history of our Constitution differently. Mr. Madison, for example, explained Art. I, § 4, to the Virginia ratifying convention as follows:

"[I]t was thought that the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent. Some States might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." 3 J. Elliot's Debates on the Federal Constitution 367 (1876).

And Mr. Mason, who was supposedly successful in opposing a broad grant of power to Congress to regulate federal elections, still found it necessary to support an unsuccessful Virginia proposal to curb the power of Congress under Art. I, § 4. *Id.*, at 403.

evidence dissatisfaction of Congress with the voting age set by many of the States for national elections. I would hold, as have a long line of decisions in this Court, that Congress has ultimate supervisory power over congressional elections.[6] Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.[7]

On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother HARLAN has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves,

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[6] See, *e. g., Ex parte Siebold,* 100 U. S. 371 (1880); *Ex parte Yarbrough,* 110 U. S. 651 (1884); *United States* v. *Mosley,* 238 U. S. 383 (1915); *United States* v. *Classic,* 313 U. S. 299 (1941).

[7] With reference to the selection of the President and Vice President, Art. II, § 1, provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." But this Court in *Burroughs* v. *United States,* 290 U. S. 534 (1934), upheld the power of Congress to regulate certain aspects of elections for presidential and vice-presidential electors, specifically rejecting a construction of Art. II, § 1, that would have curtailed the power of Congress to regulate such elections. Finally, and most important, inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause.

as provided in the Tenth Amendment,[8] the power to regulate elections. My major disagreement with my Brother HARLAN is that, while I agree as to the States' power to regulate the elections of their own officials, I believe, contrary to his view, that Congress has the final authority over federal elections. No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. *Pope* v. *Williams,* 193 U. S. 621 (1904); *Minor* v. *Happersett,* 21 Wall. 162 (1875). Moreover, Art. I, § 2,[9] is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4. It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-four, each of which has assumed that the States had general supervisory power

[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const., Amdt. X.

[9] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

over state elections, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous. My Brother BRENNAN's opinion, if carried to its logical conclusion, would, under the guise of insuring equal protection, blot out all state power, leaving the 50 States as little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.

Of course, the original design of the Founding Fathers was altered by the Civil War Amendments and various other amendments to the Constitution. The Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments have expressly authorized Congress to "enforce" the limited prohibitions of those amendments by "appropriate legislation." The Solicitor General contends in these cases that Congress can set the age qualifications for voters in state elections under its power to enforce the Equal Protection Clause of the Fourteenth Amendment.

Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. *Loving* v. *Virginia,* 388 U. S. 1 (1967); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Slaughter-House Cases,* 16 Wall. 36, 71–72 (1873). While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discrim-

inations other than those on account of race,[10] see *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Hadley* v. *Junior College District,* 397 U. S. 50 (1970); see also *Kotch* v. *Board of River Port Pilots,* 330 U. S. 552 (1947), and cases cited therein, it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

To fulfill their goal of ending racial discrimination and to prevent direct or indirect state legislative encroachment on the rights guaranteed by the amendments, the Framers gave Congress power to enforce each of the Civil War Amendments. These enforcement powers are broad. In *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 439 (1968), the Court held that § 2 of the Thirteenth

[10] My Brother BRENNAN relies upon *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); and *Evans* v. *Cornman,* 398 U. S. 419 (1970). These typical equal protection cases in which I joined are not relevant or material to our decision in the cases before us. The establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause. The crucial question here is not who is denied equal protection, but, rather, which political body, state or federal, is empowered to fix the minimum age of voters. The Framers intended the States to make the voting age decision in all elections with the provision that Congress could override state judgments concerning the qualifications of voters in federal elections.

Amendment "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*'" In construing § 5 of the Fourteenth Amendment, the Court has stated:

> "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. *It is the power of Congress which has been enlarged.*" *Ex parte Virginia,* 100 U. S. 339, 345 (1880). (Emphasis added in part.)

And in *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966) (BLACK, J., dissenting on other grounds), the Court upheld the literacy test ban of the Voting Rights Act of 1965, 79 Stat. 437, under Congress' Fifteenth Amendment enforcement power.

As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination, see *Katzenbach* v. *Morgan,* 384 U. S. 641, 651 n.

10 (1966), or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.[11]

Of course, we have upheld congressional legislation under the Enforcement Clauses in some cases where Congress has interfered with state regulation of the local electoral process. In *Katzenbach* v. *Morgan, supra,* the Court upheld a statute which outlawed New York's requirement of literacy in English as a prerequisite to voting as this requirement was applied to Puerto Ricans with certain educational qualifications. The New York statute overridden by Congress applied to all elections. And in *South Carolina* v. *Katzenbach, supra* (BLACK, J., dissenting on other grounds), the Court upheld the literacy test ban of the Voting Rights Act of 1965. That Act proscribed the use of the literacy test in all elections in certain areas. But division of power between state and national governments, like every provision of the Constitution, was expressly qualified by the Civil War Amendments' ban on racial discrimination. Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments. Cf. *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 670 (1966) (BLACK, J., dissenting).

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[11] See: the First Amendment, *e. g., Gitlow* v. *New York,* 268 U. S. 652 (1925); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); the Fourth Amendment, *Mapp* v. *Ohio,* 367 U. S. 643 (1961); the Fifth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226 (1897); *Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Benton* v. *Maryland,* 395 U. S. 784 (1969); the Sixth Amendment, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Pointer* v. *Texas,* 380 U. S. 400 (1965); *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); and the Eighth Amendment, *Robinson* v. *California,* 370 U. S. 660 (1962).

In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence. Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections. On the other hand, where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race.

To invalidate part of the Voting Rights Act Amendments of 1970, however, does not mean that the entire Act must fall or that the constitutional part of the 18-year-old vote provision cannot be given effect. In passing the Voting Rights Act Amendments of 1970, Congress recognized that the limits of its power under the Enforcement Clauses were largely undetermined, and therefore included a broad severability provision:

> "If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination." 84 Stat. 318.

In this case, it is the judgment of the Court that Title III, lowering the voting age to 18, is invalid as applied to voters in state and local elections. It is also the judgment of the Court that Title III is valid with respect to national elections. We would fail to follow the

express will of Congress in interpreting its own statute if we refused to sever these two distinct aspects of Title III. Moreover, it is a longstanding canon of statutory construction that legislative enactments are to be enforced to the extent that they are not inconsistent with the Constitution, particularly where the valid portion of the statute does not depend upon the invalid part. See, *e. g., Watson* v. *Buck,* 313 U. S. 387 (1941); *Marsh* v. *Buck,* 313 U. S. 406 (1941). Here, of course, the enforcement of the 18-year-old vote in national elections is in no way dependent upon its enforcement in state and local elections.

II

In Title I of the Voting Rights Act Amendments of 1970 Congress extended the provisions of the Voting Rights Act of 1965 which ban the use of literacy tests in certain States upon the finding of certain conditions by the United States Attorney General. The Court upheld the provisions of the 1965 Act over my partial dissent in *South Carolina* v. *Katzenbach, supra,* and *Gaston County* v. *United States,* 395 U. S. 285 (1969). The constitutionality of Title I is not raised by any of the parties to these suits.[12]

In Title II of the Amendments Congress prohibited until August 6, 1975, the use of any test or device resembling a literacy test in any national, state, or local election

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[12] Yuma County, Arizona, is presently subject to the literacy-test ban of the Voting Rights Act of 1965 pursuant to a determination of the Attorney General under § 4 (a) of the 1965 Act. I do not understand Arizona to contest the application of the 1965 Act or its extension to that county. Arizona "does not question" Congress' authority to enforce the Fourteenth and Fifteenth Amendments "when Congress possesses a 'special legislative competence' "; and cites *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), and *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), with approval. Answer and Brief for Arizona, No. 46, Orig., O. T. 1970.

in any area of the United States where such test is not already proscribed by the Voting Rights Act of 1965. The State of Arizona maintains that Title II cannot be enforced to the extent that it is inconsistent with Arizona's literacy test requirement, Ariz. Rev. Stat. Ann. §§ 16–101.A.4, 16–101.A.5 (1956). I would hold that the literacy test ban of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment and that it supersedes Arizona's conflicting statutes under the Supremacy Clause of the Federal Constitution.

In enacting the literacy test ban of Title II Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. Congress could have found that as late as the summer of 1968, the percentage registration of nonwhite voters in seven Southern States was substantially below the percentage registration of white voters.[13] Moreover, Congress had before it striking evidence to show that the provisions of the 1965 Act had had in the span of four years a remarkable impact on minority group voter registration.[14] Congress also had evidence to show that voter registration in areas with large Spanish-American populations was consistently below the state and national averages. In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the statewide average.[15] Arizona also has a serious problem of deficient voter registration among Indians. Congres-

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[13] Hearings on H. R. 4249, H. R. 5538, and Similar Proposals before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., Ser. 3, p. 14 (1969).

[14] *Id.*, at 93.

[15] Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 406 (1969–1970).

sional concern over the use of a literacy test to disfranchise Puerto Ricans in New York State is already a matter of record in this Court. *Katzenbach* v. *Morgan, supra.* And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests.[16]

Congress also had before it this country's history of discriminatory educational opportunities in both the North and the South. The children who were denied an equivalent education by the "separate but equal" rule of *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), overruled in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), are now old enough to vote. There is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement. Moreover, the history of this legislation suggests that concern with educational inequality was perhaps uppermost in the minds of the congressmen who sponsored the Act. The hearings are filled with references to educational inequality. Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments.

Finally, there is yet another reason for upholding the literacy test provisions of this Act. In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious *national* dilemma that touches every corner of our land.

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[16] *Id.,* at 401.

In this legislation Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation. Compare *South Carolina* v. *Katzenbach, supra,* and *Gaston County* v. *United States, supra.*

III

In Title II of the Voting Rights Act Amendments Congress also provided that in presidential and vice-presidential elections, no voter could be denied his right to cast a ballot because he had not lived in the jurisdiction long enough to meet its residency requirements. Furthermore, Congress provided uniform national rules for absentee voting in presidential and vice-presidential elections. In enacting these regulations Congress was attempting to insure a fully effective voice to all citizens in national elections. What I said in Part I of this opinion applies with equal force here. Acting under its broad authority to create and maintain a national government, Congress unquestionably has power under the Constitution to regulate federal elections. The Framers of our Constitution were vitally concerned with setting up a national government that could survive. Essential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent.

IV

Our judgments today give the Federal Government the power the Framers conferred upon it, that is, the final control of the elections of its own officers. Our judgments also save for the States the power to control state and

local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them.[17] The generalities of the Equal Protection Clause of the Fourteenth Amendment were not designed or adopted to render the States impotent to set voter qualifications in elections for their own local officials and agents in the absence of some specific constitutional limitations.

MR. JUSTICE DOUGLAS.

I dissent from the judgments of the Court insofar as they declare § 302 of the Voting Rights Act, 84 Stat. 318, unconstitutional as applied to state elections and concur in the judgments as they affect federal elections, but for different reasons. I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.

I

The grant of the franchise to 18-year-olds by Congress is in my view valid across the board.

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[17] That these views are not novel is demonstrated by Mr. Justice Story in his Commentaries on the Constitution of the United States, vol. 2, pp. 284–285 (1st ed. 1833):

"There is, too, in the nature of such a provision [Art. I, § 4], something incongruous, if not absurd. What would be said of a clause introduced into the national constitution to regulate the state elections of the members of the state legislatures? It would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a violation of principle, as to require no comment. It would be said, and justly, that the state governments ought to possess the power of self-existence and self-organization, independent of the pleasure of the national government. *Why does not the same reasoning apply to the national government?* What reason is there to suppose, that the state governments will be more true to the Union, than the national government will be to the state governments?" (Emphasis added.) (Footnote omitted.)

I suppose that in 1920, when the Nineteenth Amendment was ratified giving women the right to vote, it was assumed by most constitutional experts that there was no relief by way of the Equal Protection Clause of the Fourteenth Amendment. In *Minor* v. *Happersett,* 21 Wall. 162, the Court held in the 1874 Term that a State could constitutionally restrict the franchise to men. While the Fourteenth Amendment was relied upon, the thrust of the opinion was directed at the Privileges and Immunities Clause with a subsidiary reference to the Due Process Clause. It was much later, indeed not until the 1961 Term—nearly a century after the Fourteenth Amendment was adopted—that discrimination against voters on grounds *other than race* was struck down.

The first case in which this Court struck down a statute under the Equal Protection Clause of the Fourteenth Amendment was *Strauder* v. *West Virginia,* 100 U. S. 303, decided in the 1879 Term.[1] In the 1961 Term we squarely held that the manner of apportionment of members of a state legislature raised a justiciable question under the Equal Protection Clause, *Baker* v. *Carr,* 369 U. S. 186. That case was followed by numerous others, *e. g.:* that one person could not be given twice or 10 times the voting power of another person in a statewide election merely because he lived in a rural area or

[1] Strauder was tried for murder. He had sought removal to federal courts on the ground that "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State." *Id.,* at 304. He was convicted of murder and the West Virginia Supreme Court affirmed. This Court held the West Virginia statute limiting jury duty to whites only unconstitutional:

"We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. . . . [The aim of the Fourteenth Amendment] was against discrimination because of race or color." 100 U. S., at 310.

in the smallest rural county;[2] that the principle of equality applied to both Houses of a bicameral legislature;[3] that political parties receive protection under the Equal Protection Clause just as voters do.[4]

The reapportionment cases, however, are not quite in point here, though they are the target of my Brother HARLAN's dissent. His painstaking review of the history of the Equal Protection Clause leads him to conclude that "political" rights are not protected though "civil" rights are protected. The problem of what questions are "political" has been a recurring issue in this Court from the beginning, and we recently reviewed them all in *Baker* v. *Carr, supra,* and in *Powell* v. *McCormack,* 395 U. S. 486. *Baker* v. *Carr* was a reapportionment case and *Powell* v. *McCormack* involved the exclusion from the House of Representatives of a Congressman. The issue of "political" question versus "justiciable" question was argued *pro* and *con* in those cases; and my Brother HARLAN stated in *Baker* v. *Carr,* 369 U. S., at 330 *et seq.,* and on related occasions (*Gray* v. *Sanders,* 372 U. S. 368, 382; *Wesberry* v. *Sanders,* 376 U. S. 1, 20; *Reynolds* v.

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[2] *Gray* v. *Sanders,* 372 U. S. 368; *Davis* v. *Mann,* 377 U. S. 678; *Swann* v. *Adams,* 385 U. S. 440; *Kilgarlin* v. *Hill,* 386 U. S. 120; *Avery* v. *Midland County,* 390 U. S. 474; *Moore* v. *Ogilvie,* 394 U. S. 814; *Hadley* v. *Junior College District,* 397 U. S. 50.

[3] *Reynolds* v. *Sims,* 377 U. S. 533; *WMCA* v. *Lomenzo,* 377 U. S. 633; *Roman* v. *Sincock,* 377 U. S. 695.

[4] *Williams* v. *Rhodes,* 393 U. S. 23. We also held in federal elections that the command of Art. I, § 2, of the Constitution that representatives be chosen "by the People of the several States" means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *Wesberry* v. *Sanders,* 376 U. S. 1, 7–8, and that that meant "vote-diluting discrimination" could not be accomplished "through the device of districts containing widely varied numbers of inhabitants." *Id.,* at 8; *Lucas* v. *Colorado General Assembly,* 377 U. S. 713; *Kirkpatrick* v. *Preisler,* 394 U. S. 526; *Wells* v. *Rockefeller,* 394 U. S. 542.

Sims, 377 U. S. 533, 589) his views on the constitutional dimensions of the "political" question in the setting of the reapportionment problem.

Those cases involved the question whether legislatures must be so structured as to reflect with approximate equality the voice of every voter. The ultimate question was whether, absent a proper apportionment by the legislature, a federal court could itself make an apportionment. That kind of problem raised issues irrelevant here. Reapportionment, as our experience shows, presented a tangle of partisan politics in which geography, economics, urban life, rural constituencies, and numerous other nonlegal factors play varying roles. The competency of courts to deal with them was challenged. Yet we held the issues were justiciable. None of those so-called "political" questions are involved here.

This case, so far as equal protection is concerned, is no whit different from a controversy over a state law that disqualifies women from certain types of employment, *Goesaert* v. *Cleary,* 335 U. S. 464, or that imposes a heavier punishment on one class of offender than on another whose crime is not intrinsically different. *Skinner* v. *Oklahoma,* 316 U. S. 535. The right to vote is, of course, different in one respect from the other rights in the economic, social, or political field which, as indicated in the Appendix to this opinion, are under the Equal Protection Clause. The right to vote is a civil right deeply embedded in the Constitution. Article I, § 2, provides that the House is composed of members "chosen . . . by the People" and the electors "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment states that Senators shall be "elected by the people." The Fifteenth Amendment speaks of the "right of citizens of the United States to vote"—not only in federal

but in state elections. The Court in *Ex parte Yarbrough,* 110 U. S. 651, 665, stated:

> "This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination."

It was in that tradition that we said in *Reynolds* v. *Sims, supra,* at 555, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

This "right to choose, secured by the Constitution," *United States* v. *Classic,* 313 U. S. 299, 315, is a civil right of the highest order. Voting concerns "political" matters; but the right is not "political" in the constitutional sense. Interference with it has given rise to a long and consistent line of decisions by the Court; and the claim has always been upheld as justiciable.[5] Whatever distinction may have been made, following the Civil War, between "civil" and "political" rights, has passed into history. In *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 669, we stated: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." That statement is in harmony with my view of the Fourteenth Amendment, as expressed by my Brother BRENNAN: "We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being inter-

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[5] *Ex parte Siebold,* 100 U. S. 371; *Ex parte Yarbrough,* 110 U. S. 651; *Guinn* v. *United States,* 238 U. S. 347; *United States* v. *Mosley,* 238 U. S. 383; *Lane* v. *Wilson,* 307 U. S. 268; *United States* v. *Classic,* 313 U. S. 299; *United States* v. *Saylor,* 322 U. S. 385.

preted by future generations in accordance with the vision and needs of those generations." *Post,* at 278. Hence the history of the Fourteenth Amendment tendered by my Brother HARLAN is irrelevant to the present problem.

Since the right is civil and not "political," it is protected by the Equal Protection Clause of the Fourteenth Amendment which in turn, by § 5 of that Amendment, can be "enforced" by Congress.

In *Carrington* v. *Rash,* 380 U. S. 89, we held that Texas could not bar a person, otherwise qualified, from voting merely because he was a member of the armed services. Occupation, we held, when used to bar a person from voting, was that invidious discrimination which the Equal Protection Clause condemns. In *Evans* v. *Cornman,* 398 U. S. 419, we held that a State could not deny the vote to residents of a federal enclave when it treated them as residents for many other purposes. In *Harper* v. *Virginia Board of Elections,* 383 U. S., at 666, we held a State could not in harmony with the Equal Protection Clause keep a person from voting in state elections because of "the affluence of the voter or payment of any fee." In *Kramer* v. *Union School District,* 395 U. S. 621, we held that a person could not be barred from voting in school board elections merely because he was a bachelor. So far as the Equal Protection Clause was concerned, we said that the line between those qualified to vote and those not qualified turns on whether those excluded have "a distinct and direct interest in the school meeting decisions." *Id.,* at 632. In *Cipriano* v. *City of Houma,* 395 U. S. 701, we held that a state law which gave only "property taxpayers" the right to vote on the issuance of revenue bonds of a municipal utility system violated equal protection as "the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." *Id.,* at 705. And only on June 23, 1970, we held in *Phoenix* v. *Kolodziejski,* 399 U. S. 204, that

it violates equal protection to restrict those who may vote on general obligation bonds to real property taxpayers. We looked to see if there was any "compelling state interest" in the voting restrictions. We held that "nonproperty owners" are not "substantially less interested in the issuance of these securities than are property owners," *id.*, at 212, and that presumptively "when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise." [6] *Id.*, at 209. And as recently as November 9, 1970, we summarily affirmed a district court decision (310 F. Supp. 1172) on the basis of *Kolodziejski. Parish School Board of St. Charles* v. *Stewart, post,* p. 884, where Louisiana gave a vote on municipal bond issues only to "property taxpayers."

The powers granted Congress by § 5 of the Fourteenth Amendment to "enforce" the Equal Protection Clause are "the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." *Katzenbach* v. *Morgan,* 384 U. S. 641, 650. As we stated in that case, "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." *Id.*, at 651.

Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection. The Act itself brands the denial of

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[6] We noted that general obligation bonds may be satisfied not from real property taxes but from revenues from other local taxes paid by nonowners of property as well as those who own realty. Moreover, we noted that property taxes paid initially by property owners are often passed on to tenants or customers. 399 U. S., at 209–211.

the franchise to 18-year-olds as "a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed" on them. § 301 (a)(1), Voting Rights Act, 84 Stat. 318. The fact that only males are drafted while the vote extends to females as well is not relevant, for the female component of these families or prospective families is also caught up in war and hit hard by it. Congress might well believe that men and women alike should share the fateful decision.

It is said, why draw the line at 18? Why not 17? Congress can draw lines and I see no reason why it cannot conclude that 18-year-olds have that degree of maturity which entitles them to the franchise. They are "generally considered by American law to be mature enough to contract, to marry, to drive an automobile, to own a gun, and to be responsible for criminal behavior as an adult." [7] Moreover, we are advised that under state laws, mandatory school attendance does not, as a matter of practice, extend beyond the age of 18. On any of these items the States, of course, have leeway to raise or lower the age requirements. But voting is "a fundamental matter in a free and democratic society," *Reynolds* v. *Sims,* 377 U. S. 533, 561–562. Where "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 670. There we were speaking of state restrictions on those rights. Here we are dealing with the right of Congress to "enforce" the principles of equality enshrined in the Fourteenth Amendment. The right to "enforce" granted by § 5 of that Amendment is, as noted, parallel with the Necessary and Proper Clause whose reach Chief Justice Marshall described in *McCulloch* v.

[7] Engdahl, Constitutionality of the Voting Age Statute, 39 Geo. Wash. L. Rev. 1, 36 (1970).

Maryland, 4 Wheat. 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Equality of voting by all who are deemed mature enough to vote is certainly consistent "with the letter and spirit of the constitution." Much is made of the fact that Art. I, § 4, of the Constitution [8] gave Congress only the power to regulate the "Manner of holding Elections," not the power to fix qualifications for voting in elections. But the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth—made vast inroads on the power of the States. Equal protection became a standard for state action and Congress was given authority to "enforce" it. See *Katzenbach* v. *Morgan,* 384 U. S. 641, 647. The manner of enforcement involves discretion; but that discretion is largely entrusted to the Congress, not to the courts. If racial discrimination were the only concern of the Equal Protection Clause, then across-the-board voting regulations set by the States would be of no concern to Congress. But it is much too late in history to make that claim, as the cases listed in the Appendix to this opinion show. Moreover, election inequalities created by state laws and based on factors other than race may violate the Equal Protection Clause, as we have held over and over again. The reach of § 5 to "enforce" equal protection by eliminating election inequalities would seem quite broad. Certainly there is

[8] Article I, § 4, provides: "[1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

"[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."

not a word of limitation in § 5 which would restrict its applicability to matters of race alone. And if, as stated in *McCulloch* v. *Maryland,* the measure of the power of Congress is whether the remedy is consistent "with the letter and spirit of the constitution," we should have no difficulty here. We said in *Gray* v. *Sanders,* 372 U. S. 368, 381: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

It is a reasoned judgment that those who have such a large "stake" in modern elections as 18-year-olds, whether in times of war or peace, should have political equality. As was made plain in the dissent in *Colegrove* v. *Green,* 328 U. S. 549, 566 (whose reasoning was approved in *Gray* v. *Sanders,* 372 U. S. 368, 379), the Equal Protection Clause does service to protect the right to vote in federal as well as in state elections.

I would sustain the choice which Congress has made.

II

I likewise find the objections that Arizona and Idaho make to the literacy and residence requirements of the 1970 Act to be insubstantial.

Literacy. We held in *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, that a State could apply a literacy test in selecting qualified voters provided the test is not "discriminatory" and does not contravene "any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Id.,* at 51. The question in these cases is whether Congress has the power under § 5 of the Fourteenth Amendment to bar literacy tests in all federal, state, or local elections.

Section 201 bars a State from denying the right to vote in any federal, state, or local election because of "any

test or device" which is defined, *inter alia,* to include literacy.[9] We traveled most of the distance needed to sustain this Act in *Katzenbach* v. *Morgan,* 384 U. S. 641, where we upheld the constitutionality of an earlier Act which prohibited the application of English literacy tests to persons educated in Puerto Rico. The power of Congress in § 5 to "enforce" the Equal Protection Clause was sufficiently broad, we held, to enable it to abolish voting requirements which might pass muster under the Equal Protection Clause, absent an Act of Congress. *Id.,* at 648–651.

The question, we said, was whether the Act of Congress was "appropriate legislation to enforce the Equal Protection Clause":

> "It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully com-

[9] Section 201 (b) defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 84 Stat. 315.

> pleted the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.*, at 653.

We also held that the Act might be sustained as an attack on the English language test as a device to discriminate. *Id.*, at 654. And we went on to say that Congress might have concluded that "as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs." *Id.*, at 655.

We took a further step toward sustaining the present type of law in *Gaston County* v. *United States*, 395 U. S. 285. That decision involved a provision of the Voting Rights Act of 1965 which suspended the use of any "test or device," including literacy, as a prerequisite to registration in a State which was found by the Attorney General and the Director of the Census to have used it in any election on November 1, 1964, and in which less than 50% of the residents of voting age were registered or had voted.[10] Gaston County, North Carolina, was so classified and its literacy test was thereupon suspended. In a suit to remove the ban we sustained it. We noted that Congress had concluded that "the County deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test." *Id.*, at 291. Congress, it was argued, should have employed a formula based on educational disparities between the races or one based on

[10] The constitutionality of that procedure has been sustained in *South Carolina* v. *Katzenbach*, 383 U. S. 301.

literacy rates. *Id.*, at 292. But the choice of appropriate remedies is for Congress and the range of available ones is wide. It was not a defect in the formula that some literate Negroes would be turned out by Negro schools.

> "It is only reasonable to infer that among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better-educated white contemporaries. And on the Government's showing, it was certainly proper to infer that Gaston County's inferior Negro schools provided many of its Negro residents with a subliterate education, and gave many others little inducement to enter or remain in school." *Id.*, at 295–296.

By like reasoning Congress in the present legislation need not make findings as to the incidence of literacy. It can rely on the fact that most States do not have literacy tests; that the tests have been used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians; that radio and television have made it possible for a person to be well informed even though he may not be able to read and write. We know from the legislative history that these and other desiderata influenced Congress in the choice it made in the present legislation; and we certainly cannot say that the means used were inappropriate.

Residence. The residency requirements of § 202 relate only to elections for President and Vice President. Section 202 abolishes durational residency [11] and provides

[11] This Court upheld durational residency requirements as applied in presidential and vice-presidential elections absent an Act of Congress. See *Drueding* v. *Devlin*, 234 F. Supp. 721 (Md. 1964), aff'd, 380 U. S. 125. Subsequently we vacated as moot a case

for absentee voting provided that registration may be required 30 days prior to the election. The effect of § 202 is to reduce all state durational residency requirements to 30 days.

In presidential elections no parochial interests of the State, county, or city are involved. Congress found that a durational residency requirement "in some instances has the impermissible purpose or effect of denying citizens the right to vote." § 202 (a)(4). It found in § 202 (a)(3) that a durational residency requirement denies citizens their privileges and immunities.[12]

The Seventeenth Amendment states that Senators shall be "elected by the people." Article I, § 2, provides

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presenting the same question. *Hall* v. *Beals,* 396 U. S. 45. The district courts have been faced with the issue of durational residency requirements as they would be applied to congressional elections. Two have concluded the requirement is constitutional. *Howe* v. *Brown,* 319 F. Supp. 862 (ND Ohio 1970); *Cocanower* v. *Marston,* 318 F. Supp. 402 (Ariz. 1970). Additionally, one other court has refused a preliminary injunction in a case presenting the issue. *Piliavin* v. *Hoel,* 320 F. Supp. 66 (WD Wis. 1970). Some district courts, however, believe that *Drueding* cannot stand (absent an Act of Congress) after *Carrington* v. *Rash,* 380 U. S. 89; *Kramer* v. *Union School District,* 395 U. S. 621; *Cipriano* v. *City of Houma,* 395 U. S. 701, and *Phoenix* v. *Kolodziejski,* 399 U. S. 204. Accordingly they have held durational residency requirements for congressional elections (and by implication presidential elections) violate the Equal Protection Clause. See *Burg* v. *Canniffe,* 315 F. Supp. 380 (Mass. 1970); *Blumstein* v. *Ellington,* — F. Supp. — (MD Tenn. 1970); *Hadnott* v. *Amos,* 320 F. Supp. 107 (MD Ala. 1970); *Bufford* v. *Holton,* 319 F. Supp. 843 (ED Va. 1970).

In none of these cases was an Act of Congress involved.

[12] Article IV, § 2, of the Constitution provides:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Fourteenth Amendment provides in § 1 that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

that the House shall be chosen "by the People of the several States." The right to vote for national officers is a privilege and immunity of national citizenship. *Ex parte Yarbrough,* 110 U. S. 651; *In re Quarles,* 158 U. S. 532, 534; *Twining* v. *New Jersey,* 211 U. S. 78, 97; *Burroughs* v. *United States,* 290 U. S. 534; *United States* v. *Classic,* 313 U. S. 299, 315.[13]

[13] The cases relied on by my Brother HARLAN, *post,* at 214, are not to the contrary. *Snowden* v. *Hughes,* 321 U. S. 1, 7, states: "The right to become a candidate for *state* office, like the right to vote for the election of *state* officers . . . is a right or privilege of state citizenship." (Emphasis added.) Arguably *Minor* v. *Happersett,* 21 Wall. 162, is to the contrary, but to the extent its dicta indicated otherwise, it was limited in *Ex parte Yarbrough. Breedlove* v. *Suttles,* 302 U. S. 277, overruled by *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, involved a poll tax applied in both federal and state elections; it erroneously cited *Yarbrough* for the proposition voting is not a privilege and immunity of national citizenship. *Pope* v. *Williams,* 193 U. S. 621, involved durational residency requirements, but expressly reserved the question of their application to presidential and vice-presidential elections. Our holdings concerning privileges and immunities of national citizenship were analyzed less than five years ago by my Brother HARLAN. After referring to *Ex parte Yarbrough,* and *United States* v. *Classic,* he stated that those cases "are essentially concerned with the vindication of important relationships with the Federal Government—*voting in federal elections,* involvement in federal law enforcement, communicating with the Federal Government." *United States* v. *Guest,* 383 U. S. 745, 772 (separate opinion) (emphasis added).

Contrary to the suggestion of my Brother HARLAN, *post,* at 213, we need not rely on the power of Congress to declare the meaning of § 1 of the Fourteenth Amendment. This Court had determined that voting for national officers is a privilege and immunity of national citizenship. No congressional declaration was necessary. Congressional power under § 5 of the Fourteenth Amendment is, as stated, buttressed by congressional power under the Necessary and Proper Clause. Thus even if the durational residency requirements do not violate the Privileges and Immunities Clause, Congress can determine that it is necessary and proper to abolish them in national elections to effectuate and further the purpose of § 1 as it has been declared by this Court.

The Fourteenth Amendment provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Durational residency laws of the States had such effect, says Congress. The "choice of means" to protect such a privilege presents "a question primarily addressed to the judgment of Congress." *Burroughs* v. *United States, supra,* at 547. The relevance of the means which Congress adopts to the condition sought to be remedied, the degree of their necessity, and the extent of their efficacy are all matters for Congress. *Id.,* at 548.

The judgment which Congress has made respecting the ban of durational residency in presidential elections is plainly a permissible one in its efforts under § 5 to "enforce" the Fourteenth Amendment.

APPENDIX TO OPINION OF DOUGLAS, J.

Cases which have struck down state statutes under the Equal Protection Clause other than statutes which discriminate on the basis of race.

STATUTES WHICH DISCRIMINATED AGAINST CERTAIN BUSINESSES

Gulf, C. & S. F. R. Co. v. *Ellis,* 165 U. S. 150; *Atchison, T. & S. F. R. Co.* v. *Vosburg,* 238 U. S. 56 (railroad must pay attorney fees if it loses suit, but other businesses need not). *Kentucky Finance Corp.* v. *Paramount Auto Exchange,* 262 U. S. 544; *Power Co.* v. *Saunders,* 274 U. S. 490 (burdens placed upon out-of-state corporations in litigation).

STATUTES WHICH FAVORED CERTAIN BUSINESSES

Connolly v. *Union Sewer Pipe Co.,* 184 U. S. 540 (exemption from state antitrust law for agricultural goods); *Smith* v. *Cahoon,* 283 U. S. 553 (act exempting certain motor vehicles from insurance requirements); *Mayflower*

Farms v. *Ten Eyck,* 297 U. S. 266 (act allowing certain milk dealers to sell at lower than the regulated price); *Hartford Co.* v. *Harrison,* 301 U. S. 459 (statute permitting mutual, but not stock, insurance companies to act through salaried representatives), and *Morey* v. *Dowd,* 354 U. S. 457 (American Express exempted from licensing requirements applied to "currency exchanges").

TAXING STATUTES STRUCK DOWN

Concordia Ins. Co. v. *Illinois,* 292 U. S. 535; *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239; *Cumberland Coal Co.* v. *Board,* 284 U. S. 23; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Sioux City Bridge* v. *Dakota County,* 260 U. S. 441; *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412; and *Southern R. Co.* v. *Greene,* 216 U. S. 400.

TREATMENT OF CONVICTED CRIMINALS

Rinaldi v. *Yeager,* 384 U. S. 305 (statute requiring unsuccessful criminal appellants who were in jail to pay cost of trial transcript); *Baxstrom* v. *Herold,* 383 U. S. 107 (statute denying convict a sanity hearing before a jury prior to civil commitment); and *Skinner* v. *Oklahoma,* 316 U. S. 535 (sterilization of some convicts).

INDIGENTS

Douglas v. *California,* 372 U. S. 353 (Rule of Criminal Procedure which did not provide counsel for appeal to indigents); and *Shapiro* v. *Thompson,* 394 U. S. 618 (denial of welfare benefits based on residency requirement).

LEGITIMACY

Glona v. *American Guarantee Co.,* 391 U. S. 73 (mother denied right to sue for wrongful death of illegitimate

child); and *Levy* v. *Louisiana,* 391 U. S. 68 (illegitimate children denied recovery for wrongful death of mother).

ALIENS

Truax v. *Raich,* 239 U. S. 33 (statute limiting the number of aliens that could be employed to 20%); and *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410 (denial of fishing rights to aliens ineligible for citizenship).

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

From the standpoint of this Court's decisions during an era of judicial constitutional revision in the field of the suffrage, ushered in eight years ago by *Baker* v. *Carr,* 369 U. S. 186 (1962), I would find it difficult not to sustain all three aspects of the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, here challenged. From the standpoint of the bedrock of the constitutional structure of this Nation, these cases bring us to a crossroad that is marked with a formidable "Stop" sign. That sign compels us to pause before we allow those decisions to carry us to the point of sanctioning Congress' decision to alter state-determined voter qualifications by simple legislation, and to consider whether sound doctrine does not in truth require us to hold that one or more of the changes which Congress has thus sought to make can be accomplished only by constitutional amendment.

The four cases require determination of the validity of the Voting Rights Act Amendments in three respects. In Nos. 43, Orig., and 44, Orig., Oregon and Texas have sought to enjoin the enforcement of § 302 of the Act as applied to lower the voting age in those States from 21 to 18.[1]

[1] The Attorney General of the United States, a citizen of New York, is named as defendant. The jurisdictional basis alleged is Art. III, § 2, which gives this Court original jurisdiction over contro-

In Nos. 46, Orig., and 47, Orig., the United States seeks a declaration of the validity of the Act and an injunction requiring Arizona and Idaho to conform their laws to it. The Act would lower the voting age in each State from 21 to 18. It would suspend until August 6, 1975, the Arizona literacy test, which requires that applicants for registration be able to read the United States Constitution in English and write their names. It would require Idaho to make several changes in its laws governing residency, registration, and absentee voting in presidential elections. Among the more substantial changes, Idaho's present 60-day state residency requirement will in effect be lowered to 30 days; its 30-day county residency requirement for intrastate migrants will be abolished; Idaho will have to permit voting by citizens of other States formerly domiciled in Idaho who emigrated too recently to register in their new homes; and it must permit absentee registration and voting by persons who have lived in Idaho for less than six months. The relevant provisions of the Act and of the constitutions and laws of the four States are set out in an Appendix to this opinion.

Each of the States contests the power of Congress to enact the provisions of the Act involved in its suit.[2] The Government places primary reliance on the power of Congress under § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment by appropriate

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versies between a State and a citizen of another State. We held a similar suit justiciable and otherwise within our original jurisdiction in *South Carolina* v. *Katzenbach,* 383 U. S. 301, 307 (1966). The parties have not asked us to re-examine the validity of that ruling, and since the Court has not undertaken to do so, I am content to sustain jurisdiction on the authority of that decision.

[2] In response to inquiries from the Attorney General, Arizona, Oregon, and Texas indicated willingness to abide by § 202 of the Act, governing residency, registration, and absentee voting in presidential elections and to conform conflicting state laws.

legislation. For reasons to follow, I am of the opinion that the Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications, in either state or federal elections. I find no other source of congressional power to lower the voting age as fixed by state laws, or to alter state laws on residency, registration, and absentee voting, with respect to either state or federal elections. The suspension of Arizona's literacy requirement, however, can be deemed an appropriate means of enforcing the Fifteenth Amendment, and I would sustain it on that basis.

I

It is fitting to begin with a quotation from one of the leading members of the 39th Congress, which proposed the Fourteenth Amendment to the States in 1866:

> "Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers; and their authority increases in proportion to the evidence which they have left on the question." Cong. Globe, 39th Cong., 1st Sess., 677 (1866) (Sen. Sumner).

Believing this view to be undoubtedly sound, I turn to the circumstances in which the Fourteenth Amendment was adopted for enlightenment on the intended reach of its provisions. This, for me, necessary undertaking has unavoidably led to an opinion of more than ordinary length. Except for those who are willing to close their eyes to constitutional history in making constitutional interpretations or who read such history with a preconceived determination to attain a particular constitutional

goal, I think that the history of the Fourteenth Amendment makes it clear beyond any reasonable doubt that no part of the legislation now under review can be upheld as a legitimate exercise of congressional power under that Amendment.

A. Historical Setting [3]

The point of departure for considering the purpose and effect of the Fourteenth Amendment with respect to the suffrage should be, I think, the pre-existing provisions of the Constitution. Article I, § 2, provided that in determining the number of Representatives to which a State was entitled, only three-fifths of the slave population should be counted.[4] The section also provided that the qualifications of voters for such Representatives should be the same as those established by the States for electors of the most numerous branch of their respective legislatures. Article I, § 4, provided that, subject to congressional veto, the States might prescribe the times, places, and manner of holding elections for Representatives. Article II, § 1, provided that the States might direct the manner of choosing electors for President and Vice President, except that Congress might fix a uniform time for the choice.[5] Nothing in the original

[3] The account in the text is largely drawn from J. James, The Framing of the Fourteenth Amendment (1956) (hereafter James), and to some extent from W. Gillette, The Right To Vote: Politics and the Passage of the Fifteenth Amendment (1969) (hereafter Gillette), and B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction (1914) (hereafter Kendrick), as well.

[4] "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

[5] See *infra*, at 209–212, for the text of these provisions, and for discussion of the contention that they empower Congress to set qualifications of voters in federal elections.

Constitution controlled the way States might allocate their political power except for the guarantee of a Republican Form of Government, which appears in Art. IV, § 4.[6] No relevant changes in the constitutional structure were made until after the Civil War.

At the close of that war, there were some four million freed slaves in the South, none of whom were permitted to vote. The white population of the Confederacy had been overwhelmingly sympathetic with the rebellion. Since there was only a comparative handful of persons in these States who were neither former slaves nor Confederate sympathizers, the place where the political power should be lodged was a most vexing question. In a series of proclamations in the summer of 1865, President Andrew Johnson had laid the groundwork for the States to be controlled by the white populations which had held power before the war, eliminating only the leading rebels and those unwilling to sign a loyalty oath.[7] The Radicals, on the other hand, were ardently in favor of Negro suffrage as essential to prevent resurgent rebellion, requisite to protect the freedmen, and necessary to ensure continued Radical control of the government. This ardor cooled as it ran into northern racial prejudice. At that time, only six States—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York—permitted Negroes to vote, and New York imposed special property and residency requirements on Negro voters.[8] In referenda late that year, enfranchising pro-

[6] "The United States shall guarantee to every State in this Union a Republican Form of Government."

[7] *E. g.*, Proclamation of May 29, 1865, 13 Stat. 760 (North Carolina).

[8] The texts of the state constitutions are most readily available in F. Thorpe, The Federal and State Constitutions (1909). The qualifications imposed by the various States three years later, when the Fifteenth Amendment was proposed, are presented in tabular form in Hearings on the Voting Rights Bill, S. 1564, before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 128–129 (1965).

posals were roundly beaten in Connecticut, Wisconsin, Minnesota, the Territory of Colorado, and the District of Columbia. Gillette, *supra,* n. 3, at 25–26. Such popular rebuffs led the Radicals to pull in their horns and hope for a protracted process of reconstruction during which the North could be educated to the advisability of Negro suffrage, at least for the South. In the meantime, of course, it would be essential to bar southern representation in Congress lest a combination of southerners and Democrats obtain control of the government and frustrate Radical goals.

The problem of congressional representation was acute. With the freeing of the slaves, the Three-Fifths Compromise ceased to have any effect. While predictions of the precise effect of the change varied with the person doing the calculating, the consensus was that the South would be entitled to at least 15 new members of Congress, and, of course, a like number of new presidential electors. The Radicals had other rallying cries which they kept before the public in the summer of 1865, but one author gives this description of the mood as Congress convened: [9]

> "Of all the movements influencing the Fourteenth Amendment which developed prior to the first session of the Thirty-ninth Congress, that for Negro suffrage was the most outstanding. The volume of private and public comment indicates that it was viewed as an issue of prime importance. The cry for a changed basis of representation was, in reality, subsidiary to this, and was meant by Radicals to secure in another way what Negro suffrage might accomplish for them: removal of the danger of Democratic dominance as a consequence of Southern restoration. The danger of possible repudiation of the national obligations, and assumption of the rebel

[9] James 33.

> debt, was invariably presented to show the need for Negro suffrage or a new basis of representation. Sentiment for disqualification of ex-Confederates, though a natural growth, well suited such purposes. The movement to guarantee civil rights, sponsored originally by the more conservative Republicans, received emphasis from Radicals only when state elections indicated that suffrage would not serve as a party platform."

When Congress met, the Radicals, led by Thaddeus Stevens, were successful in obtaining agreement for a Joint Committee on Reconstruction, composed of 15 members, to "inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress . . . ." Cong. Globe, 39th Cong., 1st Sess., 30, 46 (1865) (hereafter Globe).

All papers relating to representation of the Southern States were to be referred to the Committee of Fifteen without debate. The result, which many had not foreseen, was to assert congressional control over Reconstruction and at the same time to put the congressional power in the hands of a largely Radical secret committee.

The Joint Committee began work with the beginning of 1866, and in due course reported a joint resolution, H. R. 51, to amend the Constitution. The proposal would have based representation and direct taxes on population, with a proviso that

> "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation." Globe 351.

The result, if the Southern States did not provide for Negro suffrage, would be a decrease in southern repre-

sentation in Congress and the electoral college by some 24 seats from their pre-war position instead of an increase of 15. The House, although somewhat balky, approved the measure after lengthy debate. Globe 538. The Senate proved more intractable. An odd combination of Democrats, moderate Republicans, and extreme Radicals combined to defeat the measure, with the Radicals basing their opposition largely on the fear that the proviso would be read to authorize racial voter qualifications and thus prevent Congress from enfranchising the freedmen under powers assertedly granted by other clauses of the Constitution. See, *e. g.,* Globe 673–687 (Sen. Sumner).

At about this same time the Civil Rights Bill and the Second Freedmen's Bureau Bill were being debated. Both bills provided a list of rights secured, not including voting.[10] Senator Trumbull, who reported the Civil Rights Bill on behalf of the Senate Judiciary Committee, stated: "I do not want to bring up the question of negro suffrage in the bill." Globe 606. His House counterpart exhibited the same reluctance. Globe 1162 (Cong. Wilson of Iowa). Despite considerable uncertainty as to the constitutionality of the measures, both ultimately passed. In the midst of the Senate debates on the basis of representation, President Johnson vetoed the Freedmen's Bureau Bill, primarily on constitutional grounds. This veto, which was narrowly sustained, was followed shortly by the President's bitter attack on Radical Reconstruction in his Washington's Birthday speech. These two actions, which were followed a month later by the veto of the Civil Rights Bill, removed any lingering hopes among the Radicals that Johnson would support them in a thoroughgoing plan of reconstruction. By the same token they increased the Radicals' need for an

[10] See Globe 209 (Freedmen's Bureau Bill); Globe 211 (Civil Rights Bill).

articulated plan of their own to be put before the country in the upcoming elections as an alternative to the course the President was taking.

The second major product of the Reconstruction Committee, before the resolution which became the Fourteenth Amendment, was a proposal to add an equal rights provision to the Constitution. This measure, H. R. 63, which foreshadowed § 1 of the Fourteenth Amendment, read as follows:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." Globe 1034.

It was reported by Congressman Bingham of Ohio, who later opposed the Civil Rights Bill because he believed it unconstitutional. Globe 1292–1293. The amendment immediately ran into serious opposition in the House and the subject was dropped.[11]

Such was the background of the Fourteenth Amendment. Congress, at loggerheads with the President over Reconstruction, had not come up with a plan of its own after six months of deliberations; both friends and foes prodded it to develop an alternative. The Reconstruction Committee had been unable to produce anything which could even get through Congress, much less obtain the adherence of three-fourths of the States. The Radicals, committed to Negro suffrage, were confronted with widespread public opposition to that goal and the necessity for a reconstruction plan that could do service as a party platform in the elections that fall. The language

[11] While formally further consideration was postponed until a date in April, six weeks off, Globe 1095, it was generally understood that "April means indefinitely." 2 Nation 289 (Mar. 1, 1866), quoted in James 87.

of the Fourteenth Amendment must be read with awareness that it was designed in response to this situation.

B. The Language of the Amendment and Reconstruction Measures

Sections 1 and 2 of the Fourteenth Amendment as originally reported read as follows: [12]

> "SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "SEC. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when-

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[12] The only change made in § 1 was the addition of the Citizenship Clause by the Senate. Globe 3041. The primary change made in § 2 was to condition reduction of representation on denial or abridgment of the right to vote in certain named elections, rather than to speak generally of denial or abridgment of "the elective franchise." *Ibid.* That section now reads:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

> ever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age." Globe 2286.

In the historical context, no one could have understood this language as anything other than an abandonment of the principle of Negro suffrage, for which the Radicals had been so eager. By the same token, the language could hardly have been understood as affecting the provisions of the Constitution placing voting qualifications in the hands of the States. Section 1 must have been seen as little more than a constitutionalization of the 1866 Civil Rights Act, concededly one of the primary goals of that portion of the Amendment.[13]

While these conclusions may, I think, be confidently asserted, it is not so easy to explain just how contemporary observers would have construed the three clauses of § 1 to reach this result.[14] No doubt in the case of

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[13] Section 1 of that Act provided in part that

"all persons . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Act of Apr. 9, 1866, § 1, 14 Stat. 27.

[14] In this connection, Professor Fairman's admonition of 20 years ago is even more forceful than it was when he wrote:

"We know so much more about the constitutional law of the Fourteenth Amendment than the men who adopted it that we should

many congressmen it simply never occurred to them that the States' longstanding plenary control over voter qualifications would be affected without explicit language to that effect. And since no speaker during the debates on the Fourteenth Amendment pursued the contention that § 1 would be construed to include the franchise, those who took the opposite view rarely explained how they arrived at their conclusions.

In attempting to unravel what was seldom articulated, the appropriate starting point is the fact that the framers of the Amendment expected the most significant portion of § 1 to be the clause prohibiting state laws "which shall abridge the privileges or immunities of citizens of the United States." These privileges were no doubt understood to include the ones set out in the first section of the Civil Rights Act. To be prohibited by law from enjoying these rights would hardly be consistent with full membership in a civil society.

The same is not necessarily true with respect to prohibitions on participation in the political process. Many members of Congress accepted the jurisprudence of the day, in which the rights of man fell into three categories: natural, civil, and political. The privileges of citizens, being "civil" rights, were distinct from the rights arising from governmental organization, which were political in character.[15] Others no doubt relied on

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remind ourselves not to be surprised to find them vague where we want them to prove sharp. Eighty years of adjudication has taught us distinctions and subtleties where the men of 1866 did not even perceive the need for analysis." Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 9 (1949).

[15] See, *e. g.*, Globe 599 (Sen. Trumbull); Globe 1117 (Cong. Wilson of Iowa, quoting Kent's Commentaries and Bouvier's Law Dictionary); Globe 1152 (Cong. Thayer). There were some, however, who considered the distinction either nonexistent or too uncertain to be

the experience under the similar language of Art. IV, § 2, which had never been held to guarantee the right to vote. The remarks of Senator Howard of Michigan, who as spokesman for the Joint Committee explained in greater detail than most why the Amendment did not reach the suffrage, contain something of each view. See Globe 2766, quoted *infra,* at 187; nn. 56 and 57, *infra;* cf. *Blake* v. *McClung,* 172 U. S. 239, 256 (1898) (dictum).

Since the Privileges and Immunities Clause was expected to be the primary source of substantive protection, the Equal Protection and Due Process Clauses were relegated to a secondary role, as the debates and other contemporary materials make clear.[16] Those clauses, which appear on their face to correspond with the latter portion of § 1 of the Civil Rights Act, see n. 13, *supra,* and to be primarily concerned with person and property, would not have been expected to enfranchise the freedmen if the Privileges and Immunities Clause did not.

Other members of Congress no doubt saw § 2 of the proposed Amendment as the Committee's resolution of the related problems of suffrage and representation. Since that section did not provide for enfranchisement, but simply reduced representation for disfranchisement, any doubts about the effect of the broad language of § 1 were removed. Congressman Bingham, who was primarily responsible for the language of § 1,

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a basis for legislation. *E. g.,* Globe 477 (Sen. Saulsbury); Globe 1157 (Cong. Thornton); Globe 1292–1293 (Cong. Bingham).

It hardly seems necessary to point out that the jurisprudential concept of "political" as opposed to "civil" or "natural" rights bears no relation to that class of nonjusticiable issues perhaps inappropriately known as "political questions." See the opinion of MR. JUSTICE DOUGLAS, *ante,* at 137–140.

[16] See generally Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949), especially at 8–9.

stated this view. Globe 2542, quoted *infra,* at 185. Finally, characterization of the Amendment by such figures as Stevens and Bingham in the House and Howard in the Senate, not contested by the Democrats except in passing remarks, was no doubt simply accepted by many members of Congress; they, repeating it, gave further force to the interpretation, with the result that, as will appear below, not one speaker in the debates on the Fourteenth Amendment unambiguously stated that it would affect state voter qualifications, and only three, all opponents of the measure, can fairly be characterized as raising the possibility.[17] Further evidence of this original understanding can be found in later events.

The 39th Congress, which proposed the Fourteenth Amendment, also enacted the first Reconstruction Act, c. 153, 14 Stat. 428 (1867). This Act required, as a condition precedent to readmission of the Southern States, that they adopt constitutions providing that the elective franchise should be enjoyed by all male citizens over the age of 21 who had been residents for more than one year and were not disfranchised for treason or common-law felony; even so, no State would be readmitted until a legislature elected under the new Constitution had ratified the proposed Fourteenth Amendment and that Amendment had become part of the Constitution.

The next development came when the ratification drive in the North stalled. After a year had passed during which only one Northern State had ratified the proposed Fourteenth Amendment, Arkansas was readmitted to the Union by the Act of June 22, 1868, 15

[17] The remarks of these three Democrats, Niblack, Boyer, and Rogers, are discussed *infra,* at 182–185. Also discussed there are the remarks of a fourth Democratic Representative, Phelps, which were delivered before the start of debate on the proposed Fourteenth Amendment.

Stat. 72. This readmission was based on the "fundamental condition" that the state constitution should not be amended to restrict the franchise, except with reference to residency requirements. Three days later the Act of June 25, 1868, 15 Stat. 73, held out a promise of similar treatment to North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida if they would ratify the Fourteenth Amendment. By happy coincidence, the assent of those six States was just sufficient to complete the ratification process. It can hardly be suggested, therefore, that the "fundamental condition" was exacted from them as a measure of caution lest the Fourteenth Amendment fail of ratification.

The 40th Congress, not content with enfranchisement in the South, proposed the Fifteenth Amendment to extend the suffrage to northern Negroes. See Gillette, *supra,* n. 3, at 46. This fact alone is evidence that they did not understand the Fourteenth Amendment to have accomplished such a result. Less well known is the fact that the 40th Congress considered and very nearly adopted a proposed amendment which would have expressly prohibited not only discriminatory voter qualifications but discriminatory qualifications for office as well. Each House passed such a measure by the required two-thirds margin. Cong. Globe, 40th Cong., 3d Sess., 1318, 1428 (1869). A conference committee, composed of Senators Stewart and Conkling and Representatives Boutwell, Bingham, and Logan, struck out the officeholding provision, *id.,* at 1563, 1593, and with Inauguration Day only a week away, both Houses accepted the conference report. *Id.,* at 1564, 1641. See generally Gillette 58–77. While the reasons for these actions are unclear, it is unlikely that they were provoked by the idea that the Fourteenth Amendment covered the field; such a rationale seemingly would have made the enfranchising provision itself unnecessary.

The 41st Congress readmitted the remaining three States of the Confederacy. The admitting act in each case recited good-faith ratification of the Fourteenth and Fifteenth Amendments, and imposed the fundamental conditions that the States should not restrict the elective franchise[18] and "[t]hat it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State." Act of Jan. 26, 1870, c. 10, 16 Stat. 62, 63 (Virginia); Act of Feb. 23, 1870, c. 19, 16 Stat. 67, 68 (Mississippi); Act of Mar. 30, 1870, c. 39, 16 Stat. 80, 81 (Texas).

These materials demonstrate not only that § 1 of the Fourteenth Amendment is susceptible of an interpretation that it does not reach suffrage qualifications, but that this is the interpretation given by the immediately succeeding Congresses. Such an interpretation is the most reasonable reading of the section in view of the background against which it was proposed and adopted, particularly the doubts about the constitutionality of the Civil Rights Act, the prejudice in the North against any recognition of the principle of Negro suffrage, and the basic constitutional structure of leaving suffrage qualifications with the States.[19] If any further clarification were

[18] While this provision might seem useless in light of the Fifteenth Amendment, it was doubtless intended to prohibit the imposition of property or literacy qualifications which, even though fairly applied, would have the effect of disfranchising most of the Negroes. The Radicals had sought to prohibit such qualifications in the Fifteenth Amendment, but were unsuccessful. See Gillette 53, 56–62, 69–72, 76.

[19] While the history indicates that the supporters of the Fourteenth Amendment would have been surprised at the suggestion that the Amendment brought qualifications for state office under federal supervision, officeholding was not the focus of attention during the consideration of the Amendment. Moreover, state

needed, one would have thought it provided by the second section of the same Amendment, which specifically contemplated that the right to vote would be denied or abridged by the States on racial or other grounds. As a unanimous Court once asked, "Why this, if it was not in the power of the [state] legislature to deny the right of suffrage to some male inhabitants?" *Minor* v. *Happersett,* 21 Wall. 162, 174 (1875).

The Government suggests that the list of protected qualifications in § 2 is "no more than descriptive of voting laws as they then stood." Brief for the United States, Nos. 46, Orig., and 47, Orig., 75. This is wholly inaccurate. Aside from racial restrictions, all States had residency requirements and many had literacy, property, or taxation qualifications. On the other hand, several of the Western States permitted aliens to vote if they had satisfied certain residency requirements and had declared

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power to set voter qualifications, unlike state power to set qualifications for office, is explicitly recognized not only in the original Constitution but in § 2 of the Fourteenth Amendment itself. Whether these distinctions are sufficient to justify testing state qualifications for office by the Fourteenth Amendment is a matter not presented by these cases.

Where the state action has a racial basis, see *Anderson* v. *Martin,* 375 U. S. 399 (1964), I am not prepared to assume that the Fifteenth Amendment provides no protection. Despite the statement in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, *post,* at 252, I would find it surprising if a State could undercut the right to vote by taking steps to ensure that all candidates are unpalatable to voters of a certain race. Although an explicit provision on officeholding was deleted from the proposed Fifteenth Amendment at the eleventh hour, the idea that the right to vote without more implies the right to be voted for was specifically referred to by supporters of the Fifteenth Amendment in both Houses of Congress. See Cong. Globe, 40th Cong., 3d Sess., 1425–1426 (1869) (Cong. Boutwell); *id.,* at 1426 (Cong. Butler); *id.,* at 1629 (Sen. Sawyer).

their intention to become citizens.[20] It hardly seems necessary to observe that the politicians who framed the Fourteenth Amendment were familiar with the makeup of the electorate. In any event, the congressional debates contain such proof in ample measure.[21]

Assuming, then, that § 2 represents a deliberate selection of the voting qualifications to be penalized, what is the point of it? The Government notes that "it was intended—although it has never been used—to provide a remedy against exclusion of the newly freed slaves from the vote." Brief for the Defendant, Nos. 43, Orig., and 44, Orig., 20. Undoubtedly this was the primary purpose. But the framers of the Amendment, with their attention thus focused on racial voting qualifications, could hardly have been unaware of § 1. If they understood that section to forbid such qualifications, the simple means of penalizing this conduct would have been to impose a reduction of representation for voting discrimination in violation of § 1. Their adoption instead of the awkward phrasing of § 2 is therefore significant.

To be sure, one might argue that § 2 is simply a rhetorical flourish, and that the qualifications listed there are merely the ones which the framers deemed to be consistent with the alleged prohibition of § 1. This argument is not only unreasonable on its face and untenable in light of the historical record; it is fatal to the validity of the reduction of the voting age in § 302 of the Act before us.

The only sensible explanation of § 2, therefore, is that the racial voter qualifications it was designed to penalize

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[20] Hearings, *supra,* n. 8, at 128–129.

[21] See, *e. g.,* Globe 141–142 (Cong. Blaine); Globe 2766–2767 (Sen. Howard); Globe 2769–2770 (Sens. Wade and Wilson); Globe 3033 (Sen. Henderson).

were understood to be permitted by § 1 of the Fourteenth Amendment. The Amendment was a halfway measure, adopted to deprive the South of representation until it should enfranchise the freedmen, but to have no practical effect in the North. It was politically acceptable precisely because of its regional consequences and its avoidance of an explicit recognition of the principle of Negro suffrage. As my Brother BLACK states: "[I]t cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves." *Ante,* at 127. The detailed historical materials make this unmistakably clear.

C. The Joint Committee

The first place to look for the understanding of the framers of the Fourteenth Amendment is the Journal of the Joint Committee on Reconstruction.[22] The exact sequence of the actions of this Committee presumably had little or no effect on the members of Congress who were not on the Committee, for the Committee attempted to keep its deliberations secret,[23] and the Journal itself was lost for nearly 20 years.[24] Nevertheless the Journal, although only a record of proposals and votes, illustrates the thoughts of those leading figures of Congress who were members and participated in the drafting of the Amendment.

Two features emerge from such a review with startling clarity. First, the Committee regularly rejected explicitly

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[22] The Journal is reprinted in Kendrick, *supra,* n. 3, at 37–129.

[23] The attempts were not altogether successful. See James 108–109.

[24] See generally Kendrick 18–22. For reasons to be developed below, *infra,* at 197, the report of the Joint Committee, H. R. Rep. No. 30, 39th Cong., 1st Sess. (1866), is less useful as an indication of the understanding of the Committee and the Congress than as an indication of the understanding of the ratifying States.

enfranchising proposals in favor of plans which would postpone enfranchisement, leave it to congressional discretion, or abandon it altogether. Second, the abandonment of Negro suffrage as a goal exactly corresponded with the adoption of provisions to reduce representation for discriminatory restrictions on the ballot.

This correspondence was present from the start. Five plans were proposed to deal with representation. One would have prohibited racial qualifications for voters and based representation on the whole number of citizens in the State; the other four proposals contained no enfranchising provision but in various ways would have reduced representation for States where the vote was racially restricted. Kendrick 41–44. A subcommittee reduced the five proposals to two, one prohibiting discrimination and the other reducing representation where it was present. On Stevens' motion the latter alternative was accepted by a vote of 11 to 3, Kendrick 51; with minor changes it was subsequently reported as H. R. 51.

The subcommittee also proposed that whichever provision on the basis of representation was adopted, the Congress should be empowered to legislate to secure all citizens "the same political rights and privileges" and also "equal protection in the enjoyment of life, liberty and property." Kendrick 51. After the Committee reported H. R. 51, it turned to consideration of this proposal. At a meeting attended by only 10 members, a motion to strike out the clause authorizing Congress to legislate for equal political rights and privileges lost by a vote of six to four. Kendrick 57. At a subsequent meeting, however, Bingham had the subcommittee proposal replaced with another which did not mention *political* rights and privileges, but was otherwise quite similar. Kendrick 61; see the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE

MARSHALL, *post*, at 258–259, for the text of the two provisions. The Committee reported the substitute as H. R. 63. In the House so much concern was expressed over the centralization of power the amendment would work—a few said it would even authorize Congress to regulate the suffrage—that the matter was dropped. *Post*, at 260.

The Fourteenth Amendment had as its most direct antecedent a proposal drafted by Robert Dale Owen, who was not a member of Congress, and presented to the Joint Committee by Stevens.[25] Originally the plan provided for mandatory enfranchisement in 1876 and for reduction of representation until that date. Kendrick 82–84. However, Stevens was pressured by various congressional delegations who wanted nothing to do with Negro suffrage, even at a remove of 10 years.[26] He therefore successfully moved to strike out the enfranchising provision and correspondingly to abolish the 10-year limitation on reduction of representation for racial discrimination. The motion carried by a vote of 12 to 2. Kendrick 101.

Bingham was then successful in replacing § 1 of Owen's proposal, which read:

> "No discrimination shall be made by any State, or by the United States, as to the civil rights of persons, because of race, color, or previous condition of servitude"

with the following now-familiar language:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

[25] Owen's account of the Fourteenth Amendment is given in Political Results from the Varioloid, 35 Atlantic Monthly 660 (June 1875).

[26] See James 109–112; Gillette 24; Owen, *supra*, n. 25, at 666.

> any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Kendrick 106.

The summary style of the Journal leaves unclear the reasons for the change. However, Bingham himself had rather consistently voted against proposals for direct and immediate enfranchisement,[27] and on the face of things it seems unlikely that the other members of the Joint Committee understood his provision to be an enfranchising proposal.[28] That they did not so understand is

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[27] See the votes on Stevens' motion to select the alternative which reduced representation rather than that which prohibited racial restrictions on the ballot, Kendrick 52; Boutwell's motion to condition readmission of Tennessee on that State's agreement not to discriminate in its voter qualifications, Kendrick 70; Stevens' motion to strike out the provision of the Owen plan enfranchising Negroes after 1876, Kendrick 101; and the motion to condition readmission of Tennessee and Arkansas on their having provided impartial male suffrage, as well as on conforming their laws and constitutions to the requirements of the proposed amendment (which included Bingham's provision when this motion was made), Kendrick 109.

Bingham was not, however, wholly opposed to Negro suffrage. As chairman of the subcommittee, he reported the equal-rights provision which would have empowered Congress to provide for equal political rights and privileges, Kendrick 56, although he was the one who subsequently had that replaced with the first equal-rights provision reported to Congress. Kendrick 61. As already noted, the substitute contained substantially identical language, but omitted reference to political rights and privileges. Bingham also voted for Owen's plan, which would have enfranchised Negroes in 1876, when it was first presented. Kendrick 85. In February 1867 he moved to condition readmission of the Southern States on impartial male suffrage as well as on the States' ratifying the Fourteenth Amendment and conforming their laws thereto. Kendrick 123.

[28] While any guess as to the motives of Bingham and the other members of the committee is sheer speculation, it is not necessarily true that they believed they were replacing specific language with

demonstrated by the speeches in the debates on the floor.[29]

Before I examine those debates, a word of explanation is in order. For obvious reasons, the discussions of voter qualifications in the 39th Congress and among the public were cast primarily in terms of racial disqualifications. This does not detract from their utility as guides to interpretation. When an individual speaker said that the Amendment would not result in the enfranchisement of Negroes, he must have taken one of two views: either the Amendment did not reach voter qualifications at all; or it set standards limiting state restrictions on the ballot, but those standards did not prohibit racial discrimination. I have already set out some of the reasons which lead me to conclude that the former interpretation is correct, and that it is the under-

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general. The author of the original plan, for one, seems to have taken the opposite view. He gave the following characterization of § 1 some years later:

"A declaration who is a citizen: unnecessary, if we had given suffrage to the negro; since there could be no possible doubt that an elector, nativeborn, is a citizen of the United States. Also a *specification* of the *particular* civil rights to be assured: out of place, I think, in a constitutional amendment, though necessary and proper in a civil rights bill." Owen, *supra,* n. 25, at 666 (emphasis added).

[29] The proceedings of the Joint Committee are examined in greater detail in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL. *Post,* at 257–263. I agree with their apparent conclusion that the Journal sheds little light on the contemporary construction of the Fourteenth Amendment. One is left to do what he can with the two facts noted at the outset of this section: that of the plans considered by the Joint Committee, all provided either for reduction of representation or for enfranchisement while none provided for both at the same time; and that the Committee consistently rejected provisions to enfranchise the freedmen, with the conceivable exception of a plan which was defeated in the House largely because of the scope of the powers it transferred from the States to the Federal Government.

standing shared by the framers of the Amendment, as well as by almost all of the opponents. The mere statement of the latter position appears to me to be a complete refutation of it. Even on its wholly unsupportable assumptions (1) that certain framers of the Amendment contemplated that the privileges and immunities of citizens included the vote, (2) that they intended to permit state laws to abridge the privileges and immunities of citizens whenever it was rational to do so, and (3) that they agreed on the rationality of prohibiting the freed slaves from voting, this remarkable theory still fails to explain why they understood the Amendment to permit racial voting qualifications in the free States of the North.

D. In Congress

On May 8, 1866, Thaddeus Stevens led off debate on H. R. 127, the Joint Resolution proposing the Fourteenth Amendment. After explaining the delay of the Joint Committee in coming up with a plan of reconstruction, he apologized for his proposal in advance:

> "This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this." Globe 2459.

In the climate of the times, Stevens could hardly have been understood as referring to anything other than the failure of the measure to make some provision for the enfranchisement of the freedmen. However, lest any mistake be made, he recounted the history of the Committee's prior effort in the field of representation and suf-

frage, H. R. 51, which "would surely have secured the enfranchisement of every citizen at no distant period." That measure was dead, "slaughtered by a puerile and pedantic criticism," and "unless this (less efficient, I admit) shall pass, its death has postponed the protection of the colored race perhaps for ages." *Ibid.*

With this explanation made, Stevens turned to a section-by-section study of the proposed resolution. The results to be achieved by § 1, as he saw it, would be equal punishment for crime, equal entitlement to the benefits of "[w]hatever law protects the white man," equal means of redress, and equal competence to testify. *Ibid.* If he thought the section provided equal access to the polls, despite his immediately preceding apology for the fact that it did not, his failure to mention that application is remarkable.[30]

Turning then to § 2, Stevens again discussed racial qualifications for voting. He explained the section as follows:

> "If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive." *Ibid.*

Stevens recognized that it might take several years for the coercive effect of the Amendment to result in Negro suffrage, but since this would give time for education and enlightenment of the freedmen, "That short delay would

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[30] Unless, of course, one adopts a "conspiracy theory" of the history of the Fourteenth Amendment. Thus far no one has (quite) done so in this context.

not be injurious." *Ibid.* He did not indicate that he believed it would be unconstitutional. He admitted that § 2 was not so good as the proposal which had been defeated in the Senate, for that, by reducing representation by all the members of a race if any one was discriminated against, would have hastened full enfranchisement. Section 2 allowed proportional credit. "But it is a short step forward. The large stride which we in vain proposed is dead . . . ." Globe 2460.

I have dealt at length with Stevens' remarks because of his prominent position in the House and in the Joint Committee. The remaining remarks, except for Bingham's summation, can be treated in more summary fashion. Of the supporters of the Amendment, Garfield of Ohio,[31] Kelley of Pennsylvania,[32] Boutwell of Massachusetts (a member of the Joint Committee),[33]

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[31] "I regret more than I shall be able to tell this House that we have not found the situatiou [*sic*] of affairs in this country such, and the public virtue such that we might come out on the plain, unanswerable proposition that every adult intelligent citizen of the United States, unconvicted of crime, shall enjoy the right of suffrage." Globe 2462.

[32] "I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country." Globe 2469.

"So far as I am individually concerned, I object to the amendment as a whole, because it does not go far enough and propose to at once enfranchise every loyal man in the country." *Ibid.*

[33] "The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country—and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people—I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation." Globe 2508.

Eliot of Massachusetts,[34] Beaman of Michigan,[35] and Farnsworth of Illinois,[36] expressed their regret that the Amendment did not prohibit restrictions on the franchise. As the quotations set out in the margin indicate, the absence of such a prohibition was generally attributed to prejudice in the Congress, in the States, or both, to such an extent that an enfranchising amendment could not pass. This corresponds with the first part of Stevens' introductory speech.

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[34] "The second section, Mr. Speaker, is, in my judgment, as nearly correct as it can be without being fully, in full measure, right. But one thing is right, and that is secured by the amendment. Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, ultimately recognized and admitted." Globe 2511.

[35] "I did hope to see the rights of the freedmen completely established. . . . I did hope . . . that we should have the manhood and magnanimity to declare that men who have wielded the sword in defense of their country are fit to be intrusted with the ballot. But I am convinced that my expectations, hitherto fondly cherished, are doomed to some disappointment." Globe 2537.

[36] "This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best." Globe 2540.

Other supporters of the Amendment obviously based their remarks on their understanding that it did not affect state laws imposing discriminatory voting qualifications, but did not indicate that the omission was a drawback in their view. In this group were Thayer of Pennsylvania,[37] Broomall of Pennsylvania,[38] Raymond of New York,[39] McKee of Kentucky,[40] Miller of Pennsyl-

[37] "[If the freed slaves had been added] to the thinking, voting men of the southern States, it would be just and proper that that addition should be represented in this body. But we all know that such is not the case. In those States themselves the late slaves do not enter into the basis of local representation. . . .

"Would it not be a most unprecedented thing that when this population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here . . . ." Globe 2464.

[38] "The second proposition is, in short, to limit the representation of the several States as those States themselves shall limit suffrage. . . .

". . . And why not? If the negroes of the South are not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union? If they are not to be counted as against the southern people themselves, why should they be counted as against us?" Globe 2498.

[39] H. R. 51 "deprived [the southern States] of all inducement for [the] gradual admission [of the freedmen] to the right of suffrage, inasmuch as it exacted universal suffrage as the only condition upon which they should be counted in the basis of representation at all. . . . I voted against a proposition which seemed to me so unjust and so injurious, not only to the whites of the southern States, but to the colored race itself. Well, sir, that amendment was rejected in the Senate, and the proposition, as embodied in the committee's report, comes before us in a very different form. It is now proposed to base representation upon suffrage, upon the number of voters, instead of upon the aggregate population in every State of the Union. And as I believe that to be essentially just, and likely to remedy the unequal representation of which complaint is so justly made, I shall give it my vote." Globe 2502.

Later, in discussion of § 3, which at that time would have dis-

[*Footnote 40 on page 180*]

vania,[41] Banks of Massachusetts,[42] and Eckley of Ohio.[43]

The remaining members of the House who supported the Fourteenth Amendment either did not speak at all or did not address themselves to the suffrage issue in any very clear terms. Those in the latter group who gave speeches on the proposed Amendment included

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franchised certain rebels in federal elections, Raymond remarked that the effect would be to allow "one fifth, one eighth, or one tenth, as the case may be, of the people of these southern States to elect members from those States, to hold seats upon this floor." *Ibid.* It is obvious that the possibility of Negroes' voting in these elections did not cross his mind.

[40] "But this House is not prepared to enfranchise all men; the nation, perhaps, is not prepared for it to-day; the colored race are not prepared for it, probably, and I am sure the rebels are unfit for it; and as Congress has not the moral courage to vote for it, then put in this provision which cuts off the traitor from all political power in the nation, and then we have secured to the loyal men that control which they so richly deserve." Globe 2505.

[41] "This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age." Globe 2510.

[42] "I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have no doubt that the Government of the United States has authority to do this under the Constitution; but I do not think they have the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion." Globe 2532.

[43] "If South Carolina persists in withholding the ballot from the colored man, then let her take the alternative we offer, of confining her to the white basis of representation . . . ." Globe 2535.

Spalding of Ohio,[44] Longyear of Michigan,[45] and Shellabarger of Ohio.[46] The remaining Republican members of the Joint Committee—Washburne of Illinois, Morrill of Vermont, Conkling of New York, and Blow of Missouri—did not participate in the debates over the Amendment.

In the opposition to the Amendment were only the handful of Democrats. Even they, with one seeming exception, did not assert that the Amendment was applicable to suffrage, although they would have been expected to do so if they thought such a reading plausible. Finck of Ohio and Shanklin of Kentucky did not even

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[44] Spalding's speeches are given at Globe 2509–2510. His only remarks addressed to §§ 1 and 2 read:

"As to the first measure proposed, a person may read it five hundred years hence without gathering from it any idea that this rebellion ever existed. The same may be said of the second proposition, for it only proposes that, the bondsmen being made free, the apportionment of Representatives in Congress shall be based upon the whole number of persons who exercise the elective franchise, instead of the population." Globe 2509.

A month later, in the debate over the Amendment when it had returned from the Senate, Spalding expressed his views more clearly:

"I say, as an individual, that I would more cheerfully give my vote if that provision allowed all men of proper age whom we have made free to join in the exercise of the right of suffrage in this country. But if I cannot obtain all that I wish, I will go heartily to secure all we can obtain." Globe 3146.

[45] Longyear's speech is published at Globe 2536–2537. He did not in terms address himself to any section except the third. However, it is not difficult to read his statement that the proposals of the Joint Committee disappointed "the expectations of the people" and his personal hopes as having reference to the absence of any provision on suffrage.

[46] Shellabarger spoke only briefly, and this in connection with the disfranchising section. In the course of his remarks he expressed the view that congressional power to regulate voter qualifications in federal elections was granted by Art. I, § 4. Globe 2512.

mention Negro suffrage in their attacks on the Amendment, although Finck discussed the reasons why the Southern States could not be expected to ratify it, Globe 2460–2462, and Shanklin characterized the Amendment as "tyrannical and oppressive." Globe 2501. Eldridge of Wisconsin [47] and Randall of Pennsylvania [48] affirmatively indicated their understanding that with the Amendment the Radicals had at least temporarily abandoned their crusade for Negro suffrage, as did Finck when the measure returned from the Senate with amendments.[49]

The other two Democrats to participate in the three days of debate on H. R. 127, Boyer of Pennsylvania and Rogers of New Jersey, have been a source of great comfort to those who set out to prove that the history of the Fourteenth Amendment is inconclusive on this issue. Each, in the course of a lengthy speech, included a sentence which, taken out of context, can be read to indicate a fear that § 1 might prohibit racial restrictions on the ballot. Boyer said, "The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent in-

[47] "Why is it that the gentleman from Pennsylvania [Mr. STEVENS] gives up universal suffrage? Why is it that he and other gentlemen give up universal confiscation? Why is it that other gentlemen give up universal butchery of that people? It is a compromise of what they call principle for the purpose of saving their party in the next fall election." Globe 2506.

[48] "Gentlemen here admit that they desire [federal control over suffrage], but that the weak kneed of their party are not equal to the issue. Your purpose is the same, and but for that timidity you would now ingraft negro suffrage upon our Constitution and force it on the entire people of this Union." Globe 2530.

[49] "While this [second] section admits the right of the States thus to exclude negroes from voting, it says to them, if you do so exclude them they shall also be excluded from all representation; and you shall suffer the penalty by loss of representation." Globe 3145.

directly, the political equality of the negro race." Globe 2467. Rogers, commenting on the uncertain scope of the Privileges and Immunities Clause, observed: "The right to vote is a privilege." Globe 2538.

While these two statements are perhaps innocuous enough to be left alone, it is noteworthy that each speaker had earlier in the session delivered a tirade against the principle of Negro suffrage; [50] if either seriously believed that the Fourteenth Amendment might enfranchise the freedmen, he was unusually calm about the fact. That they did not seriously interpret the Amendment in this way is indicated as well by other portions of their speeches.[51]

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[50] Boyer's speech was made in opposition to a proposal to enfranchise Negroes in the District of Columbia. He then thought Negro suffrage a "monstrous proposition," Globe 176, which was incompatible with "the broad general principle that this is, and of right ought to be, a white man's Government." Globe 175. One of Rogers' harangues on the subject came in connection with the same bill. There he spoke of "the monstrous doctrine of political equality of the negro race with the white at the ballot-box," Globe 198, and launched into an attack remarkable for its vitriol.

[51] Boyer viewed § 3, which at that time would have prohibited voluntary participants in the rebellion from voting in federal elections, as "the most objectionable of all the parts," Globe 2467, as it would disfranchise nine-tenths of the voting population of the South for more than four years. The second section he found objectionable as designed "to reduce the number of southern representatives in Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage." Globe 2467. These remarks indicate no awareness that the first section would increase the number of voters in the Southern States and also render any "inducement" to Negro suffrage unnecessary.

Rogers later in his speech asserted:

"The committee dare not submit the broad proposition to the people of the United States of negro suffrage. They dare not to-day pass the negro suffrage bill which passed this House in the Senate of the United States because, as I have heard one honorable and leading man on the Republican side of the House say, it would

Two other opponents of the Fourteenth Amendment, Phelps of Maryland and Niblack of Indiana, made statements which have been adduced to show that there was no consensus on the applicability of the Fourteenth Amendment to suffrage laws. Phelps voiced his sentiments on May 5, three days before the beginning of debate.[52] In the course of a speech urging a soft policy on reconstruction, he expressed the fear that the Amendment would authorize Congress to define the privileges of citizens to include the suffrage—or indeed that it might have that effect *proprio vigore*. Globe 2398. Phelps did not repeat this sentiment after he was contradicted by speaker after speaker during the debates proper; indeed, he did not take part in the debates at all, but simply voted against the Amendment, along with most of his Democratic colleagues. Globe 2545.[53]

As for Niblack, on the first day of debate he made the following remarks:

> "I give notice that I will offer the following amendment if I shall have the opportunity:

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sink into oblivion the party that would advocate before the American people the equal right of the negro with the white man to suffrage." Globe 2538.

When H. R. 127 was returned by the Senate with amendments, Rogers addressed the House and stated that when the records of the Joint Committee were made public, it would be revealed that the Committee at first agreed to recommend universal Negro suffrage, but reconsidered because of the force of public opinion. Globe App. 230. Rogers was himself a member of the Joint Committee, and he presumably was referring to the acceptance and then rejection of Owen's plan for enfranchisement in 1876.

[52] The Amendment, however, had been released to the press on April 28. James 115.

[53] It is not amiss to point out that whatever force Phelps' and Rogers' interpretations may have in the face of the contrary authority, even they foresaw no danger from the Equal Protection Clause as a source of federal power over the suffrage.

> " 'Add to the fifth section as follows:
>
> " '*Provided,* That nothing contained in this article shall be so construed as to authorize Congress to regulate or control the elective franchise within any State, or to abridge or restrict the power of any State to regulate or control the same within its own jurisdiction, except as in the third section hereof prescribed.' " Globe 2465.

Like Phelps, Niblack found it unnecessary to participate in the debates. He was not heard from again until the vote on the call for the previous question. As Garfield ascertained at the time, the only opportunity to amend H. R. 127 would arise if the demand was voted down. Niblack voted to sustain it. Globe 2545.

Debate in the House was substantially concluded by Bingham, the man primarily responsible for the language of § 1. Without equivocation, he stated:

> "The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.
>
> "The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people." Globe 2542.

Stevens then arose briefly in rebuttal. He attacked Bingham for saying in another portion of his speech that the disqualification provisions of § 3 were unenforceable. He did not contradict—or even refer to—Bingham's

interpretation of §§ 1 and 2. Globe 2544. The vote was taken and the resolution passed immediately thereafter. Globe 2545.

To say that Stevens did not contradict Bingham is to minimize the force of the record. Not once, during the three days of debate, did *any* supporter of the Amendment criticize or correct *any* of the Republicans or Democrats who observed that the Amendment left the ballot "exclusively under the control of the States." Globe 2542 (Bingham). This fact is tacitly admitted even by those who find the debates "inconclusive." The only contrary authority they can find in the debates is the pale remarks of the four Democrats already discussed.[54]

In the Senate, which did not have a gag rule, matters proceeded at a more leisurely pace. The introductory speech would normally have been given by Senator Fessenden of Maine, the Chairman of the Joint Committee on behalf of the Senate, but he was still weak with illness and unable to deliver a lengthy speech. The duty of presenting the views of the Joint Committee therefore devolved on Senator Howard of Michigan.[55]

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[54] Like my colleagues, *post*, at 264, I find it difficult to understand what Bingham meant when he said that "the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States." Globe 2542. However, I do not find this mysterious sentence to mean that the exercise of the elective franchise is exclusively under the control of the States and Congress, nor do I find it to dilute the force of his explicit statements quoted above that § 1 did not reach the right to vote. The general statements by Bingham and Stevens to the effect that the Amendment was designed to achieve equality before the law, or would be effectuated by legislation in part, likewise do not weaken the force of the statements specifically addressed to the suffrage question quoted above.

[55] Fessenden, however, was present in the Senate and participated in the discussion. See Globe 2763, 2769, 2770. He was therefore in a position to correct any gross misinterpretation of his views or of those of the Committee.

Howard minced no words. He stated that

> "the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [*sic*]." Globe 2766.

"The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." *Ibid.* Howard stated that while he personally would have preferred to see the freedmen enfranchised, the Committee was confronted with the necessity of proposing an amendment which could be ratified.

> "The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race." *Ibid.*

Howard's forthright attempt to prevent misunderstanding was completely successful insofar as the Senate was concerned; at least, no one has yet discovered a remark during the Senate debates on the proposed Fourteenth Amendment which indicates any contrary impres-

sion.[56] For some, however, time has muddied the clarity with which he spoke.[57]

The Senate, like the House, made frequent reference to the fact that the proposed amendment would not result in the enfranchisement of the freedmen. The sup-

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[56] My colleagues, *post*, at 264, point to Howard's reference to *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (No. 3230) (CCED Pa. 1825), in order to "gather some intimation of what probably will be the opinion of the judiciary" on the scope of the Privileges and Immunities Clause of § 1. Globe 2765. As the text indicates, Howard rejected Justice Washington's lengthy dictum insofar as it said that the protected privileges and immunities included "the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised." No other Senator quoted or referred to this portion of Washington's opinion during the debates over the proposed Fourteenth Amendment. *Corfield*, which held that New Jersey could constitutionally restrict access to her oyster beds to her own residents, was the leading authority on privileges and immunities in the mind of the 39th Congress, but it was not the only one. *Campbell* v. *Morris*, 3 H. & McH. 535 (Md. 1797) (Samuel Chase, J.), and *Abbot* v. *Bayley*, 6 Pick. 89 (Mass. 1827) (Parker, C. J.), were also cited. See Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 12–15 (1949). Both specifically stated that the privileges and immunities protected by Art. IV, § 2, did not include the right of suffrage or the right to hold office.

[57] Howard was a very clear-spoken man. When it was suggested, during the debates over the Fifteenth Amendment, that the freedmen were entitled to the ballot by virtue of the Privileges and Immunities Clause of the Fourteenth Amendment, he recalled his role in the framing of that Amendment and said: "I feel constrained to say here now that this is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth article. I think such a construction cannot be maintained." Cong. Globe, 40th Cong., 3d Sess., 1003 (1869). He then referred to the debates, § 2 of the Fourteenth Amendment, and the fact that "[n]obody ever supposed that the right of voting or of holding office was guarantied by that second section of the fourth article of the old Constitution" to bolster his construction of § 1 of the Fourteenth Amendment. *Ibid.*

porters who expressed their regret at the fact were Wade of Ohio,[58] Poland of Vermont,[59] Stewart of Nevada,[60] Howe of Wisconsin,[61] Henderson of Mis-

[58] "I think our friends, the colored people of the South, should not be excluded from the right of voting, and they shall not be if my vote and the votes of a sufficient number who agree with me in Congress shall be able to carry it. I do not agree in this particular with the Senator from Michigan [Mr. Howard]. He yields to the provision in the committee's resolution on the subject reluctantly, because he does not believe three fourths of the States can be got to ratify that proposition which is right and just in itself. My own opinion is that if you go down to the very foundation of justice, so far from weakening yourself with the people, you will strengthen yourself immensely by it; but I know that it is not the opinion of many here, and I suppose we must accommodate ourselves to the will of majorities, and if we cannot do all we would, do all we can. I propose for myself to contend for all I can get in the right direction, and finally to go with those who will give us anything that is beneficial." Globe 2769.

[59] "I should be much better satisfied if the right of suffrage had been given at once to the more intelligent of ["the colored people of the South"] and such as had served in our Army. . . . Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further." Globe 2963–2964.

[60] "It declares that all men are entitled to life, liberty, and property, and imposes upon the Government the duty of discharging these solemn obligations, but fails to adopt the easy and direct means for the attainment of the results proposed. It refuses the aid of four million people in maintaining the Government of the people. . . . [But] it furnishes a conclusive argument in favor of universal amnesty and impartial suffrage. . . . The utter impossibility of a final solution of the difficulties by the means proposed will cause the North to clamor for suffrage." Globe 2964.

[61] "I am sorry to have to put that clause [§ 2] into our Constitution, as I am sorry for the necessity which calls upon us to put the preceding clause into the Constitution. I wish there was no community and no State in the United States that was not

souri,[62] and Yates of Illinois.[63] The remarks of Senator Sherman of Ohio, whose support for the amendment was lukewarm, see Globe 2986, seem to have been based on the common interpretation.[64]

Doolittle of Wisconsin, whose support for the President resulted in his virtually being read out of the Republican Party, proposed to base representation on adult male voters. Globe 2942. In a discussion with Senator Grimes of Iowa, a member of the Joint Committee, about the desirability of this change, Doolittle defended himself by pointing out that: "Your amendment proposes to

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prepared to say with my friend from Nevada [Mr. Stewart] that all men may be represented in the Congress of the United States and shall be represented and shall choose their own representatives. That is the better doctrine; that is the true doctrine. I would much prefer, myself, to unite with the people of the United States in saying that hereafter no man shall be excluded from the right to vote, than to unite with them in saying that hereafter some men may be excluded from the right of representation." Globe App. 219.

[62] Henderson, who had offered a direct enfranchising provision as an alternative to the Committee's first effort in the field of representation, see Globe App. 115, stated that he now recognized that "the country is not yet prepared" to share political power with Negroes, and he supported the Committee plan. Globe 3035.

[63] "[A]lthough we do not obtain suffrage now, it is not far off, because the grasping desire of the South for office, that old desire to rule and reign over this Government and control its destinies, will at a very early day hasten the enfranchisement of the loyal blacks." Globe 3038.

[64] "There is no reason why the white citizens of South Carolina should vote the political power of a class of people whom they say are entirely unfit to vote for themselves. If there is any portion of the people of this country who are unfit to vote for themselves, their neighbors ought not to vote for them." Globe 2986.

There was no indication that Sherman considered South Carolina's disqualification on racial grounds any more improper than Massachusetts' limitations of the franchise to men, which he mentioned in the next breath.

allow the States to say who shall vote." Globe 2943. Grimes did not respond. Among the Democrats, no different view was expressed. Those whose remarks are informative are Hendricks of Indiana,[65] Cowan of Pennsylvania,[66] Davis of Kentucky,[67] and Johnson of Maryland.[68]

Senator Howard, who had opened debate, made the last remarks in favor of the Amendment. He said:

> "We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate

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[65] "If you think the negro ought to have the right of voting; if you are in favor of it, and intend it shall be given, why do you not in plain words confer it upon them? It is much fairer than to seek it by indirection, and the people will distinctly understand you when you propose such a change of the Constitution." Globe 2939.

[66] "What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania, and you say to her that she must either allow her negroes to vote or have one member of Congress less." Globe 2987.

[67] "[The second section's] true meaning was intended to be difficult to be reached, but when understood it is a measure which shrinks from the responsibility of openly forcing negro suffrage upon the late slave States, but attempts by a great penalty to coerce them to accept it." Globe App. 240.

[68] "It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Government of the United States will be impotent to redress." Globe 3027. Johnson was the only Democratic Senator on the Joint Committee.

it by any clause of the Constitution of the United States." Globe 3039.

Shortly thereafter the Amendment was approved. Globe 3041–3042.

In the House, there was a brief discussion of the Senate amendments and the measure generally, chiefly by the Democrats. Stevens then concluded the debate as he had begun it, expressing his regret that the Amendment would not enfranchise the freedmen.[69] The House accepted the Senate changes and sent the measure to the States. Globe 3149.

E. Collateral Evidence of Congressional Intent

It has been suggested that despite this evidence of congressional understanding, which seems to me overwhelming, the history is nonetheless inconclusive. Primary reliance is placed on debates over H. R. 51, the Joint Committee's first effort in the field of the basis of representation. In these debates, some of the more extreme Radicals, typified by Senator Sumner of Massachusetts, suggested that Congress had power to interfere with state voter qualifications at least to the extent of enfranchising the freedmen. This power was said to exist in a variety of constitutional provisions, including Art. I, § 2, Art. I, § 4, the war power, the power over territories, the guarantee of a republican form of government, and § 2 of the Thirteenth Amendment. Those who held this view expressed concern lest the Committee's proposal be read to authorize the States to discriminate on racial grounds and stated that they could not vote for the measure if such was the correct construction. They were sometimes comforted by sup-

[69] "With [the rebel States'] enlarged basis of representation, and exclusion of the loyal men of color from the ballot-box, I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition-precedent." Globe 3148.

porters of the committee proposal, who assured them that there would be no such effect. From these statements, and the fact that some of those who took the extreme view ultimately did vote for the proposed Fourteenth Amendment, it is sought to construct a counter-argument: if H. R. 51, properly interpreted, would not have precluded congressional exercise of power otherwise existing under the constitutional provisions referred to, then § 2 of the Fourteenth Amendment, properly interpreted, does not preclude the exercise of congressional power under §§ 1 and 5 of that Amendment.

This argument, however, is even logically fallacious, and quite understandably none of the opinions filed today place much reliance on it. I do not maintain that the framers of the Fourteenth Amendment took away with one hand what they had given with the other, but simply that the Amendment must be construed as a whole, and that for the reasons already given, *supra,* at 167–170, the inclusion of § 2 demonstrates that the framers never intended to confer the power which my Brethren seek to find in §§ 1 and 5. Bingham, for one, distinguished between these two positions. When it was suggested in the debates over H. R. 51 that the proviso would remove pre-existing congressional power over voting qualifications, Bingham made the response quoted by my colleagues. Globe 431–432; see *post,* at 276–277. When it was observed during the debates over the proposed Fourteenth Amendment that § 2 demonstrated that the Amendment did not reach state control over voting qualifications, Bingham was the one making the observation. Globe 2542, quoted *supra,* at 185. As Bingham seems to have recognized, the sort of argument he made in connection with H. R. 51 is beside the point with respect to the Fourteenth Amendment.

In any event, even disregarding its analytical difficulties, the argument is based on blatant factual shortcomings. All but one of the speakers on whose statements

primary reliance is placed stated, either during the debates on the Fourteenth Amendment or subsequently, that the Amendment did not enfranchise the freedmen.[70]

Finally, some of those determined to sustain the legislation now before us rely on speeches made between two and three years after Congress had sent the proposed Amendment to the States. Boutwell and Stevens in the House, and Sumner in the Senate, argued that the Fif-

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[70] Kelley: see Globe 2469, quoted at n. 32, *supra.*

Farnsworth: see Globe 2540, quoted at n. 36, *supra.*

Eliot: see Globe 2511, quoted at n. 34, *supra.*

Higby: see Globe 3978 (debate over readmission of Tennessee despite all-white electorate).

Bingham: see Globe 2542, quoted *supra,* at 185; see also Globe 3979 (debate over readmission of Tennessee).

Stevens: see Globe 2459–2460, quoted *supra,* at 175–177; Globe 3148, quoted at n. 69, *supra.*

Raymond: see Globe 2502, quoted at n. 39, *supra.*

Ashley: see Globe 2882.

Sumner: see n. 71, *infra.*

Fessenden: see H. R. Rep. No. 30, 39th Cong., 1st Sess., XIII–XIV (1866), quoted *infra,* at 197–198.

Yates: see Globe 3038, quoted at n. 63, *supra.*

Stewart: see Globe 2964, quoted at n. 60, *supra.*

Wade: see Globe 2769, quoted at n. 58, *supra.*

The exception is Senator Wilson of Massachusetts, who did not address himself to this issue. However, he participated in the debates, see Globe 2770, 2986–2987, and was therefore in a position to express disagreement with the interpretation uniformly offered in the Senate.

Secondary reliance is placed on Shellabarger, Cook, Boutwell, Julian, and Lawrence of Ohio. These Representatives, with the exception of Boutwell, see n. 33, *supra,* did not participate significantly in the debates over the Fourteenth Amendment. The substance of their earlier remarks is that Congress had some power, usually by way of the Guarantee Clause, see n. 6, *supra,* to oversee state voter qualifications. Shellabarger also relied on Art. I, § 4, see n. 46, *supra; infra,* at 210; Julian relied on the Thirteenth Amendment; and Boutwell looked to the Declaration of Independence. The relevance of these views to the scope of § 1 of the Fourteenth Amendment is not apparent.

teenth Amendment or enfranchising legislation was unnecessary because the Fourteenth Amendment prohibited racial discrimination in voter qualifications. Each had earlier expressed the opposite position.[71] Their subsequent attempts to achieve by assertion what they had not had the votes to achieve by constitutional processes can hardly be entitled to weight.

F. Ratification

State materials relating to the ratification process are not very revealing. For the most part only gubernatorial messages and committee reports have survived.[72] So far as my examination of these materials reveals, while the opponents of the Amendment were divided

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[71] Stevens: see Globe 2459–2460, quoted *supra,* at 175–177; Globe 3148, quoted at n. 69, *supra;* James 163 (campaign speech in fall of 1866).

Boutwell: see Globe 2508, quoted at n. 33, *supra;* Globe 3976 (debate over readmission of Tennessee).

Sumner did not actually participate in the debates on H. R. 127. However, after the caucus of Republican Senators had agreed on the form of the Amendment, Sumner gave notice that he intended to move to amend the bill accompanying the proposed Amendment. This bill, S. 292, provided that any Confederate State might be readmitted to representation in Congress once the proposed Amendment had become part of the Constitution and the particular State should have ratified it and modified its constitution and laws in conformity therewith. The bill is reprinted in H. R. Rep. No. 30, 39th Cong., 1st Sess., V–VI, and in Kendrick 117–119. Sumner's amendment would have provided that a State might be readmitted when it should have ratified the Fourteenth Amendment and modified its constitution and laws in conformity therewith "and shall have *further* provided that there shall be no denial of the elective franchise to citizens of the United States because of race or color, and that all persons shall be equal before the law." Globe 2869 (emphasis added).

Sumner also referred to Negro suffrage as unfinished business in speeches that fall. James 173, 178.

[72] For citations to the state materials, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 84–132 (1949).

and sometimes equivocal on whether it might be construed to require enfranchisement,[73] the supporters of the Amendment in the States approached the congressional proponents in the unanimity of their interpretation. I have discovered only one brief passage in support of the Amendment which appears to be based on the assumption that it would result in enfranchisement.[74] These remarks, in the message of the Governor of Illinois, had to compete in the minds of the legislators with the viewpoint of the Chicago Tribune. This Radical journal repeatedly criticized the Amendment's lack of an enfranchising provision, and at one time it even expressed the hope that the South would refuse to ratify the Amendment so that the North would turn to enfranchisement of the freedmen as the only means of reconstruction. June 25, 1866, quoted in James 177. In all the other States I have examined, where the materials are sufficiently full for the understanding of a supporter of the Amendment to appear, his under-

[73] Fear that the Amendment would reach voting was expressed in Brevier Legis. Rep. [Indiana] 45–46, 80, 88–89 (1867); Tenn. H. R. J. 38 (Extra Sess. 1866); Fla. S. J. 102 (1866); N. C. S. J. 96–97 (1866–1867); S. C. H. R. J. 34 (1866); and Tex. S. J. 422–423 (1866). The last four States rejected the proposed Amendment. Opponents of the Amendment stated or assumed that it would not reach voting qualifications in Ark. H. R. J. 288–289 (1866); Fla. S. J. 8–9 (1866); Report of the Joint Committee on Federal Relations, Md. H. R. Doc. MM, p. 15 (Mar. 18, 1867); Mass. H. R. Doc. No. 149, pp. 7–9, 16–17 (1867); and Wis. S. J. 102–103 (1867). Fla. H. R. J. 76–78 (1866); Ind. H. R. J. 102–103 (1867); and N. H. S. J. 71–72 (1866) are equivocal.

[74] "Are not all persons born or naturalized in the United States and subject to its jurisdiction, rightfully citizens of the United States and of each State, and justly entitled to all the political and civil rights citizenship confers? and should any State possess the power to divest them of these great rights except for treason or other infamous crime?" Ill. H. R. J. 40 (1867).

standing has been that enfranchisement would not result.[75]

The scanty official materials can be supplemented by other sources. There was a congressional election in the fall of the year the Fourteenth Amendment went to the States. The Radicals ran on the Amendment as their reconstruction program, attempting to force voters to choose between their plan and that of President Johnson. From the campaign speeches and from newspaper reactions, we can get some further idea of the understanding of the States.

The tone of the campaign was set by the formal report of the Joint Committee, which Fessenden openly stated he had composed as a partisan document. James 147. Indeed, it was not even submitted to Congress until the day the Senate approved the measure, and then only in manuscript form. Globe 3038. On the delicate issue of Negro suffrage, the report read as follows: [76]

> "Doubts were entertained whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or could act directly on the subject. It was doubtful, in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. As the best if not the only method of surmounting the difficulty, and as eminently just and proper in itself, your committee came to the conclusion that political power should be possessed in all the States exactly in proportion as the right of suffrage should be granted, without distinction of color or race.

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[75] Ind. H. R. J. 47–48 (1867); Kan. S. J. 45 (1867); Maine S. J. 23 (1867); Mass. H. R. Doc. No. 149, pp. 25–26 (1867); Nev. S. J. App. 9 (1867); Vt. S. J. 28 (1866); W. Va. S. J. 19 (1867); Wis. Assembly J. 33 (1867).

[76] H. R. Rep. No. 30, 39th Cong., 1st Sess., XIII–XIV (1866).

> This it was thought would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise. Such a provision would be in its nature gentle and persuasive, and would lead, it was hoped, at no distant day, to an equal participation of all, without distinction, in all the rights and privileges of citizenship, thus affording a full and adequate protection to all classes of citizens, since all would have, through the ballot-box, the power of self-protection.
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> "Holding these views, your committee prepared an amendment to the Constitution to carry out this idea, and submitted the same to Congress. Unfortunately, as we think, it did not receive the necessary constitutional support in the Senate, and therefore could not be proposed for adoption by the States. The principle involved in that amendment is, however, believed to be sound, and your committee have again proposed it in another form, hoping that it may receive the approbation of Congress."

Newspapers expressed the same view of the reach of the Amendment. Even while deliberations were underway, predictions that Congress would come up with a plan involving enfranchisement of the freedmen had gradually ceased. James 91. When the Amendment was released to the press, Andrew Johnson was reported as seeing in it a "practical abandonment of the negro suffrage issue." Cincinnati Daily Commercial, April 30, 1866, quoted in James 117. The New York Herald had reported editorially that the Amendment reflected an abandonment of the Radical push for Negro suffrage and acceptance of Johnson's position that control over suffrage rested exclusively with the States. May 1, 1866, reported in James 119. The Nation, a Radical organ,

attributed the absence of any provision on Negro suffrage to "sheer want of confidence in the public." 2 Nation 545 (May 1, 1866), quoted in James 120. The Chicago Tribune, another Radical organ, complained that § 1 was objectionable as "surplusage," May 5, 1866, quoted in James 123, and later in the same month criticized the measure for "postponing, and not settling" the matter of equal political rights for Negroes. May 31, 1866, quoted in James 146. As deliberations continued, the reporting went on in the same vein. The New York Times reported that with elections approaching, "No one now talks or dreams of forcing Negro suffrage upon the Southern States." June 6, 1866. The Cincinnati Daily Commercial and the Boston Daily Journal for June 7, 1866, commented on the Radicals' abandonment of Negro suffrage. James 145.

Much the same picture emerges from the campaign speeches. Although an occasional Democrat expressed the fear that the Amendment would or might result in political equality,[77] the supporters of the Amendment denied such effects without exception that I have discovered. Among the leading congressional figures who stated in campaign speeches that the Amendment did not prohibit racial voting qualifications were Senators Howe, Lane, Sherman, Sumner, and Trumbull, and Congressmen Bingham, Delano, Schenck, and Stevens. See James 159–168, 173, 178; Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5, 70–78 (1949).

As was pointed out above, all but a handful of Northern States prohibited blacks from voting at all,

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[77] I have found references to only two such speeches, one by Senator Hendricks and the other by one George M. Morgan, a candidate for Congress in Ohio. Cincinnati Daily Commercial, Aug. 9, 1866, p. 1, col. 4, quoted in Fairman, *supra,* n. 14, at 72; Cincinnati Daily Commercial, Aug. 23, 1866, p. 2, col. 3, quoted in Fairman, *supra,* at 75.

and opposition to a change was intense. Between 1865 and 1869 referenda on the issue rejected impartial Negro suffrage in Colorado Territory, Connecticut, Wisconsin, Minnesota (twice), the District of Columbia, Nebraska Territory, Kansas, Ohio, Michigan, Missouri, and New York. Only Iowa and Minnesota accepted it, and that on the day Grant was elected to the Presidency.[78] It is inconceivable that those States, in that climate, could have ratified the Amendment with the expectation that it would require them to permit their black citizens to vote.

Small wonder, then, that in early 1869 substantially the same group of men who three years earlier had proposed the Fourteenth Amendment felt it necessary to make further modifications in the Constitution if state suffrage laws were to be controlled even to the minimal degree of prohibiting qualifications which on their face discriminated on the basis of race. If the consequences for our federal system were not so serious, the contention that the history is "inconclusive" would be undeserving of attention. And, with all respect, the transparent failure of attempts to cast doubt on the original understanding is simply further evidence of the force of the historical record.

II

The history of the Fourteenth Amendment with respect to suffrage qualifications is remarkably free of the problems which bedevil most attempts to find a reliable guide to present decision in the pages of the past. Instead, there is virtually unanimous agreement, clearly and repeatedly expressed, that § 1 of the Amendment did not reach discriminatory voter qualifications. In this rather remarkable situation, the issue of the bearing of the historical understanding on constitutional interpretation squarely arises.

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[78] See Gillette, *supra*, n. 3, at 25–27.

I must confess to complete astonishment at the position of some of my Brethren that the history of the Fourteenth Amendment has become irrelevant. *Ante,* at 139–140. In the six years since I first set out much of this history,[79] I have seen no justification for such a result which appears to me at all adequate. With matters in this posture, I need do no more by way of justifying my reliance on these materials than sketch the familiar outlines of our constitutional system.

When the Constitution with its original Amendments came into being, the States delegated some of their sovereign powers to the Federal Government, surrendered other powers, and expressly retained all powers not delegated or surrendered. Amdt. X. The power to set state voting qualifications was neither surrendered nor delegated, except to the extent that the guarantee of a republican form of government[80] may be thought to require a certain minimum distribution of political power. The power to set qualifications for voters for national office, created by the Constitution, was expressly committed to the States by Art. I, § 2, and Art. II, § 1.[81] By Art. V, States may be deprived of their retained powers only with the concurrence of two-thirds of each House of Congress and three-fourths of the States. No one asserts that the power to set voting qualifications was taken from the States or subjected to federal control by any Amendment before the Fourteenth. The historical evidence makes it plain that the Congress and the States proposing and ratifying that Amendment affirmatively understood that they were not limiting state power over voting qualifications. The

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[79] *Reynolds* v. *Sims,* 377 U. S. 533, 589 (1964) (dissenting opinion).

[80] Art. IV, § 4. See n. 6, *supra,* for the text.

[81] The contention that Congress has power to override state judgments as to qualifications for voting in federal elections is discussed *infra,* at 209–212.

existence of the power therefore survived the amending process, and, except as it has been limited by the Fifteenth, Nineteenth, and Twenty-fourth Amendments, it still exists today.[82] Indeed, the very fact that constitutional amendments were deemed necessary to bring about federal abolition of state restrictions on voting by reason of race (Amdt. XV), sex (Amdt. XIX), and, even with respect to federal elections, the failure to pay state poll taxes (Amdt. XXIV), is itself forceful evidence of the common understanding in 1869, 1919, and 1962, respectively, that the Fourteenth Amendment did not empower Congress to legislate in these respects.

It must be recognized, of course, that the amending process is not the only way in which constitutional understanding alters with time. The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change the Constitution in a sense changes as well. But when the Court gives the language of the Constitution an

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[82] Amdt. XV: "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Amdt. XIX: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

Amdt. XXIV: "Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers.[83] This is necessarily so; the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.[84]

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[83] See, *e. g., Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 670 (1966): "Our conclusion, like that in *Reynolds* v. *Sims,* [377 U. S. 533 (1964),] is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires."

[84] Most of the cases in which this Court has used the Equal Protection Clause to strike down state voter qualifications have been decided since 1965. Eight such cases have been decided by opinion. *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Louisiana* v. *United States,* 380 U. S. 145 (1965); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966); *Kramer* v. *Union School District,* 395 U. S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); *Evans* v. *Cornman,* 398 U. S. 419 (1970); *Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970). Other cases have been summarily disposed of. In none of these cases did the Court advert to the argument based on the historical understanding.

Before 1965, although this Court had occasionally entertained on the merits challenges to state voter qualifications under the Equal Protection Clause, only two cases had sustained the challenges. *Nixon* v. *Herndon,* 273 U. S. 536 (1927), held that a Texas statute limiting participation in the Democratic Party primary to whites violated the Fourteenth Amendment. *Nixon* v. *Condon,* 286 U. S. 73 (1932), held that Texas did not avoid the reach of the *Herndon*

As the Court is not justified in substituting its own views of wise policy for the commands of the Constitution, still less is it justified in allowing Congress to disregard those commands as the Court understands them. Although Congress' expression of the view that it does have power to alter state suffrage qualifications is entitled to the most respectful consideration by the judiciary, coming as it does from a coordinate branch of government,[85] this cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers. The reason for this goes beyond Marshall's assertion that: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).[86] It inheres in the structure of the

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decision by transferring to the party's executive committee the power to set qualifications for participation in the primary. In neither of the *Nixon* cases was the history of the Fourteenth Amendment suggested to the Court. Both cases were argued on the assumption that racial prohibitions on voting in state general elections would violate the Fourteenth as well as the Fifteenth Amendment. This potential line of decisions proved abortive when *United States* v. *Classic*, 313 U. S. 299 (1941), laid the groundwork for holding that participation in party primaries was included within the "right . . . to vote" protected by the Fifteenth Amendment. See *Reynolds* v. *Sims*, 377 U. S. 533, 614 n. 72 (1964) (dissenting opinion). The *Nixon* opinions were not relied on by the Court in the subsequent white-primary cases, *Smith* v. *Allwright*, 321 U. S. 649 (1944), and *Terry* v. *Adams*, 345 U. S. 461 (1953), and they were not even referred to in the recent cases on voter qualifications cited above.

[85] In this particular instance the other two branches of the Government have in fact expressed conflicting views as to the validity of Title III of the Act, the voting-age provision. See H. R. Doc. No. 91–326 (1970).

[86] In fact, however, I do not understand how the doctrine of deference to rational constitutional interpretation by Congress, espoused by the majority in *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), is consistent with this statement of Chief Justice Marshall or

constitutional system itself. Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure. Nor is that structure adequately protected by a requirement that the judiciary be able to perceive a basis for the congressional interpretation, the only restriction laid down in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966).

It is suggested that the proper basis for the doctrine enunciated in *Morgan* lies in the relative factfinding competence of Court, Congress, and state legislatures. *Post,* at 246–249. In this view, as I understand it, since Congress is at least as well qualified as a state legislature to determine factual issues, and far better qualified than this Court, where a dispute is basically factual in nature the congressional finding of fact should control, subject only to review by this Court for reasonableness.

In the first place, this argument has little or no force as applied to the issue whether the Fourteenth Amendment covers voter qualifications. Indeed, I do not understand the adherents of *Morgan* to maintain the con-

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with our reaffirmation of it in *Cooper* v. *Aaron,* 358 U. S. 1, 18 (1958):

"[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

trary. But even on the assumption that the Fourteenth Amendment does place a limit on the sorts of voter qualifications which a State may adopt, I still do not see any real force in the reasoning.

When my Brothers refer to "complex factual questions," *post,* at 248, they call to mind disputes about primary, objective facts dealing with such issues as the number of persons between the ages of 18 and 21, the extent of their education, and so forth. The briefs of the four States in these cases take no issue with respect to any of the facts of this nature presented to Congress and relied on by my Brothers DOUGLAS, *ante,* at 141–143, and BRENNAN, WHITE, and MARSHALL, *post,* at 243–246, 279–280. Except for one or two matters of dubious relevance, these facts are not subject to rational dispute. The disagreement in these cases revolves around the evaluation of this largely uncontested factual material.[87] On the assumption that maturity and experience are relevant to intelligent and responsible exercise of the elective franchise, are the immaturity and inexperience of the average 18-, 19-, or 20-year-old sufficiently serious to justify denying such a person a direct voice in decisions affecting his or her life? Whether or not this judgment is characterized as "factual," it calls for striking a balance between incommensurate interests. Where the balance is to be struck depends ultimately on the values and the perspective of the decisionmaker. It is a matter as to which men of good will can and do reasonably differ.

I fully agree that judgments of the sort involved here are beyond the institutional competence and constitu-

[87] Contrast *Metropolitan Cas. Ins. Co.* v. *Brownell,* 294 U. S. 580 (1935), relied on by my colleagues. In that case the crucial factual issue, on which the record was silent, was whether casualty insurance companies not incorporated in Indiana "generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." 294 U. S., at 585.

tional authority of the judiciary. See, *e. g., Baker* v. *Carr,* 369 U. S. 186, 266–330 (1962) (Frankfurter, J., dissenting); *Kramer* v. *Union School District,* 395 U. S. 621, 634–641 (1969) (STEWART, J., dissenting). They are pre-eminently matters for legislative discretion, with judicial review, if it exists at all, narrowly limited. But the same reasons which in my view would require the judiciary to sustain a reasonable state resolution of the issue also require Congress to abstain from entering the picture.

Judicial deference is based, not on relative factfinding competence, but on due regard for the decision of the body constitutionally appointed to decide. Establishment of voting qualifications is a matter for state legislatures. Assuming any authority at all, only when the Court can say with some confidence that the legislature has demonstrably erred in adjusting the competing interests is it justified in striking down the legislative judgment. This order of things is more efficient and more congenial to our system and, in my judgment, much more likely to achieve satisfactory results than one in which the Court has a free hand to replace state legislative judgments with its own. See *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963).

The same considerations apply, and with almost equal force, to Congress' displacement of state decisions with its own ideas of wise policy. The sole distinction between Congress and the Court in this regard is that Congress, being an elective body, presumptively has popular authority for the value judgment it makes. But since the state legislature has a like authority, this distinction between Congress and the judiciary falls short of justifying a congressional veto on the state judgment. The perspectives and values of national legislators on the issue of voting qualifications are likely to differ from those of state legislators, but I see no reason

a priori to prefer those of the national figures, whose collective decision, applying nationwide, is necessarily less able to take account of peculiar local conditions. Whether one agrees with this judgment or not, it is the one expressed by the Framers in leaving voter qualifications to the States. The Supremacy Clause does not, as my colleagues seem to argue, represent a judgment that federal decisions are superior to those of the States whenever the two may differ.

To be sure, my colleagues do not expressly say that Congress or this Court is empowered by the Constitution to substitute its own judgment for those of the States. However, before sustaining a state judgment they require a "clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." [88] *Post,* at 238; see *post,* at 247 n. 30. I should think that if the state interest were truly "compelling" and "substantial," and a clear showing could be made that the voter qualification was "necessary" to its preservation, no reasonable person would think the qualification undesirable. Equivalently, if my colleagues or a majority of Congress deem a given voting qualification undesirable as a matter of policy, they must consider that the state interests involved are not "compelling" or "substantial" or that they can be adequately protected in other ways. It follows that my colleagues must be prepared to hold invalid as a matter

[88] It might well be asked why this standard is not equally applicable to the congressional expansion of the franchise before us. Lowering of voter qualifications dilutes the voting power of those who could meet the higher standard, and it has been held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964) (footnote omitted). Interference with state control over qualifications for voting in presidential elections in order to encourage interstate migration appears particularly vulnerable to analysis in terms of compelling federal interests.

of federal constitutional law all state voting qualifications which they deem unwise, as well as all such qualifications which Congress reasonably deems unwise. For this reason, I find their argument subject to the same objection as if it explicitly acknowledged such a conclusion.

It seems to me that the notion of deference to congressional interpretation of the Constitution, which the Court promulgated in *Morgan,* is directly related to this higher standard of constitutionality which the Court intimated in *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966), and brought to fruition in *Kramer.* When the scope of federal review of state determinations became so broad as to be judicially unmanageable, it was natural for the Court to seek assistance from the national legislature. If the federal role were restricted to its traditional and appropriate scope, review for the sort of "plain error" which is variously described as "arbitrary and capricious," "irrational," or "invidious," there would be no call for the Court to defer to a congressional judgment on this score that it did not find convincing. Whether a state judgment has so exceeded the bounds of reason as to authorize federal intervention is not a matter as to which the political process is intrinsically likely to produce a sounder or more acceptable result. It is a matter of the delicate adjustment of the federal system. In this area, to rely on Congress would make that body a judge in its own cause. The role of final arbiter belongs to this Court.

III

Since I cannot agree that the Fourteenth Amendment empowered Congress, or the federal judiciary, to control voter qualifications, I turn to other asserted sources of congressional power. My Brother BLACK would find that such power exists with respect to *federal* elections by

virtue of Art. I, § 4, and seemingly other considerations that he finds implicit in federal authority.

The constitutional provisions controlling the regulation of congressional elections are the following:

> Art. I, § 2: "the Electors [for Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."
>
> Art. I, § 4: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."
>
> Amdt. XVII: "The electors [for Senators] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress. The reason for the scheme is not hard to find. In the Constitutional Convention, Madison expressed the view that: "The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." 2 M. Farrand, Records of the Federal Convention of 1787, pp. 249–250 (1911). He explained further in The Federalist No. 52, p. 326 (C. Rossiter ed. 1961):

> "To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the

> States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution."

See also Federalist No. 60, p. 371 (C. Rossiter ed. 1961) (Hamilton), quoted in the opinion of MR. JUSTICE STEWART, *post*, at 290, which is to the same effect.

As to presidential elections, the Constitution provides:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." Art. II, § 1, cl. 2.
>
> "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Art. II, § 1, cl. 4.

Even the power to control the "Manner" of holding elections, given with respect to congressional elections by Art. I, § 4, is absent with respect to the selection of presidential electors.[89] And, of course, the fact that it was deemed necessary to provide separately for con-

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[89] Although MR. JUSTICE BLACK rests his decision in part on the assumption that the selection of presidential electors is a "federal" election, the Court held in *In re Green*, 134 U. S. 377, 379 (1890), and repeated in *Ray* v. *Blair*, 343 U. S. 214, 224–225 (1952), that presidential electors act by authority of the States and are not federal officials.

gressional power to regulate the time of choosing presidential electors and the President himself demonstrates that the power over "Times, Places and Manner" given by Art. I, § 4, does not refer to presidential elections, but only to the elections for Congressmen. Any shadow of a justification for congressional power with respect to congressional elections therefore disappears utterly in presidential elections.

IV

With these major contentions resolved, it is convenient to consider the three sections of the Act individually to determine whether they can be supported by any other basis of congressional power.

A. Voting Age

The only constitutional basis advanced in support of the lowering of the voting age is the power to enforce the Equal Protection Clause, a power found in § 5 of the Fourteenth Amendment. For the reasons already given, it cannot be said that the statutory provision is valid as declaratory of the meaning of that clause. Its validity therefore must rest on congressional power to lower the voting age as a means of preventing invidious discrimination that is within the purview of that clause.

The history of the Fourteenth Amendment may well foreclose the possibility that § 5 empowers Congress to enfranchise a class of citizens so that they may protect themselves against discrimination forbidden by the first section, but it is unnecessary for me to explore that question. For I think it fair to say that the suggestion that members of the age group between 18 and 21 are threatened with unconstitutional discrimination, or that any hypothetical discrimination is likely to be affected by lowering the voting age, is little short of fanciful. I see no justification for stretching to find any such possibility

when all the evidence indicates that Congress—led on by recent decisions of this Court—thought simply that 18-year-olds were fairly entitled to the vote and that Congress could give it to them by legislation.[90]

I therefore conclude, for these and other reasons given in this opinion, that in § 302 of the Voting Rights Act Amendments of 1970 Congress exceeded its delegated powers.

B. Residency

For reasons already stated, neither the power to regulate voting qualifications in presidential elections, asserted by my Brother BLACK, nor the power to declare the meaning of § 1 of the Fourteenth Amendment, relied on by my Brother DOUGLAS, can support § 202 of the Act. It would also be frivolous to contend that requiring States to allow new arrivals to vote in presidential elections is an appropriate means of preventing local discrimination against them in other respects, or of forestalling violations of the Fifteenth Amendment. The remaining grounds relied on are the Privileges and Immunities Clause of Art. IV, § 2,[91] and the right to travel across state lines.

While the right of qualified electors to cast their ballots and to have their votes counted was held to be a privilege of citizenship in *Ex parte Yarbrough,* 110 U. S. 651 (1884), and *United States* v. *Classic,* 313 U. S. 299 (1941), these decisions were careful to observe that it

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[90] At the time these suits were filed only two of the 50 States, Georgia and Kentucky, allowed 18-year-olds to vote, and only two other States, Hawaii and Alaska, set the voting age below 21. In subsequent referenda, voters in 10 States declined to lower the voting age; five States lowered the voting age to 19 or 20; and Alaska lowered the age from 19 to 18. See the Washington Post, Nov. 5, 1970, p. A13, col. 5.

[91] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

remained with the States to determine the class of qualified voters. It was federal law, acting on this state-defined class, which turned the right to vote into a privilege of national citizenship. As the Court has consistently held, the Privileges and Immunities Clauses do not react on the mere status of citizenship to enfranchise any citizen whom an otherwise valid state law does not allow to vote. *Minor* v. *Happersett,* 21 Wall. 162, 170–175 (1875); *Pope* v. *Williams,* 193 U. S. 621, 632 (1904); *Breedlove* v. *Suttles,* 302 U. S. 277, 283 (1937); cf. *Snowden* v. *Hughes,* 321 U. S. 1, 6–7 (1944). Minors, felons, insane persons, and persons who have not satisfied residency requirements are among those citizens who are not allowed to vote in most States.[92] The Privileges and Immunities Clause of Art. IV of the Constitution is a direct descendant of Art. IV of the Articles of Confederation:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States . . . ."

It is inconceivable that these words when used in the Articles could have been understood to abolish state durational residency requirements.[93] There is not a

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[92] At the time the Constitution was adopted, additional restrictions based on payment of taxes and ownership of property, as well as creed and sex, were imposed, making the proposition even clearer.

[93] See Art. II: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

vestige of evidence that any further extent was envisioned for them when they were carried over into the Constitution. And, as I have shown, when they were substantially repeated in § 1 of the Fourteenth Amendment it was affirmatively understood that they did not include the right to vote. The Privileges and Immunities Clause is therefore unavailing to sustain any portion of § 202.

The right to travel across state lines, see *United States* v. *Guest,* 383 U. S. 745, 757–758 (1966), and *Shapiro* v. *Thompson,* 394 U. S. 618, 630 (1969), is likewise insufficient to require Idaho to conform its laws to the requirements of § 202. MR. JUSTICE STEWART justifies § 202 solely on the power under § 5 of the Fourteenth Amendment to enforce the Privileges and Immunities Clause of § 1 which he deems the basis for the right to travel. *Post,* at 285–287. I find it impossible to square the position that § 5 authorizes Congress to abolish state voting qualifications based on residency with the position that it does not authorize Congress to abolish such qualifications based on race. Since the historical record compels me to accept the latter position, I must reject the former.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL do not anchor the right of interstate travel to any specific constitutional provision. *Post,* at 237–238. Past decisions to which they refer have relied on the two Privileges and Immunities Clauses, just discussed, the Due Process Clause of the Fifth Amendment, and the Commerce Clause. See *Shapiro* v. *Thompson,* 394 U. S., at 630 n. 8; *id.,* at 663–671 (dissenting opinion). The Fifth Amendment is wholly inapplicable to state laws; and surely the Commerce Clause cannot be seriously relied on to sustain the Act here challenged. With no specific clause of the Constitution

empowering Congress to enact § 202, I fail to see how that nebulous judicial construct, the right to travel, can do so.

C. Literacy

The remaining provision of the Voting Rights Act Amendments involved in these cases is the five-year suspension of Arizona's requirement that registrants be able to read the Constitution in English and to write their names. Although the issue is not free from difficulty, I am of the opinion that this provision can be sustained as a valid means of enforcing the *Fifteenth* Amendment.

Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious.[94] This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

Whether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make.[95] The fact that the suspension is only for five years will require Congress to re-evaluate at the close of that period. While a less sweeping approach

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[94] The legislative history of the Voting Rights Act Amendments contains sufficient evidence to this effect, if any be needed.

[95] Cf. § 4 of the Voting Rights Act of 1965, 79 Stat. 438, which suspended literacy tests only in areas falling within a coverage formula and allowed reinstatement of the tests upon judicial determination that during the preceding five years no tests had been used with discriminatory purpose or effect. 42 U. S. C. § 1973b (a) (1964 ed., Supp. V), amended by Pub. L. No. 91–285 § 3, 84 Stat. 315.

in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable.[96] I therefore agree that § 201 of the Act is a valid exercise of congressional power to the extent it is involved in this case. I express no view about its validity as applied to suspend tests such as educational qualifications, which do not lend themselves so readily to discriminatory application or effect.

For the reasons expressed in this opinion, I would grant the relief requested in Nos. 43, Orig., and 44, Orig. I would dismiss the complaint in No. 47, Orig., for failure to state a claim on which relief can be granted. In No. 46, Orig., I would grant declaratory relief with respect to the validity of § 201 of the Voting Rights Act Amendments as applied to Arizona's current literacy test; I would deny relief in all other respects, with leave to reapply to the United States District Court for the District of Arizona for injunctive relief in the event it proves necessary, which I am confident it will not.

V

In conclusion I add the following. The consideration that has troubled me most in deciding that the 18-year-old and residency provisions of this legislation should be held unconstitutional is whether I ought to regard the doctrine of *stare decisis* as preventing me from arriving at that result. For as I indicated at the outset of this opinion, were I to continue to consider myself constricted by recent past decisions holding that the Equal Protection Clause of the Fourteenth Amendment reaches

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[96] I assume that reasonableness is the applicable standard, notwithstanding the fact that the instant legislation is challenged on the ground that it improperly dilutes the votes of literate Arizona citizens. But see *Kramer* v. *Union School District*, 395 U. S. 621 (1969); n. 88, *supra*.

state electoral processes, I would, particularly perforce of the decisions cited in n. 84, *supra,* be led to cast my vote with those of my Brethren who are of the opinion that the lowering of the voting age and the abolition of state residency requirements in presidential elections are within the ordinary legislative power of Congress.

After much reflection I have reached the conclusion that I ought not to allow *stare decisis* to stand in the way of casting my vote in accordance with what I am deeply convinced the Constitution demands. In the annals of this Court few developments in the march of events have so imperatively called upon us to take a fresh hard look at past decisions, which could well be mustered in support of such developments, as do the legislative lowering of the voting age and, albeit to a lesser extent, the elimination of state residential requirements in presidential elections. Concluding, as I have, that such decisions cannot withstand constitutional scrutiny, I think it my duty to depart from them, rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis.*

In taking this position, I feel fortified by the evident *malaise* among the members of the Court with those decisions. Despite them, a majority of the Court holds that this congressional attempt to lower the voting age by simple legislation is unconstitutional, insofar as it relates to state elections. Despite them, four members of the Court take the same view of this legislation with respect to federal elections as well; and the fifth member of the Court who considers the legislation constitutionally infirm as regards state elections relies not at all on any of those decisions in reaching the opposite conclusion in federal elections. And of the eight members of the Court who vote to uphold the residential provision of the stat-

ute, only four appear to rely upon any of those decisions in reaching that result.

In these circumstances I am satisfied that I am free to decide these cases unshackled by a line of decisions which I have felt from the start entailed a basic departure from sound constitutional principle.

APPENDIX TO OPINION OF HARLAN, J.

VOTING RIGHTS ACT AMENDMENTS OF 1970, PUB. L. 91-285, 84 STAT. 314

TITLE II—SUPPLEMENTAL PROVISIONS

APPLICATION OF PROHIBITION TO OTHER STATES

SEC. 201. (a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4 (a) of this Act are not in effect by reason of determinations made under section 4 (b) of this Act.

(b) As used in this section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

RESIDENCE REQUIREMENTS FOR VOTING

SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient

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opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency

requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice

President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

SEPARABILITY

SEC. 205. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

DECLARATION AND FINDINGS

SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a

citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

PROHIBITION

SEC. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

EFFECTIVE DATE

SEC. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971.

ARIZONA CONSTITUTION

Art. 7, § 2. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question

which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex.

ARIZONA REVISED STATUTES ANNOTATED

§ 16–101. Qualifications of elector

A. Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

1. Is a citizen of the United States.

2. Will be twenty-one years or more of age prior to the regular general election next following his registration.

3. Will have been a resident of the state one year and of the county in which he claims the right to vote thirty days next preceding the election.

4. Is able to read the constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting from memory, unless prevented from so doing by physical disability.

5. Is able to write his name, unless prevented from so doing by physical disability.

B. At an election held between the date of registration and the next regular general election, the elector is eligible to vote if at the date of the intervening election he is twenty-one years of age and has been a resident of the state one year and the county thirty days.

C. A person convicted of treason or a felony, unless restored to civil rights, or an idiot, insane person or person under guardianship is not qualified to register. As amended, Laws 1970, c. 151, § 1.

§ 16–107. Closing of registrations

A. No elector shall be registered to vote between five o'clock p. m. of the day which is two months preceding the date of the next primary election and seven o'clock p. m. of the day of the primary election.

B. No elector shall be registered to vote between five o'clock p. m. of the eighth Monday preceding a general election and seven o'clock p. m. of the day thereof. As amended, Laws 1958, c. 48, § 1; Laws 1970, c. 151, § 5.

IDAHO CONSTITUTION

Art. 6, § 2. Qualifications of electors.—Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; provided however, that every citizen of the United States, twenty-one years old, who has actually resided in this state for sixty days next preceding the day of election, if registered as required by law, is a qualified elector for the sole purpose of voting for presidential electors; and until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

IDAHO CODE

Sec. 34–401. Qualifications of voters.—Every person over the age of twenty-one (21) years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six (6) months immediately preceding the election at which he offers to vote,

and in the county thirty (30) days: provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six (6) months, and in the precinct ninety (90) days, where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex.

34–408. Eligibility of new residents to vote.—Each citizen of the United States who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for sixty (60) days next preceding the day of election but for less than the six (6) month period of required residence for voting prior to a presidential election, is entitled to vote for presidential and vice-presidential electors at that election, but for no other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state, except the requirement of residence and registration, and

(2) he complies with the provisions of this act.

34–409. Application for presidential ballot by new residents.—A person desiring to qualify under this act in order to vote for presidential and vice-presidential electors shall be considered as registered within the meaning of this act if on or before ten (10) days prior to the date of the general election, he shall make an application in the form of an affidavit executed in duplicate in the presence of the county auditor, substantially as follows . . . .

34–413. Voting by new residents.—(1) The applicant, upon receiving the ballot for presidential and vice-presidential electors shall mark forthwith the ballot in the

presence of the county auditor, but in a manner that the official cannot know how the ballot is marked. He shall then fold the ballot in the county auditor's presence so as to conceal the markings, and deposit and seal it in an envelope furnished by the county auditor.

34–1101. Absent voting authorized.—Any qualified elector of the state of Idaho who is absent or expects to be absent from the election precinct in which he resides on the day of holding any election under any of the laws of this state in which an official ballot is required, or who is within the election precinct and is, or will be, unable, because of physical disability, or because of blindness, to go to the voting place, and if registration is required for such election, who is duly registered therefor, may vote at any such election, as hereinafter provided.

34–1105. Return of ballot.—On marking such ballot or ballots such absent or disabled or blind elector shall refold same as theretofore folded and shall inclose the same in said official envelope and seal said envelope securely and mail by registered or certified mail or deliver it in person to the officer who issued same; provided, that an absentee ballot must be received by the issuing officer by 12:00 o'clock noon on the day of the election before such ballot may be counted. Said ballot or ballots shall be so marked, folded and sealed by said voter in private and secretly. Provided, that whenever the disability or blindness makes it necessary that the voter shall be assisted in marking his ballot, such voter may have the assistance of any person of his choice in marking his ballot.

OREGON CONSTITUTION

Art. II, § 2. Qualifications of electors. (1) Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

(a) Is 21 years of age or older . . . .

TEXAS CONSTITUTION

Art. 6, § 1. Classes of persons not allowed to vote

Section 1. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

§ 2. Qualified elector; registration; absentee voting

Sec. 2. Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, however, that before offering to vote at an election a voter shall have registered annually, but such requirement for registration shall not be considered a qualification of an elector within the meaning of the term "qualified elector" as used in any other Article of this Constitution in respect to any matter except qualification and eligibility to vote at an election. Any legislation enacted in anticipation of the adoption of this Amendment shall not be invalid because of its anticipatory nature. The Legislature may authorize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation.

TEXAS ELECTION CODE

Article 5.01. Classes of persons not qualified to vote

The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.
2. Idiots and lunatics.

3. All paupers supported by the county.

4. All persons convicted of any felony except those restored to full citizenshp and right of suffrage or pardoned.

Art. 5.02. Qualification and requirements for voting

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, and who shall have registered as a voter, shall be deemed a qualified elector. No person shall be permitted to vote unless he has registered in accordance with the provisions of this code. The provisions of this section, as modified by Sections 35 and 39 of this code, shall apply to all elections, including general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL dissent from the judgments insofar as they declare § 302 unconstitutional as applied to state and local elections, and concur in the judgments in all other respects, for the following reasons.

These cases draw into question the power and judgment of Congress in enacting Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 314. The State of Arizona challenges the power of Congress to impose a nationwide ban, until August 6, 1975, on the use of literacy and certain other tests to limit the franchise in any election. The State of Idaho takes issue with the asserted congressional power to find that the imposition of a durational residence requirement to deny the right to vote in elections for President and Vice President imposes a burden upon the right of free inter-

state migration that is not necessary to further a compelling state interest.[1] Finally, the States of Oregon, Texas, Arizona, and Idaho would have us strike down as unreasonable and beyond congressional power the findings, embodied in § 301 (a) of the Amendments, that denying the vote to otherwise qualified persons 18 to 21 years of age, while granting it to those 21 years of age and older, violates the Equal Protection Clause and is, in any event, not reasonably related to any compelling state interest.[2] In Nos. 43, Orig., and 44, Orig., Oregon and Texas have invoked our original jurisdiction under Art. III, § 2, of the Constitution to restrain the Attorney General of the United States, a citizen of New York, from enforcing the 18-year-old voting provisions of the Amend-

[1] Section 202 (a) of the Amendments embodies a congressional finding that

"the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

. . . . . .

"(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

. . . . . .

"(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections."

[2] Section 301 (a) of the Amendments provides:

"The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest."

ments. *South Carolina* v. *Katzenbach,* 383 U. S. 301, 307 (1966). In Nos. 46, Orig., and 47, Orig., the United States seeks orders enjoining Arizona from enforcing age and literacy limitations on the franchise,[3] and enjoining Idaho from enforcing age, residence, and absentee voting limitations,[4] insofar as those limitations are inconsistent with the 1970 Amendments. Original jurisdiction, again, is founded upon Art. III, § 2, of the Constitution. See *United States* v. *California,* 332 U. S 19, 22 (1947). Since, in our view, congressional power to enact the challenged Amendments is found in the enforcement clauses of the Fourteenth and Fifteenth Amendments, and since we may easily perceive a rational basis for the congressional judgments underlying each of them, we would deny relief in Nos. 43, Orig., and 44, Orig., and issue the requested orders in Nos. 46, Orig., and 47, Orig.

I

The Voting Rights Act of 1965, 79 Stat. 438, 42 U. S. C. § 1973 *et seq.* (1964 ed., Supp. V), proscribed the use of any "test or device," [5] including literacy tests, in States

[3] Arizona Constitution, Art. 7, § 2, limits the franchise to those 21 years of age and older. Ariz. Rev. Stat. Ann. § 16–101 (Supp. 1970) requires voters to be able to read the Federal Constitution (in English), and to write their names.

[4] Idaho Constitution, Art. 6, § 2, requires all voters to be 21 years of age or older, and requires 60 days' residence within the State as a precondition to voting in presidential elections. Idaho Code § 34–408 (1963) further requires that 60-day residents have been citizens of another State prior to their removal to Idaho. Provisions for absentee balloting are contained in *id.,* §§ 34–1101 to 34–1125.

[5] Section 4 (c) of the 1965 Act, 42 U. S. C. § 1973b (c) (1964 ed., Supp. V), defines a "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

or their political subdivisions that fell within a coverage formula set forth in § 4 (b) of the 1965 Act. 42 U. S. C. §§ 1973b (a), (b) (1964 ed., Supp. V). Although we had previously concluded that literacy tests, fairly administered, violate neither the Fourteenth nor the Fifteenth Amendment, *Lassiter* v. *Northampton Election Board,* 360 U. S. 45 (1959), we nevertheless upheld their selective proscription by Congress. *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). Canvassing the "voluminous" legislative history of the 1965 Act, we found ample basis for a legislative conclusion that such a proscription was necessary to combat the "insidious and pervasive evil" of racial discrimination with regard to voting. *Id.,* at 308–315. Accordingly, we held the proscription to be well within the power of Congress granted by § 2 of the Fifteenth Amendment. *Id.,* at 327–334. Three years later, in *Gaston County* v. *United States,* 395 U. S. 285 (1969), we sustained application of the ban on literacy tests to a county where there was no evidence that the test itself was discriminatory or that—at least since 1962 [6]—it had been administered in a discriminatory manner. Notwithstanding this fact, we noted that the record did contain substantial evidence that in years past, "Gaston County [had] systematically deprived its black citizens of the educational opportunities it granted to its white citizens." *Id.,* at 297. Since this "in turn deprived them of an equal chance to pass the literacy test," *id.,* at 291, even impartial administration of an impartial test would inevitably result in just the discrimination that Congress

[6] *Gaston County* was a suit by the county under § 4 (a) of the 1965 Act, 42 U. S. C. § 1973b (a) (1964 ed., Supp. V), to reinstate the county's literacy test. The county would have been entitled to do so upon demonstration that, for the preceding five years, no "test or device" had been there used for the purpose or with the effect of abridging the right to vote on account of race or color.

and the Fifteenth Amendment had sought to proscribe. *Id.*, at 296–297; see *South Carolina* v. *Katzenbach*, 383 U. S., at 308, 333–334.

No challenge is made in the present cases either to the 1965 Act or to the five-year extension of its ban on "tests or devices" embodied in Title I of the 1970 Amendments. Arizona does, however, challenge § 201 of the Amendments, which extends (until August 6, 1975) the 1965 Act's selective ban on the use of "tests or devices" to all States and political subdivisions in which it is not already in force by virtue of the 1965 Act. In substance, Arizona argues that it is and has been providing education of equal quality for all its citizens; that its literacy test is both fair and fairly administered; and that there is no evidence in the legislative record upon which Congress could have relied to reach a contrary conclusion. It urges that to the extent that any citizens of Arizona have been denied the right to vote because of illiteracy resulting from discriminatory governmental practices, the unlawful discrimination has been by governments other than the State of Arizona or its political subdivisions. Arizona, it suggests, should not have its laws overridden to cure discrimination on the part of governmental bodies elsewhere in the country.

We need not question Arizona's assertions as to the nondiscriminatory character, past and present, of its educational system. Congressional power to remedy the evils resulting from state-sponsored racial discrimination does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred. "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S.

511, 523 (1935); see *Edwards* v. *California,* 314 U. S. 160, 173–176 (1941). In upholding the suspension of literacy tests as applied to Gaston County under the 1965 Act, we could see "no legal significance" in the possibility that adult residents of the county might have received their education "in other counties or States also maintaining segregated and unequal school systems." *Gaston County* v. *United States,* 395 U. S., at 293 n. 9.[7]

The legislative history of the 1970 Amendments contains substantial information upon which Congress could have based a finding that the use of literacy tests in Arizona and in other States where their use was not proscribed by the 1965 Act has the effect of denying the vote to racial minorities whose illiteracy is the consequence of a previous, governmentally sponsored denial of equal educational opportunity. The Attorney General of Arizona told the Senate Subcommittee on Constitutional Rights that many older Indians in the State were "never privileged to attend a formal school."[8] Extensive testimony before both Houses indicated that racial minorities have long received inferior educational opportunities throughout the United States.[9] And in-

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[7] We there reserved only the question of the application of the 1965 Act to suspend literacy tests "in the face of racially disparate educational or literacy achievements *for which a government bore no responsibility.*" 395 U. S., at 293 n. 8 (emphasis supplied).

[8] Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 675 (1969–1970) (hereafter Senate Hearings). Schooling of Indians has for some time been the responsibility of the Federal Government. See *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U. S. 685, 690–691 (1965).

[9] *E. g.,* Senate Hearings 185–187; Hearings on the Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 3, pp. 55–57, 223–225 (1969) (hereafter House Hearings).

terstate migration of such persons, particularly of Negroes from the Southern States, has long been a matter of common knowledge.[10]

Moreover, Congress was given testimony explicitly relating the denial of educational opportunity to inability to pass literacy tests in States not covered by the formula contained in the 1965 Act. The United States Commission on Civil Rights reported a survey of the Northern and Western States which concluded that literacy tests have a negative impact upon voter registration which "falls most heavily on blacks and persons of Spanish surname."[11] With regard specifically to Arizona, the Chairman of the Navajo Tribal Council testified that a greater percentage of Navajos are registered in New Mexico, which has no literacy test, than in Arizona.[12]

In short, there is no question but that Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education. Almost five years ago, we found in § 2 of the Fifteenth Amendment an ample grant of legislative power for Congress to decree a selective proscription of such tests in certain portions of the country. *South Carolina* v. *Katzenbach,* 383 U. S., at 327–334. We have since held that power ample to cover the proscription of fair literacy tests, fairly administered, which

[10] For example, 1960 census data indicate that from 1955 to 1960, 4,388 blacks moved from Southern States to Arizona, 74,804 to California, and 74,821 to New York. Table 100 in 1 1960 Census of Population, pts. 4, 6, and 34.

[11] Senate Hearings 399; see *id.,* at 400–407.

[12] Senate Hearings 678. Tribal Chairman Nakai viewed Arizona's literacy test as the primary cause of this disparity.

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nevertheless operate to disenfranchise racial minorities because of previous governmental discrimination against them in education. *Gaston County* v. *United States,* 395 U. S., at 287, 289–293. Five years of experience with the 1965 Act persuaded Congress that a nationwide ban on literacy and other potentially discriminatory tests was necessary to prevent racial discrimination in voting throughout the country. That conclusion is amply supported in the legislative record and § 201 of the 1970 Amendments is accordingly well within the scope of congressional power.

II

Section 202 of the 1970 Amendments abolishes all durational state residence requirements restricting the right to vote in presidential elections. In their place, Congress has undertaken to prescribe a uniform nationwide system of registration and absentee voting designed to allow all otherwise qualified persons to vote in such elections regardless of the length of time they have lived in a particular jurisdiction.[13] The States are required to keep open their registration rolls for presidential elections until 30 days preceding the election. § 202 (d). Persons who have changed their residence within 30 days of the election are, if otherwise qualified, entitled to vote either in person or by absentee ballot in the State of their previous residence, § 202 (e), and the States are compelled to permit the casting of absentee ballots by all properly qualified persons who have made application not less than seven days prior to the election, and returned the ballot to the appropriate officials not later than the closing of polls on election day. §§ 202 (b), (d). Provision must also be made by the States to allow absentee registration. § 202 (f).

[13] The States are permitted, should they desire, to adopt practices less restrictive than those prescribed by the 1970 Amendments. § 202 (g).

Idaho challenges the power of Congress to enact such legislation insofar as it conflicts with Idaho's statutory and constitutional provisions regarding durational residence requirements for voting; regarding absentee voting; and regarding absentee registration.[14] The State's argument in brief is that the Constitution has left to the States the power to set qualifications for voters in both state and federal elections, subject only to certain explicit limitations such as, for example, those imposed by the Fourteenth, Fifteenth, Nineteenth, and Twenty-fourth Amendments. Admitting that unreasonable residence requirements may not withstand judicial scrutiny, *Carrington* v. *Rash,* 380 U. S. 89 (1965), Idaho urges that its 60-day residence requirement is necessary for protection against fraud, and for administrative purposes. In consequence, § 202 of the 1970 Amendments is said to be of no weight against these compelling state interests.

Whether or not the Constitution vests Congress with particular power to set qualifications for voting in strictly federal elections,[15] we believe there is an adequate constitutional basis for § 202 in § 5 of the Fourteenth Amendment. For more than a century, this Court has recognized the constitutional right of all citizens to unhindered interstate travel and settlement. *Passenger Cases,* 7 How. 283, 492 (1849) (Taney, C. J.); *Crandall* v. *Nevada,* 6 Wall. 35, 43–44 (1868); *Paul* v. *Virginia,* 8 Wall. 168, 180 (1869); *Edwards* v. *California,* 314 U. S. 160 (1941); *United States* v. *Guest,* 383 U. S. 745, 757–758 (1966); *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631, 634 (1969). From whatever constitutional provision this right may be said to flow,[16] both its existence

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[14] See n. 4, *supra.*

[15] See the opinion of MR. JUSTICE DOUGLAS, *ante,* at 148–150.

[16] See *Shapiro* v. *Thompson,* 394 U. S., at 630 and n. 8; *United States* v. *Guest,* 383 U. S., at 757–758.

and its fundamental importance to our Federal Union have long been established beyond question.

By definition, the imposition of a durational residence requirement operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration. Of course, governmental action that has the incidental effect of burdening the exercise of a constitutional right is not *ipso facto* unconstitutional. But in such a case, governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. *Shapiro* v. *Thompson,* 394 U. S., at 634; *United States* v. *Jackson,* 390 U. S. 570, 582–583 (1968); *Sherbert* v. *Verner,* 374 U. S. 398, 406–409 (1963). And once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden. See *Speiser* v. *Randall,* 357 U. S. 513, 525–526 (1958).

In the present case, Congress has explicitly found both that the imposition of durational residence requirements abridges the right of free interstate migration and that such requirements are not reasonably related to any compelling state interests. 1970 Amendments, §§ 202 (a)(2), (6). The latter finding was made with full cognizance of the possibility of fraud and administrative difficulty. Senator Goldwater, testifying at Senate hearings on the bill, pointed out that 40 States presently allow registration until 30 days or less prior to the election.[17] Idaho itself allows registration by those desiring to vote as new residents in presidential elections within 10 days of balloting. Idaho Code § 34–409 (1963). And Idaho's assertion of the administrative unfeasibility

[17] Senate Hearings 282.

of maintaining separate registration lists for fully qualified voters and for those qualified only for presidential balloting is difficult to credit in light of the fact that the Idaho Constitution, Art. 6, § 2, itself sets separate qualifications for voting in general and in presidential elections. The provisions for absentee voting, as Senator Goldwater pointed out on the floor of the Senate, were likewise "drawn from the proven practice of the States themselves." [18] Thirty-seven States allow application within a week of the election, and 40 permit the marked ballot to be returned on election day.[19] Finally, Idaho has provided no evidence beyond the mere assertion that the scheme of § 202 is inadequate to protect against fraud. But the only kind of fraud asserted is the possibility of dual voting, and Idaho has provided no explanation why the 30-day period between the closing of new registrations and the date of election would not provide, in light of modern communications, adequate time to insure against such frauds. Accordingly, we find ample justification for the congressional conclusion that § 202 is a reasonable means for eliminating an unnecessary burden on the right of interstate migration. *United States* v. *Guest, supra.*

III

The final question presented by these cases is the propriety of Title III of the 1970 Amendments, which

[18] 116 Cong. Rec. 6991.

[19] *Ibid.* Idaho Code §§ 34–1101, 34–1102, 34–1103 appear to allow application to be made at any time. *Id.*, § 34–1121 allows application up to five days before the election for persons in United States service. The ballot may be returned any time prior to noon on election day, *id.*, § 34–1105 (Supp. 1969). Finally, effective January 1, 1971, applications may be made up to 5 p. m. the day before the election. *Id.*, § 34–1002 (Supp. 1970). In such circumstances, the argument of administrative impossibility from the viewpoint of Idaho seems almost chimerical.

forbids the States from disenfranchising persons over the age of 18 because of their age. Congress was of the view that this prohibition, embodied in § 302 of the Amendments, was necessary among other reasons in order to enforce the Equal Protection Clause of the Fourteenth Amendment. See §§ 301 (a)(2), (b). The States involved in the present litigation question the assertion of congressional power to make that judgment.

It is important at the outset to recognize what is not involved in these cases. We are not faced with an assertion of congressional power to regulate any and all aspects of state and federal elections, or even to make general rules for the determination of voter qualifications. Nor are we faced with the assertion that Congress is possessed of plenary power to set minimum ages for voting throughout the States. Every State in the Union has conceded by statute that citizens 21 years of age and over are capable of intelligent and responsible exercise of the right to vote. The single, narrow question presented by these cases is whether Congress was empowered to conclude, as it did, that citizens 18 to 21 years of age are not substantially less able.

We believe there is serious question whether a statute granting the franchise to citizens 21 and over while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause. Regardless of the answer to this question, however, it is clear to us that proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases. We would uphold § 302 as a valid exercise of congressional power under § 5 of the Fourteenth Amendment.

A

All parties to these cases are agreed that the States are given power, under the Constitution, to determine the qualifications for voting in state elections. Art. I, § 2; *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, 50 (1959); *Carrington* v. *Rash,* 380 U. S. 89, 91 (1965). But it is now settled that exercise of this power, like all other exercises of state power, is subject to the Equal Protection Clause of the Fourteenth Amendment. *Carrington* v. *Rash, supra; Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Kramer* v. *Union School District,* 395 U. S. 621 (1969); *Evans* v. *Cornman,* 398 U. S. 419 (1970). Although it once was thought that equal protection required only that a given legislative classification, once made, be evenly applied, see *Hayes* v. *Missouri,* 120 U. S. 68, 71–72 (1887), for more than 70 years we have consistently held that the classifications embodied in a state statute must also meet the requirements of equal protection. *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 155 (1897); see *McLaughlin* v. *Florida,* 379 U. S. 184, 189–191 (1964), and cases cited.

The right to vote has long been recognized as a "fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886); see *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964); *Williams* v. *Rhodes,* 393 U. S. 23, 31 (1968). "Any unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government." *Kramer* v. *Union School District,* 395 U. S., at 626. Consequently, when exclusions from the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the State.

Cf. *Metropolitan Cas. Ins. Co.* v. *Brownell,* 294 U. S. 580, 583–584 (1935). "A more exacting standard obtains." *Kramer* v. *Union School District,* 395 U. S., at 633. In such cases, "the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Id.,* at 627; *Cipriano* v. *City of Houma,* 395 U. S. 701, 704 (1969).

In the present cases, the States justify exclusion of 18- to 21-year-olds from the voting rolls solely on the basis of the States' interests in promoting intelligent and responsible exercise of the franchise.[20] There is no reason to question the legitimacy and importance of these interests. But standards of intelligence and responsibility, however defined, may permissibly be applied only to the means whereby a prospective voter determines how to exercise his choice, and not to the actual choice itself. Were it otherwise, such standards could all too easily serve as mere epithets designed to cloak the exclusion of a class of voters simply because of the way they might vote. Cf. *Evans* v. *Cornman,* 398 U. S., at 422–423. Such a state purpose is, of course, constitutionally impermissible. *Carrington* v. *Rash,* 380 U. S., at 94. We must, therefore, examine with particular care the asserted connection between age limitations and the admittedly laudable state purpose to further intelligent and responsible voting.

We do not lack a starting point for this inquiry. Although the question has never been squarely presented, we have in the past indicated that age is a factor not necessarily irrelevant to qualifications for voting. *Lassi-*

[20] Idaho, in addition, claims that its interest in setting qualifications for voters in its own elections serves, without more, as a compelling state interest sufficient to justify the challenged exclusion. But there is no state interest in the mere exercise of power; the power must be exercised for some reason. The only reason asserted by Idaho for the exercise of its power is that already mentioned—promotion of intelligent and responsible voting.

ter v. *Northampton Election Board,* 360 U. S., at 51; *Kramer* v. *Union School District,* 395 U. S., at 625–626. But recognition that age is not in all circumstances a "capricious or irrelevant factor," *Harper* v. *Virginia Board of Elections,* 383 U. S., at 668, does not insure the validity of the particular limitation involved here. *Evans* v. *Cornman,* 398 U. S., at 425–426. Every State in the Union has concluded for itself that citizens 21 years of age and over are capable of responsible and intelligent voting. Accepting this judgment, there remains the question whether citizens 18 to 21 years of age may fairly be said to be less able.

State practice itself in other areas casts doubt upon any such proposition. Each of the 50 States has provided special mechanisms for dealing with persons who are deemed insufficiently mature and intelligent to understand, and to conform their behavior to, the criminal laws of the State.[21] Forty-nine of the States have concluded that, in this regard, 18-year-olds are invariably to be dealt with according to precisely the same standards prescribed for their elders.[22] This at the very least is evidence of a nearly unanimous legislative judgment on the part of the States themselves that differences in maturity and intelligence between 18-year-olds and persons 21 years of age and over are too trivial to warrant specialized treatment for *any* of the former class in the critically important matter of criminal responsibility.[23] Similarly,

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[21] 116 Cong. Rec. 6970 (Library of Congress, Legislative Reference Service survey).

[22] *Ibid.*

[23] Nor does the California statute, Cal. Welf. & Inst'ns Code § 602 (1966), necessarily evidence a contrary conclusion. California permits its juvenile court to waive jurisdiction of persons over the age of 16 to the regular criminal courts, and state practice appears to be that very few if any felony defendants over the age of 18 are ever tried as juveniles. R. Boches & J. Goldfarb, California Juvenile Court Practice 35–36 (1968). This may well indicate that the Cali-

every State permits 18-year-olds to marry, and 39 States do not require parental consent for such persons of one or both sexes.[24] State statutory practice in other areas follows along these lines, albeit not as consistently.[25]

Uniform state practice in the field of education points the same way. No State in the Union requires attendance at school beyond the age of 18. Of course, many 18-year-olds continue their education to 21 and beyond. But no 18-year-old who does not do so will be disenfranchised thereby once he reaches the age of 21.[26]

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fornia statute reflects merely a legislative conclusion that the slight burden of waiver hearings is outweighed by the possibility, however slight, that a very few individuals between the ages of 18 and 21 might in fact be more appropriately treated as juveniles.

[24] 116 Cong. Rec. 6970.

[25] For example, in California any woman 18 years old may marry without parental consent, and any man of that age may marry with the consent of one parent. Cal. Civ. Code § 4101 (1970). Any married person who has attained the age of 18 is treated in precisely the same way as all persons of the age of 21 and over with regard to all provisions of the Civil Code, Probate Code, and Code of Civil Procedure, as well as for the purposes of making contracts or entering into any agreement regarding property or his estate. Cal. Civ. Code § 25 (Supp. 1970). The State Labor Department treats males of the age of 18 and over as adults. Cal. Labor Code §§ 1172, 3077 (1955). Persons of the age of 18 and over may serve civil process in the State. Cal. Civ. Proc. Code § 410 (Supp. 1970).

[26] Some States, of course, do attempt to condition exercise of the franchise upon the ability to pass a literacy test. Presumably some 18-year-old illiterates will be literate at 21. But in light of the fact that 81 percent of the disenfranchised class are high school graduates, it would seem that the number of 18-year-old illiterates who are literate three years later is vanishingly small. See Hearings on S. J. Res. 147 and Others before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., 133 (1970) (Sen. Goldwater). Of course, for reasons that apply as well to 18-year-olds as to others, we have today upheld a nationwide suspension of all literacy tests. *Ante*, at 118. But in any event, that some 18-year-olds may be illiterate is hardly sufficient reason for disenfranchising the entire class. See *Kramer* v. *Union School District*, 395 U. S., at 632–633.

Whether or not a State could in any circumstances condition exercise of the franchise upon educational achievements beyond the level reached by 18-year-olds today, there is no question but that no State purports to do so. Accordingly, that 18-year-olds as a class may be less educated than some of their elders [27] cannot justify restriction of the franchise, for the States themselves have determined that this incremental education is irrelevant to voting qualifications. And finally, we have been cited to no material whatsoever that would support the proposition that intelligence, as opposed to educational attainment, increases between the ages of 18 and 21.

One final point remains. No State seeking to uphold its denial of the franchise to 18-year-olds has adduced anything beyond the mere difference in age. We have already indicated that the relevance of this difference is contradicted by nearly uniform state practice in other areas. But perhaps more important is the uniform experience of those States—Georgia since 1943, and Kentucky since 1955—that have permitted 18-year-olds to vote.[28] We have not been directed to a word of testimony or other evidence that would indicate either that 18-year-olds in those States have voted any less intelligently and responsibly than their elders, or that there is any reasonable ground for belief that 18-year-olds in other States are less able than those in Georgia and Kentucky. On the other hand, every person who spoke to the issue in either the House or Senate was agreed that 18-year-

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[27] Eighteen-year-olds as a class are better educated than some of their elders. The median number of school years completed by 18- and 19-year-olds two years ago was 12.2; it was 8.8 for persons 65 to 74. Bureau of the Census, Educational Attainment, table 1 (Current Population Reports, Series P–20, No. 182) (1969).

[28] Hawaii and Alaska have, since their admission to the Union in 1959, allowed the vote to 19-year-olds (Alaska) and 20-year-olds (Hawaii).

olds in both States were at least as interested, able, and responsible in voting as were their elders.[29]

In short, we are faced with an admitted restriction upon the franchise, supported only by bare assertions and long practice, in the face of strong indications that the States themselves do not credit the factual propositions upon which the restriction is asserted to rest. But there is no reason for us to decide whether, in a proper case, we would be compelled to hold this restriction a violation of the Equal Protection Clause. For as our decisions have long made clear, the question we face today is not one of judicial power under the Equal Protection Clause. The question is the scope of congressional power under § 5 of the Fourteenth Amendment. To that question we now turn.

B

As we have often indicated, questions of constitutional power frequently turn in the last analysis on questions of fact. This is particularly the case when an assertion of state power is challenged under the Equal Protection Clause of the Fourteenth Amendment. For although equal protection requires that all persons "under like circumstances and conditions" be treated alike, *Hayes* v. *Missouri,* 120 U. S., at 71, such a formulation merely raises, but does not answer the question whether a legislative classification has resulted in different treatment of persons who are in fact "under like circumstances and conditions."

Legislatures, as well as courts, are bound by the provisions of the Fourteenth Amendment. *Cooper* v. *Aaron,* 358 U. S. 1, 18–20 (1958). When a state legislative classification is subjected to judicial challenge as violating the Equal Protection Clause, it comes before the

[29] See, *e. g.,* 116 Cong. Rec. 6433–6434 (Sen. Cook), 6929–6930 (Sens. Talmadge and Ervin); Senate Hearings 343 (Gov. Maddox).

courts cloaked by the presumption that the legislature has, as it should, acted within constitutional limitations. *Kotch* v. *Board of River Port Pilots,* 330 U. S. 552, 556, 563–564 (1947); see *Kramer* v. *Union School District,* 395 U. S., at 627–628. Accordingly, "[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Cas. Ins. Co.* v. *Brownell,* 294 U. S., at 584.

But, as we have consistently held, this limitation on judicial review of state legislative classifications is a limitation stemming, not from the Fourteenth Amendment itself, but from the nature of judicial review. It is simply a "salutary principle of judicial decision," *Metropolitan Cas. Ins. Co.* v. *Brownell, supra,* at 584, one of the "self-imposed restraints intended to protect [the Court] and the state against irresponsible exercise of [the Court's] unappealable power." *Fay* v. *New York,* 332 U. S. 261, 282 (1947). The nature of the judicial process makes it an inappropriate forum for the deter-

[30] The state of facts necessary to justify a legislative discrimination will of course vary with the nature of the discrimination involved. When we have been faced with statutes involving nothing more than state regulation of business practices, we have often found mere administrative convenience sufficient to justify the discrimination. *E. g., Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 487, 488–489 (1955). But when a discrimination has the effect of denying or inhibiting the exercise of fundamental constitutional rights, we have required that it be not merely convenient, but necessary. *Kramer* v. *Union School District,* 395 U. S., at 627; *Carrington* v. *Rash,* 380 U. S., at 96; see *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968); *United States* v. *Jackson,* 390 U. S. 570, 582–583 (1968). And we have required as well that it be necessary to promote not merely a constitutionally permissible state interest, but a state interest of substantial importance. *Kramer* v. *Union School District, supra; Carrington* v. *Rash, supra; Shelton* v. *Tucker,* 364 U. S. 479, 487–490 (1960); see *United States* v. *O'Brien, supra.*

mination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," or "unreasonable." *Communist Party* v. *Control Board,* 367 U. S. 1, 94–95 (1961); *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–154 (1938); *Metropolitan Cas. Ins. Co.* v. *Brownell,* 294 U. S., at 583–584.

Limitations stemming from the nature of the judicial process, however, have no application to Congress. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Should Congress, pursuant to that power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter. See *Katzenbach* v. *Morgan,* 384 U. S. 641, 654–656 (1966). It should hardly be necessary to add that if the asserted factual basis necessary to support a given state discrimination does not exist, § 5 of the Fourteenth Amendment vests Congress with power to remove the discrimination by appropriate means. *Id.,* at 656–657; *Fay* v. *New York,* 332 U. S., at 282–283; *Ex parte Virginia,* 100 U. S. 339, 347–348 (1880).

The scope of our review in such matters has been established by a long line of consistent decisions. "It is not for the courts to re-examine the validity of these legislative findings and reject them." *Communist Party* v. *Control Board,* 367 U. S., at 94. "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regu-

latory scheme necessary . . . our investigation is at an end." *Katzenbach* v. *McClung,* 379 U. S. 294, 303–304 (1964); *Katzenbach* v. *Morgan,* 384 U. S., at 653; see *Galvan* v. *Press,* 347 U. S. 522, 529 (1954).[31]

This scheme is consistent with our prior decisions in related areas. The core of dispute over the constitutionality of Title III of the 1970 Amendments is a conflict between state and federal legislative determinations of the factual issues upon which depends decision of a federal constitutional question—the legitimacy, under the Equal Protection Clause, of state discrimination against persons between the ages of 18 and 21. Our cases have repeatedly emphasized that, when state and federal claims come into conflict, the primacy of federal power requires that the federal finding of fact control. See *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 415–417 (1964); *Townsend* v. *Sain,* 372 U. S. 293, 311–312 (1963); *Tarble's Case,* 13 Wall. 397, 406–407 (1872); cf. *United States* v. *Darby,* 312 U. S. 100, 119 (1941). The Supremacy Clause requires an identical result when the conflict is one of legislative, not judicial, findings.

Finally, it is no answer to say that Title III intrudes upon a domain reserved to the States—the power to set qualifications for voting. It is no longer open to question that the Fourteenth Amendment applies to this, as to any other, exercise of state power. *Kramer* v.

[31] As we emphasized in *Katzenbach* v. *Morgan, supra,* "§ 5 does not grant Congress power to . . . enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.'" 384 U. S., at 651 n. 10. As indicated above, a decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature.

Union School District, supra, and cases cited. As we said in answer to a similar contention almost a century ago, "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." *Ex parte Virginia,* 100 U. S., at 347–348.

C

Our Brother HARLAN has set out in some detail the historical evidence that persuades him that the framers of the Fourteenth Amendment did not believe that the Equal Protection Clause, either through judicial action or through congressional enforcement under § 5 of the Amendment, could operate to enfranchise Negroes in States that denied them the vote. *Ante,* at 154–200. From this he has concluded "that the Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications, in either state or federal elections." *Ante,* at 154. This conclusion, if accepted, would seem to require as a corollary that although States may not, under the Fifteenth Amendment, discriminate against Negro *voters,* they are free so far as the Federal Constitution is concerned to discriminate against Negro or unpopular *candidates* in any way they desire. Not surprisingly, our Brother HARLAN's thesis is explicitly disavowed by all the States party to the present litigation,[32] and has been presented to us only in the briefs *amici*

[32] Brief for the State of Oregon 10–13; Brief for the State of Texas 10–12; Brief for the State of Arizona 19; Brief for the State of Idaho 22, 28–30.

curiae of Virginia and, perhaps, Mississippi.[33] We could not accept this thesis even if it were supported by historical evidence far stronger than anything adduced here today. But in our view, our Brother HARLAN's historical analysis is flawed by his ascription of 20th-century meanings to the words of 19th-century legislators. In consequence, his analysis imposes an artificial simplicity upon a complex era, and presents, as universal, beliefs that were held by merely one of several groups competing for political power. We can accept neither his judicial conclusion nor his historical premise that the original understanding of the Fourteenth Amendment left it within the power of the States to deny the vote to Negro citizens.

It is clear that the language of the Fourteenth Amendment, which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws," applies on its face to all assertions of state power, however made. More than 40 years ago, this Court faced for the first time the question whether a State could deny Negroes the right to vote in primary elections. Writing for a unanimous Court, Mr. Justice Holmes observed tartly that "[w]e find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." *Nixon* v. *Herndon,* 273 U. S. 536, 540–541 (1927); see *Nixon* v. *Condon,* 286 U. S. 73, 83, 87–89 (1932) (Cardozo, J.); *Anderson* v. *Martin,* 375 U. S. 399 (1964); cf. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35–36 (1907). If the broad language of the Equal Protection Clause were to be read as nevertheless allowing the States to deny equal political rights to any citizens they see fit to exclude from the political process,

[33] Brief *amicus curiae* for the Commonwealth of Virginia 13–22; see Brief *amicus curiae* for the State of Mississippi 7–11.

far more is involved than merely shifting the doctrinal basis of such cases as *Nixon* v. *Herndon* from the Fourteenth to the Fifteenth Amendment. For the Fifteenth Amendment applies only to voting, not to the holding of public office; in consequence, our Brother HARLAN's view would appear to leave the States free to encourage citizens to cast their votes solely on the basis of race (a practice found to violate the Fourteenth Amendment in *Anderson* v. *Martin, supra*), or even presumably to deny Negro citizens the right to run for office at all.[34] We cannot believe that the Equal Protection Clause would permit such discrimination.

In any event, it seems to us, the historical record will not bear the weight our Brother HARLAN has placed upon it. His examination of the historical background of the Fourteenth Amendment leads him to conclude that it is "clear beyond any reasonable doubt that no part of the legislation now under review can be upheld as a legitimate exercise of congressional power under that Amendment," *ante,* at 155, because the Amendment was not intended "to restrict the authority of the States to allocate their political power as they see fit." *Ante,* at 154. Our own reading of the historical background, on the other hand, results in a somewhat imperfect picture of an era of constitutional confusion, confusion that the Amendment did little to resolve. As the leading constitutional historian of the Civil War has observed, constitutional law was characterized during the war years by "a noticeable lack of legal precision" and by "[a] tendency toward irregularity . . . in legislation, and in legal interpretation." J. Randall, Constitutional Problems under Lin-

[34] Indeed, since the First Amendment is applicable to the States only through the Fourteenth, our Brother HARLAN's view would appear to allow a State to exclude any unpopular group from the political process solely upon the basis of its political opinions.

coln 515–516 (rev. ed. 1951). Nor would the postwar period of Reconstruction be substantially different.

For several decades prior to the Civil War, constitutional interpretation had been a pressing concern of the Nation's leading statesmen and lawyers, whose attention focused especially on the nature of the relationship of the States to the Federal Government. The onset of the Civil War served only to raise new problems upon which the original Constitution offered, at best, only peripheral guidance. The greatest problem of all, perhaps, was the character of the civil conflict—whether it was to be treated as a rebellion, as a war with a belligerent state, or as some combination of the two. Another issue concerned the scope of federal power to emancipate the slaves; even President Lincoln doubted whether his Emancipation Proclamation would be operative when the war had ended and his special war powers had expired. This particular issue was resolved by the Thirteenth Amendment, but that Amendment only raised new issues, for some men doubted the validity of even a constitutional change upon such a fundamental matter as slavery, particularly while the status of the eleven Confederate States remained unsettled. See *id.*, at 12–24, 59–73, 342–404.

The end of the war did not bring an end to difficult constitutional questions. Two perplexing problems remained. The one was the relation of the former Confederate States to the Federal Government; the other was the relation of the former slaves to the white citizens of the Nation. Both were intimately related to the politics of the day, an understanding of which is essential since the Fourteenth Amendment was presented to the Nation as the Republican Party's solution for these problems. See J. James, The Framing of the Fourteenth Amendment 169–173 (1956) (hereafter James).

The starting point must be the key fact that, as of 1860, the Republicans were very much the Nation's minority party. Lincoln had won the Presidency that year with less than 40% of the popular vote, while the Republicans had secured control of Congress only when southern Democrats had left Washington following the secession of their States. The compromise in the original Constitution, by which only three-fifths of the slaves in Southern States were computed in determining representation in the House of Representatives and votes in the electoral college also was a matter of critical importance in 1865; with slavery abolished, southern and hence Democratic power in the House and in the electoral college would increase. The Republicans had calculated this matter rather carefully; as the Chicago Tribune had demonstrated as early as the summer of 1865, the increased southern delegation would need only 29 readily obtainable Democratic votes from the North in order to dominate the House. See James 21–23. But Republicans had no intention of permitting such a Democratic resurgence to occur; in their view, as one Republican Senator observed, Republicans would be "faithless" to their "trust," if they allowed "men who have thus proven themselves faithless" to recover "the very political power which they have hitherto used for the destruction of this Government." Cong. Globe, 39th Cong., 1st Sess. (hereafter Globe) 2918 (1866) (remarks of Sen. Willey). Whether one looks upon such sentiments as a grasp for partisan political power or as an idealistic determination that the gains of the Civil War not be surrendered, the central fact remains that Republicans found it essential to bar or at least to delay the return of all-white southern delegations to Congress.

Temporarily, they proposed to do so by refusing to seat Congressmen from the seceded States. They usually justified their refusal on constitutional grounds,

presenting a variety of theories as to how the former Confederate States had forfeited their rights by secession. See generally E. McKitrick, Andrew Johnson and Reconstruction 93–119 (1960). But exclusion of southern representatives could not be a permanent solution; a better solution seemed to be to elect at least some Republican representatives from the South by enfranchising the only class that could be expected to vote Republican in large numbers—the freedmen.

According to the census of 1860, Negroes had constituted some 4,200,000 of the total population of 12,200,000 in the 15 slave States. In two States—Mississippi and South Carolina—Negroes were a substantial majority of the population, while in several other States the population was at least 40% Negro. Thus, Negro suffrage would probably result in a number of Negro and presumably Republican representatives from the South. The difficulty was with the means of bringing Negro suffrage about. Some, including Chief Justice Chase, looked back toward the Emancipation Proclamation and contended that Negro suffrage could be achieved, at least in the South, by means of a presidential proclamation. See James 5–7; 1 W. Fleming, Documentary History of Reconstruction 142 (1906). Others thought congressional legislation the appropriate vehicle for granting the suffrage, see James 13, 52–53; Van Alstyne, The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Supreme Court Review 33, 49–51, while still others argued for a constitutional amendment. See Cincinnati Daily Commercial, Sept. 19, 1865, in James 11–12 (reporting speech of Cong. Bingham). Disagreement over means, however, was but a minor obstacle in the path of equal suffrage; racial prejudice in the North was a far more significant one. Only five New England States and New York permitted any Negroes to vote

as of 1866, see Van Alstyne, *supra,* at 70, and extension of the suffrage was rejected by voters in 17 of 19 popular referenda held on the subject between 1865 and 1868. Moreover, Republicans suffered some severe election setbacks in 1867 on account of their support of Negro suffrage. See W. Gillette, The Right to Vote 25–27, 32–38 (1969).

Meeting in the winter and spring of 1866 and facing elections in the fall of the same year, the Republicans in Congress thus faced a difficult dilemma: they desperately needed Negro suffrage in order to prevent total Democratic resurgence in the South, yet they feared that by pressing for suffrage they might create a reaction among northern white voters that would lead to massive Democratic electoral gains in the North. Their task was thus to frame a policy that would prevent total southern Democratic resurgence and that simultaneously would serve as a platform upon which Republicans could go before their northern constituents in the fall. What ultimately emerged as the policy and political platform of the Republican Party was the Fourteenth Amendment.[35]

As finally adopted, relevant portions of the Fourteenth Amendment read as follows:

> Sec. 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[35] Republicans explicitly looked upon the Fourteenth Amendment as a political platform. See 2 F. Fessenden, Life and Public Services of William Pitt Fessenden 62 (1907); B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction 302 (1914). See also *infra,* at 262.

> Sec. 2. "Representatives shall be apportioned among the several States according to their respective numbers . . . . But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."
>
> Sec. 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The key provision on the suffrage question was, of course, § 2, which was to have the effect of reducing the representation of any State which did not permit Negroes to vote. Section 1 also began, however, as a provision aimed at securing equality of "political rights and privileges"—a fact hardly surprising in view of Republican concern with the question. In their earliest versions in the Joint Congressional Committee on Reconstruction, which framed the Fourteenth Amendment, §§ 1 and 2 read as follows:

> "[Sec. 1.] Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property." B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction 51 (1914) (hereafter Kendrick).
>
> "[Sec. 2.] Representatives and direct taxes shall be apportioned among the several States, which

> may be included within this Union, according to their respective numbers of persons, deducting therefrom all of any race or color, whose members or any of them are denied any of the civil or political rights or privileges." *Id.*, at 43.

The question that must now be pursued is whether § 1 of the Amendment ever lost its original connection with the suffrage question.

It became evident at an early date that the Joint Committee did not wish to make congressional power over the suffrage more explicit than did the language of the original version of the future § 1. Six days after that section had been proposed by a subcommittee, the full committee refused to adopt an amendment offered by Senator Howard to make the section refer expressly to "political and *elective* rights and privileges," *id.*, at 55 (emphasis added), and refused as well to substitute for the language:

> "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States in each State the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property."

the following language offered by Congressman Boutwell:

> "Congress shall have power to abolish any distinction in the exercise of the elective franchise in any State, which by law, regulation or usage may exist therein." *Id.*, at 54–55.

The committee did agree, however, to return the proposal to a special subcommittee, chaired by Congressman John A. Bingham, which at the next meeting of the full committee reported back the following language:

> "Congress shall have power to make all laws which shall be necessary and proper to secure all

> persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges." *Id.*, at 56.

This language, it seems clear, did not change the meaning of the section as originally proposed, but the next change in language, proposed several days later by Bingham, arguably did. Bingham moved the following substitute:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." *Id.*, at 61.

This substitute was accepted by a committee vote of 7–6.

No record of the committee's debates has been preserved, and thus one can only guess whether Bingham's substitute was intended to change the meaning of the original proposal. The breakdown of the committee vote suggests, however, that no change in meaning was intended. The substitute was supported by men of all political views, ranging from Senator Howard and Congressman Boutwell, radicals who had earlier sought to make the section's coverage of suffrage explicit, to Congressman Rogers, a Democrat. Similarly, among the six voting against the substitute were a radical, Stevens; a moderate, Fessenden; and a Democrat, Grider. *Id.*, at 61. Thus, while one might continue to argue that Bingham meant his substitute to do away with congressional power to legislate for the preservation of equal rights of suffrage, one can, with at least equal plausibil-

ity, contend that Bingham sought to do no more than substitute for his earlier specific language more general language which had already appeared elsewhere in the Constitution.[36]

Bingham's proposed amendment to the Constitution, as modified, was next submitted to the House of Representatives, where Republicans joined Democrats in attacking it. Republican Representative Hale of New York, for example, thought the amendment "in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden," Globe 1063, while Representative Davis, also a New York Republican, thought it would give Congress power to establish "perfect political equality between the colored and the white race of the South." *Id.*, at 1085. Meanwhile, the New York Times, edited by conservative Republican Congressman Henry J. Raymond, wondered if the proposed Amendment was "simply a preliminary to the enactment of negro suffrage." Feb. 19, 1866. Even the Amendment's supporters recognized that it would confer extensive power upon the Federal Government; Representative Kelley, a Pennsylvania radical, who supported the Amendment, concluded, after a lengthy discussion of the right of suffrage, that "the proposed amendment . . . [was] intended to secure it." Globe 1063. Its proponents, however, could not secure the necessary support for the Amendment in the House and thus were compelled to postpone the matter until a later date, when they failed to bring it again to the floor. Kendrick 215.

Meanwhile, the Joint Committee had returned to work and had begun to consider the direct antecedent of the Fourteenth Amendment, a proposal by Robert Dale

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[36] The language appears earlier in Art. IV, § 2.

Owen which Representative Stevens had placed before the committee. Its relevant provisions were as follows:

> "Section 1. No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.
>
> "Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.
>
> "Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.
>
> . . . . .
>
> "Sec. 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article." *Id.*, at 83–84.

Congressman Bingham had not, however, given up on his own favorite proposal, and he immediately moved to add the following new section to the Amendment:

> "Sec. 5. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*, at 87.

His motion was adopted on a 10-to-2 party-line vote, but its adoption was only the beginning of some intricate and inexplicable maneuvering. Four days later, Senator

Williams, an Oregon radical, moved to delete Bingham's section, and his motion was carried by a vote of 7 to 5, with radicals Howard and Boutwell and Democrats Grider and Johnson voting for the motion and Stevens, Bingham, and Democrat Rogers voting against. Bingham then moved to submit his proposal as a separate amendment, but he was supported by only the three Democrats on the committee. The committee then agreed to submit the Owen proposal to Congress with only slight modifications, but postponed the submission until after one further meeting to be held three days hence. *Id.*, at 98–100.

At this meeting, the proposed Fourteenth Amendment was substantially rewritten. First, the committee, by a vote of 12 to 2, deleted § 2, which had barred States from making racial discriminations in the enjoyment of the right of suffrage after 1876, and conformed § 3, so as to insure that it would remain in effect after 1876. After making numerous other changes, the committee then concluded its deliberations by replacing Owen's ban in § 1 on discrimination "as to civil rights" with Bingham's now familiar language. Here the vote was 10 to 3, with the majority again containing a full spectrum of political views. *Id.*, at 100–106. The reasons for the rewriting are not entirely clear. The only known explanation was given by Owen in 1875, when he wrote an article recalling a contemporary conversation with Stevens. Stevens had reportedly explained that the committee's original decisions had "got noised abroad," and that, as a result, several state delegations had held caucuses which decided that the explicit references to "negro suffrage, in any shape, ought to be excluded from the platform . . . ." Quoted in *id.*, at 302. Thus, the provision for suffrage after 1876 had to be eliminated, but Stevens did not explain why Bingham's version of § 1 was then substituted

for Owen's version. Perhaps the changes in § 1 of the Amendment were thought by the committee to be mere linguistic improvements which did not substantially modify Owen's meaning and which did not extend its coverage to political as distinguished from civil rights. But, at the very least the committee must have realized that it was substituting for Owen's rather specific language Bingham's far more elastic language—language that, as one scholar has noted, is far more "capable of growth" and "receptive to 'latitudinarian' construction." Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 61, 63 (1955). It is, moreover, at least equally plausible that the committee meant to substitute for Owen's narrow provision dealing solely with civil rights a broader provision that had originated and been understood only two months earlier as protecting equality in the right of suffrage as well as equality of civil rights.

The purpose of § 1 in relation to the suffrage emerges out of the debates on the floor of Congress with an equal obscurity. In the search for meaning one must begin, of course, with the statements of leading men in Congress, such as Bingham and Howard. Bingham, for one, stated without apparent equivocation that "[t]he amendment does not give . . . the power to Congress of regulating suffrage in the several States." Globe 2542. Similarly, Senator Howard, after noting that the Amendment would accord to Negroes the same protection in their fundamental rights as the law gave to whites, explicitly cautioned that "the first section of the proposed amendment does not give to either of these classes the right of voting." Globe 2766.[37] But such statements are not

[37] As the statements of Bingham and Howard in the text indicate, the framers of the Amendment were not always clear whether they understood it merely as a grant of power to Congress or whether they thought, in addition, that it would confer power upon the

as unambiguous as they initially appear to be. Thus, Howard, with that "lack of legal precision" typical of the period, stated that the right of suffrage was not one of the privileges and immunities protected by the Constitution, Globe 2766, immediately after he had read into the record an excerpt from the case of *Corfield* v. *Coryell,* 6 F. Cas. 546 (No. 3230) (CCED Pa. 1825), an excerpt which listed the elective franchise as among the privileges and immunities. Globe 2765. Bingham was equally ambiguous, for he too thought that the elective franchise was a constitutionally protected privilege and immunity. Globe 2542. Indeed, at one point in the debates, Bingham made what is for us a completely incongruous statement:

> "To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States." Globe 2542.

Bingham seemed to say in one breath first, that the franchise was a constitutionally protected privilege in support of which Congress under § 5 of the Fourteenth Amendment could legislate and then, in the next breath, that the franchise was exclusively under the control of the States.

Bingham's words make little sense to modern ears; yet, when they were uttered, his words must have made some sense, at least to Bingham and probably to many of his listeners. The search for their meaning probably

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courts, which the courts would use to achieve equality of rights. Since § 5 is clear in its grant of power to Congress and we have consistently held that the Amendment grants power to the courts, this issue is of academic interest only.

ought to begin with Art. IV, § 2—the Privileges and Immunities Clause of the original Constitution. In the minds of members of the 39th Congress, the leading case to construe that clause was *Corfield* v. *Coryell, supra,* which had listed among a citizen's privileges and immunities "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised." 6 F. Cas., at 552. Here again is the same apparent ambiguity that later occurred in Bingham's thought—that the franchise is a federally protected right, but only to the extent it is regulated and established by state law. The ambiguity was, however, only apparent and not real, for the Privileges and Immunities Clause of the original Constitution served a peculiar function; it did not create absolute rights but only placed a noncitizen of a State "upon a perfect equality with its own citizens" as to those fundamental rights already created by state law. *Scott* v. *Sandford,* 19 How. 393, 407 (1857). Accord, *id.,* at 584 (dissenting opinion). The Privileges and Immunities Clause, that is, was a sort of equal protection clause adopted for the benefit of out-of-state citizens; [38] it required, for example, that if a State gave its own citizens a right to enter into a lawful business, it could not arbitrarily deny the same right to out-of-state citizens solely because they came from out of State. See *Ward* v. *Maryland,* 12 Wall. 418, 430 (1871). Thus, what Bingham may have meant in indicating that the franchise was included within the scope of the Privileges and Immunities Clause of the Fourteenth Amendment while remaining entirely under the control of the States was that, although the States would be free in general to confer the franchise upon whomever they chose, Congress would have power

[38] According to *Paul* v. *Virginia,* 8 Wall. 168, 180 (1869), the Privileges and Immunities Clause in Art. 4, § 2, secured to citizens "in other States the equal protection of their laws."

to bar them from racial or other arbitrary discriminations in making their choices. In short, the Privileges and Immunities Clause might for Bingham have meant the same as the Equal Protection Clause; as he later explained in a campaign speech, § 1 was nothing but "a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every State of this Union . . . ." Cincinnati Daily Commercial, Aug. 27, 1866, quoted in James 160.

One way, then, to reconcile the seemingly incongruous statements of Bingham is to read him as understanding that, while the Fourteenth Amendment did not take from the States nor grant to Congress plenary power to regulate the suffrage, it did give Congress power to invalidate discriminatory state legislation. In his words, the Amendment took "from no State any right which hitherto pertained to the several States of the Union, but it impose[d] a limitation upon the States to correct their abuses of power." *Ibid.* Others had a similar understanding. Thus, for Charles Sumner, "Equality of *political* rights . . . [did] not involve necessarily what is sometimes called the 'regulation' of the suffrage by the National Government, although this would be best . . . [but] simply require[d] the abolition of any discrimination among citizens, inconsistent with Equal Rights." C. Sumner, Are We a Nation? 34 (1867). Or, as Stevens explained in presenting the Amendment to the House, it merely allowed "Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." Globe 2459 (emphasis in original). Clearest of all, perhaps was Thomas M. Cooley in the 1871 edition of his Constitutional Limitations, where he wrote:

> "This amendment of the Constitution does not concentrate power in the general government for

> any purpose of police government within the States; its object is to preclude legislation by any State which shall 'abridge the privileges or immunities of citizens of the United States,' or 'deprive any person of life, liberty, or property without due process of law,' or 'deny to any person within its jurisdiction the equal protection of the laws'; and Congress is empowered to pass all laws necessary to render such unconstitutional State legislation ineffectual." T. Cooley, Constitutional Limitations 294 (2d ed. 1871).

There is also other evidence that at least some members of Congress and of the electorate believed that § 1 of the Fourteenth Amendment gave Congress power to invalidate discriminatory state regulations of the suffrage. Thus, Congressman Rogers, a Democrat who had served on the Joint Committee, agreed with Bingham and Howard that "[t]he right to vote is a privilege," Globe 2538, while Congressman Boyer, another Democrat, feared that § 1 was "intended to secure ultimately, and to some extent indirectly, the political equality of the negro race." Globe 2467. A third Democrat, Congressman Niblack, thought the section sufficiently ambiguous to warn that he might, although in fact he never did, offer the following addition to it:

> "*Provided,* That nothing contained in this article shall be so construed as to authorize Congress to regulate or control the elective franchise within any State, or to abridge or restrict the power of any State to regulate or control the same within its own jurisdiction, except as in the third section hereof prescribed." Globe 2465.

Republicans also alluded on occasion to their belief that the Amendment might give Congress power to prevent discrimination in regard to the suffrage. Radi-

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cal Senator Stewart, for example, while unhappy that the Amendment did not directly confer suffrage, nevertheless could "support this plan" because it did "not preclude Congress from adopting other means by a two-thirds vote,[39] when experience shall have demonstrated, as it certainly will, the necessity for a change of policy. In fact it furnishes a conclusive argument in favor of universal amnesty and impartial suffrage." Globe 2964. Likewise, the more conservative Congressman Raymond of New York supported the first section because he thought Congress should have the power to legislate on behalf of equal rights "in courts and elsewhere," Globe 2513, after the radical Congressman Wilson of Iowa had informed him that, "if we give a reasonable construction to the term 'elsewhere,' we may include in that the jury-box and the ballot-box." Globe 2505. Congressman Stevens, meanwhile, was informing Congress that "if this amendment prevails you must legislate to carry out many parts of it," Globe 2544, and was looking forward to "further legislation; in enabling acts or other provisions," Globe 3148, while even the Joint Committee submitted the Amendment to the Nation "in the hope that its imperfections may be cured, and its deficiencies supplied, by legislative wisdom . . . ." Report of the Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., xxi (1866). Nor did the radical Republican press disagree; as the Lansing State Republican argued in its editorial columns, even "[i]f impartial suffrage, the real vital question of the whole struggle . . . [was] postponed through the mulish obstinacy of Andrew Johnson," "freedom" would "triumph by the adoption of the pro-

[39] Senator Stewart's statement regarding the two-thirds requirement appears to refer to § 3 of the Fourteenth Amendment, which requires such a majority for legislation granting amnesty to former Confederate leaders.

posed amendment," which would be followed by "equal rights to all . . . ." July 11, 1866. And, of course, once the Amendment had been ratified, Republicans in Congress began to make speeches in favor of legislation which would implement the Amendment by guaranteeing equal suffrage. See, *e. g.*, Cong. Globe, 40th Cong., 2d Sess., 1966–1967 (1868) (remarks of Cong. Stevens); 3d Sess., 1008 (1869) (remarks of Sen. Sumner).

Of course, few of the above statements taken from congressional debates, campaign speeches, and the press were made with such clarity and precision that we can know with certainty that its framers intended the Fourteenth Amendment to function as we think they did. But clarity and precision are not to be expected in an age when men are confronting new problems for which old concepts do not provide ready solutions. As we have seen, the 1860's were such an age, and the men who formulated the Fourteenth Amendment were facing an especially perplexing problem—that of creating federal mechanisms to insure the fairness of state action without in the process destroying the reserved powers of the States. It would, indeed, be surprising if the men who first faced this difficult problem were possessed of such foresight that they could debate its solution with complete clarity and consistency and with uniformity of views. There is, in short, every reason to believe that different men reconciled in different and often imprecise ways the Fourteenth Amendment's broad guarantee of equal rights and the statements of some of its framers that it did not give Congress power to legislate upon the suffrage.

Some men, for example, might have reconciled the broad guarantee and the narrow language by concluding that Negroes were not yet ready to exercise the franchise and hence that a State would not act arbitrarily

in denying it to them while granting it to whites. As the debates make clear, proponents of the Amendment did not understand the Equal Protection Clause to forbid States to distinguish among persons where justification for distinctions appeared. See, *e. g.*, Globe 1064 (Congressman Stevens). At the time the Fourteenth Amendment was adopted, the overwhelming majority of Negro residents of the United States were former slaves living in the Southern States. Most of them were illiterate and uneducated. Except for those few who had been kidnaped by slave traders after reaching adulthood, they had no prior experience with the responsibilities of citizenship. Given this state of affairs, it would hardly be surprising if some of the framers of the Fourteenth Amendment felt that the Equal Protection Clause would not forbid the States from classifying Negroes as a group to be denied the right to vote. Equal protection has never been thought to require identical treatment of all persons in all respects. *Metropolitan Cas. Ins. Co.* v. *Brownell,* 294 U. S., at 583–584, and cases cited. It requires only that the State provide adequate justification for treating one group differently from another. *Levy* v. *Louisiana,* 391 U. S. 68 (1968). Entirely aside from any concepts of racial inequality that may have been held by some members of Congress at that time, it seems clear that many members had serious reservations about the ability of the majority of Negroes, after centuries of slavery, to cast an intelligent and responsible vote. See, for example, the debates over a proposal to enfranchise Negroes in the District of Columbia in Cong. Globe, 38th Cong., 1st Sess., 2140–2141, 2239–2243, 2248 (1864). Of course, we would not now hold that even the situation existing in 1866 would justify wholesale exclusion of Negroes from the franchise: our decisions have consistently held that a particular group may not be denied the right to vote merely

because many, or even most, of its members could properly be excluded. *Carrington* v. *Rash,* 380 U. S., at 93–96; *Kramer* v. *Union School District,* 395 U. S., at 632–633; *Evans* v. *Cornman,* 398 U. S., at 424–426; cf. Tussman & TenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 351–352 (1949). But mere administrative convenience was once thought to be sufficient justification for an overly broad legislative classification, so long at least as the resultant discrimination could be justified as to a majority of the class affected. *Terrace* v. *Thompson,* 263 U. S. 197, 218–222 (1923); cf. *Kotch* v. *Board of River Port Pilots,* 330 U. S. 552 (1947). Rejection of this approach has been the result of a judicial development that could hardly have been known to the framers of the Amendment. Cf. *Baxstrom* v. *Herold,* 383 U. S. 107, 114–115 (1966).

Of course, many Americans in the 1860's rejected imputations that Negroes were unready for the franchise and thus concluded that distinctions between the races in regard to the franchise would constitute denials of equal protection. Congressman Stevens, for one, had no doubt that to allow a State to deny the franchise to Negroes would be to allow it "to discriminate among the same class." Globe 2460. And Negroes, of course, indignantly rejected such imputations, arguing that "[w]e are not all so illiterate as you suppose" and that "even if we were, our instincts have proved better than that 'educated class,' whose 'little learning' prompted them to attempt the impossible thing of destroying this great Republic . . . ." Letter to the Editor, New York Times, Nov. 4, 1866.

Among the men who refused to regard Negroes as ill prepared for the exercise of the franchise, there may have been some who did not understand the subtle distinctions of constitutional lawyers such as Bingham and who thus

accepted at face value assurances that the Fourteenth Amendment gave Congress no power over the suffrage. As a result, at least three identifiable groups may have existed within the Republican majorities that enacted and ratified the Amendment—those who thought that Congress would have power to insure to Negroes the same right to suffrage as the States gave to whites, those who thought that Congress would not have such power since Negroes and whites constituted distinct and dissimilar classes for voting purposes, and those who thought Congress would possess no power at all over the suffrage. Perhaps all three such groups did not exist in 1866 in Congress and in the Nation at large, but surely the evidence is not clear "beyond any reasonable doubt" that the only existent group was the last one, consisting of men who, despite the broad language of § 1 and the hints by speakers of its applicability to the suffrage, simply assumed without developing any analytical framework in support of their assumption that the section would not be so applied.

The evidence, in sum, plausibly suggests that the men who framed the Fourteenth Amendment possessed differing views as to the limits of its applicability but that they papered over their differences because those differences were not always fully apparent and because they could not foresee with precision how their amendment would operate in the future. Moreover, political considerations militated against clarification of issues and in favor of compromise. Much of the North, as already noted, opposed Negro suffrage, and many Republicans in Congress had to seek re-election from constituencies where racial prejudice remained rampant. Republicans in the forthcoming elections thus found it convenient to speak differently before different constituencies; as the Republican state chairman of Ohio wrote, in northern counties of the State "some of our Speakers have openly

advocated impartial suffrage, while in other places it was thought necessary, not only to repudiate it but to oppose it." Letter from B. R. Cowan to S. P. Chase, Oct. 12, 1866, quoted in James 168. Similarly, Senator Wilson of Massachusetts, when accused shortly after the 1866 elections of misrepresenting the issues of the campaign in Delaware by saying nothing of Negro suffrage, replied that since he had been "in a State where not much progress had been made, I acted somewhat on the scriptural principle of giving 'milk to babes.'" Cong. Globe, 39th Cong., 2d Sess., 42. Apparently Congressman Ashley of Ohio acted upon similar principles, for when he was asked after the House had initially approved the Amendment whether Congress had "power to confer the right of suffrage upon negroes in the States," he responded,

> "Well, sir, I do not intend to put myself on record against the right of Congress to do that. I am not prepared now to argue the point with my colleague; but I will say to him that when the time comes for the American Congress to take action on the question, I will be ready to speak. I will not say now whether I would vote for or against such a proposition." Globe 2882.

Thus, precise legal analysis and clarity of thought were both intellectually difficult and politically unwise. What Republicans needed, in the words of Wendell Phillips, the former abolitionist leader, was "a party trick to tide over the elections and save time," after which they could "float back into Congress, able to pass an act that shall give the ballot to the negro and initiate an amendment to the Constitution which shall secure it to him." Speech of Wendell Phillips, July 4, 1866, quoted in A. Harris, A Review of the Political Conflict in America 437 (1876). Similarly, the New York Times, edited by Congressman Henry J. Raymond, a conservative Republican who

ultimately would support the Amendment, observed that "all the excitement that had been raised about constitutional amendments . . . has been simply dust thrown in the eyes of the public to cover the approach to the grand fundamental, indispensable principle of universal negro suffrage . . . ." April 27, 1866, quoted in Harris, *supra,* at 433.

Not surprisingly, the product of such political needs was an Amendment which contemporaries saw was vague and imprecise. Democratic Senator Hendricks, for example, protested that he had "not heard any Senator accurately define, what are the rights and immunities of citizenship," Globe 3039, while Congressman Boyer, another Democrat, found the first section "objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions." Globe 2467. Republicans, too, were aware of the Amendment's vagueness. Thus, when he presented the Amendment to the Senate, Senator Howard noted that "[i]t would be a curious question to solve what are the privileges and immunities of citizens" and proposed not to consider the question at length, since "[i]t would be a somewhat barren discussion." Instead, like the pre-Civil War Supreme Court,[40] he "very modestly declined to go into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise." Globe 2765.

Thus, the historical evidence does not point to a single, clear-cut conclusion that contemporaries viewed the first section of the Fourteenth Amendment as an explicit abandonment of the radical goal of equal suffrage for Negroes. Rather the evidence suggests an alternative hypothesis: that the Amendment was framed by men who possessed differing views on the great question of the

[40] This Court had taken such an approach in *Conner* v. *Elliott,* 18 How. 591 (1856).

suffrage and who, partly in order to formulate some program of government and partly out of political expediency, papered over their differences with the broad, elastic language of § 1 and left to future interpreters of their Amendment the task of resolving in accordance with future vision and future needs the issues that they left unresolved. Such a hypothesis strikes us as far more consistent with the turbulent character of the times than one resting upon a belief that the broad language of the Equal Protection Clause contained a hidden limitation upon its operation that would prevent it from applying to state action regulating rights that could be characterized as "political." [41]

Nor is such a hypothesis inconsistent with the subsequent enactment of the Fifteenth, Nineteenth, and Twenty-fourth Amendments. Those who submitted the Fifteenth Amendment to the States for ratification could well have desired that any prohibition against racial discrimination in voting stand upon a firmer foundation than mere legislative action capable of repeal [42] or the vagaries of judicial decision.[43] Or they could merely have concluded that, whatever might be the case with other rights, the right to vote was too important to allow disenfranchisement of any person for no better reason

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[41] Ironically, the same distinction between "political" and other rights was drawn by this Court in *Plessy* v. *Ferguson,* 163 U. S. 537, 545–546 (1896). But the Court there concluded, directly contrary to our Brother HARLAN's position, that the Fourteenth Amendment applied to "political" rights and to those rights only.

[42] As Thaddeus Stevens had pointed out in urging passage of the Fourteenth Amendment despite the fact that, he felt, some of its guarantees could be enforced by mere legislative enactment, "a law is repealable by a majority." Globe 2459.

[43] Radical disenchantment with decisions of this Court had led, prior to the Fifteenth Amendment, to the Act of March 27, 1868, 15 Stat. 44, withdrawing our appellate jurisdiction over certain habeas corpus cases. See *Ex parte McCardle,* 7 Wall. 506, 508, 514–515 (1869).

than that others of the same race might not be qualified. At least some of the supporters of the Nineteenth Amendment believed that sex discrimination in voting was itself proscribed by the Fourteenth Amendment's guarantee of equal protection. 57 Cong. Rec. 3053 (1919). And finally, the Twenty-fourth Amendment was not proposed to the States until this Court had held, in *Breedlove* v. *Suttles,* 302 U. S. 277 (1937),[44] that state laws requiring payment of a poll tax as a prerequisite to voting did not *ipso facto* violate the Equal Protection Clause. Accordingly, we see no reason that the mere enactment of these amendments can be thought to imply that their proponents believed the Fourteenth Amendment did not apply to state allocations of political power. At a dubious best, these amendments may be read as implying that their proponents felt particular state allocations of power a proper exercise of power under the Equal Protection Clause.

Nor do we find persuasive our Brother HARLAN's argument that § 2 of the Fourteenth Amendment was intended as an exclusive remedy for state restrictions on the franchise, and that therefore any such restrictions are permissible under § 1. As Congressman Bingham emphatically told the House, when the same argument was made by Congressman Bromwell,

> "there has not been such a construction, in my opinion, of a law which imposes only a penalty, for centuries, if ever, in any country where the common law obtains. The construction insisted upon by the gentleman amounts to this, that a law which inflicts a penalty or works a forfeiture for doing an act, by implication authorizes the act to be done for doing which the penalty is inflicted. There

[44] *Breedlove* has been overruled by *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 669 (1966).

> cannot be such a construction of the proviso. It is a penalty. It says in terms that if any of the States of the United States shall disobey the Constitution . . . as a penalty such State shall lose political power in this House . . . .
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> . . . . .
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> "You place upon your statute-book a law punishing the crime of murder with death. You do not thereby, by implication, say that anybody may, of right, commit murder. You but pass a penal law. You do not prohibit murder in the Constitution; you guaranty life in the Constitution. You do not prohibit the abuse of power by the majority in the Constitution in express terms, but you guaranty the equal right of all free male citizens of full age to elect Representatives; and by the proviso you inflict a penalty upon a State which denies or abridges that right on account of race or color. In doing that we are not to be told that we confer a power to override the express guarantees of the Constitution. We propose the penalty in aid of the guarantee, not in avoidance of it." Globe 431–432.

See Van Alstyne, *supra,* at 48–68.

It may be conceivable that § 2 was intended to be the sole remedy available when a State deprived its citizens of their right to vote, but it is at least equally plausible that congressional legislation pursuant to §§ 1 and 5 was thought by the framers of the Amendment to be another potential remedy. Section 2, in such a scheme, is hardly superfluous: it was of critical importance in assuring that, should the Southern States deny the franchise to Negroes, the Congress called upon to remedy that discrimination would not be controlled by the beneficiaries of discrimination themselves. And it could, of course, have been expected to provide at least a limited remedy

in the event that both Congress and the courts took no action under § 1. Neither logic nor historical evidence compellingly suggests that § 2 was intended to be more than a remedy supplementary, and in some conceivable circumstances indispensable, to other congressional and judicial remedies available under §§ 1 and 5. See generally Van Alstyne, *supra.*

The historical record left by the framers of the Fourteenth Amendment, because it is a product of differing and conflicting political pressures and conceptions of federalism, is thus too vague and imprecise to provide us with sure guidance in deciding the pending cases. We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record and cease to interpret the Amendment as this Court has always interpreted it.

D

There remains only the question whether Congress could rationally have concluded that denial of the franchise to citizens between the ages of 18 and 21 was unnecessary to promote any legitimate interests of the States in assuring intelligent and responsible voting. There is no need to set out the legislative history of Title III at any great length here.[45] Proposals to lower the voting age to 18 had been before Congress at several times since 1942.[46] The Senate Subcommittee on Con-

[45] For a full collection of the relevant materials, see Note, Legislative History of Title III of the Voting Rights Act of 1970, 8 Harv. J. Legis. 123 (1970).

[46] See 88 Cong. Rec. 8312, 8316 (1942).

stitutional Amendments conducted extensive hearings on the matter in 1968 and again in 1970,[47] and the question was discussed at some length on the floor of both the House and the Senate.

Congress was aware, of course, of the facts and state practices already discussed.[48] It was aware of the opinion of many historians that choice of the age of 21 as the age of maturity was an outgrowth of medieval requirements of time for military training and development of a physique adequate to bear heavy armor.[49] It knew that whereas only six percent of 18-year-olds in 1900 had completed high school, 81 percent have done so today.[50] Congress was aware that 18-year-olds today make up a not insubstantial proportion of the adult work force;[51] and it was entitled to draw upon its experience in supervising the federal establishment to determine the competence and responsibility with which 18-year-olds perform their assigned tasks. As Congress recognized, its judgment that 18-year-olds are capable of voting is consistent with its practice of entrusting them with the heavy responsibilities of military service. See § 301 (a) (1) of the Amendments.[52] Finally, Congress was pre-

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[47] Hearings on S. J. Res. 8, 14, and 78 before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968); Hearings on S. J. Res. 147 and Others before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970) (hereafter 1970 Hearings).

[48] *Supra,* at 242–246.

[49] See 116 Cong. Rec. 6955; James, The Age of Majority, 4 Am. J. Legal Hist. 22 (1960); Report of the Committee on the Age of Majority Presented to the English Parliament 21 (1967).

[50] 116 Cong. Rec. 6435.

[51] 16 Department of Labor, Bureau of Labor Statistics, Employment and Earnings, table A–3 (June 1970).

[52] See also Senate Hearings 323 (Sen. Kennedy), 116 Cong. Rec. 5950–5951 (Sen. Mansfield); 6433 (Sen. Cook). See generally Note, *supra,* n. 45, at 134–148.

sented with evidence that the age of social and biological maturity in modern society has been consistently decreasing. Dr. Margaret Mead, an anthropologist, testified that in the past century, the "age of physical maturity has been dropping and has dropped over 3 years." [53] Many Senators and Representatives, including several involved in national campaigns, testified from personal experience that 18-year-olds of today appeared at least as mature and intelligent as 21-year-olds in the Congressmen's youth.[54]

Finally, and perhaps most important, Congress had before it information on the experience of two States, Georgia and Kentucky, which have allowed 18-year-olds to vote since 1943 and 1955, respectively. Every elected Representative from those States who spoke to the issue agreed that, as Senator Talmadge stated, "young people [in these States] have made the sophisticated decisions and have assumed the mature responsibilities of voting. Their performance has exceeded the greatest hopes and expectations." [55]

In sum, Congress had ample evidence upon which it could have based the conclusion that exclusion of citizens 18 to 21 years of age from the franchise is wholly unnecessary to promote any legitimate interest the States may have in assuring intelligent and responsible voting. See *Katzenbach* v. *Morgan,* 384 U. S., at 653–656. If discrimination is unnecessary to promote any legitimate state interest, it is plainly unconstitutional

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[53] 1970 Hearings at 223. Dr. W. Walter Menninger, a psychiatrist, and Dr. S. I. Hayakawa agreed. *Id.*, at 23, 36.

[54] *E. g.*, 116 Cong. Rec. 5950–5951 (Sen. Mansfield); 6433–6434 (Sen. Cook); 6434–6437 (Sen. Goldwater); 6929–6930 (Sen. Talmadge, joined by Sen. Ervin); 6950–6951 (Sen. Tydings).

[55] 116 Cong. Rec. 6929.

under the Equal Protection Clause, and Congress has ample power to forbid it under § 5 of the Fourteenth Amendment. We would uphold § 302 of the 1970 Amendments as a legitimate exercise of congressional power.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In these cases we deal with the constitutional validity of three provisions of the Voting Rights Act Amendments of 1970. Congress undertook in these provisions: (a) to abolish for a five-year period all literacy tests and similar voting eligibility requirements imposed by any State in the Union (§ 201); (b) to remove the restrictions imposed by state durational residency requirements upon voters in presidential elections (§ 202); and (c) to reduce the voting age to a minimum of 18 years for all voters in all elections throughout the Nation (§ 302). The Court today upholds § 201's nationwide literacy test ban and § 202's elimination of state durational residency restrictions in presidential elections. Section 302's extension of the franchise to 18-year-old voters is (by virtue of the opinion of MR. JUSTICE BLACK announcing the judgments of the Court) upheld as applied to federal elections. I agree with the Court in sustaining the congressional ban on state literacy tests, for substantially the same reasons relied upon by MR. JUSTICE BLACK. I also agree that the action of Congress in removing the restrictions of state residency requirements in presidential elections is constitutionally valid, but I base this judgment upon grounds quite different from those relied upon by MR. JUSTICE BLACK. And, finally, I disagree with the Court's conclusion that Congress could constitutionally reduce the voting

age to 18 for federal elections, since I am convinced that Congress was wholly without constitutional power to alter—for the purpose of *any* elections—the voting age qualifications now determined by the several States.

Before turning to a discussion of my views, it seems appropriate to state that we are not called upon in these cases to evaluate or appraise the wisdom of abolishing literacy tests, of altering state residency requirements, or of reducing the voting age to 18. Whatever we may think as citizens, our single duty as judges is to determine whether the legislation before us was within the constitutional power of Congress to enact. I find it necessary to state so elementary a proposition only because certain of the separate opinions filed today contain many pages devoted to a demonstration of how beneficent are the goals of this legislation, particularly the extension of the electoral franchise to young men and women of 18. A casual reader could easily get the impression that what we are being asked in these cases is whether or not we think allowing people 18 years old to vote is a good idea. Nothing could be wider of the mark. My Brothers to the contrary, there is no question here as to the "judgment" of Congress; there are questions only of Congress' constitutional power.

I

I concur in Part II of MR. JUSTICE BLACK'S opinion, which holds that the literacy test ban of § 201 of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment. Our decisions establish that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson,* 307 U. S. 268, 275;

cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339. Because literacy and illiteracy are seemingly neutral with respect to race, creed, color, and sex, we upheld a literacy requirement against a claim that it was invalid on its face under the Fifteenth Amendment. *Lassiter* v. *Northampton Election Board,* 360 U. S. 45. But in *Gaston County* v. *United States,* 395 U. S. 285, we made it clear that Congress has ample authority under § 2 of the Fifteenth Amendment to determine that literacy requirements work unfairly against Negroes in practice because they handicap those Negroes who have been deprived of the educational opportunities available to white citizens. We construed the 1965 Voting Rights Act in light of the report of the Senate Judiciary Committee which said, "[T]he educational differences between whites and Negroes in the areas to be covered by the prohibitions—differences which are reflected in the record before the committee—would mean that equal application of the tests would abridge 15th amendment rights." S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 16. See also *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308–315.

Congress has now undertaken to extend the ban on literacy tests to the whole Nation. I see no constitutional impediment to its doing so. Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country. This in turn increases the likelihood of voluntary compliance with the letter and spirit of federal law. Nationwide application facilitates the free movement of citizens from one State to another, since it eliminates the prospect that a change in residence will mean the loss of a federally protected right. Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not. Such a

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line may well appear discriminatory to those who think themselves on the wrong side of it. Moreover the application of the line to particular States can entail a substantial burden on administrative and judicial machinery and a diversion of enforcement resources. Finally, nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one and reflects a national commitment to its solution.

Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. Cf. *Lassiter* v. *Northampton Election Board, supra.* The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests. Instead, at that time "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *South Carolina* v. *Katzenbach,* 383 U. S., at 328. Experience gained under the 1965 Act has now led Congress to conclude that it should go the whole distance. This approach to the problem is a rational one; consequently it is within the constitutional power of Congress under § 2 of the Fifteenth Amendment.

II

Section 202 added by the Voting Rights Act Amendments of 1970 is a comprehensive provision aimed at insuring that a citizen will not be deprived of the opportunity to vote for the offices of President and Vice President because of a change of residence. Those who take up a new residence more than 30 days before a presidential election are guaranteed the right to register and vote in the State to which they have moved notwithstanding any durational residency requirement imposed by state law, provided, of course, that they are otherwise qualified to vote. Those who take up a new residence less than 30 days before a presidential election are guaranteed the right to vote, either in person or by absentee ballot, in the State from which they have moved, provided that they satisfied, as of the date of their change of residence, the requirements to vote in that State.

A

Congress, in my view, has the power under the Constitution to eradicate political and civil disabilities that arise by operation of state law following a change in residence from one State to another. Freedom to travel from State to State—freedom to enter and abide in any State in the Union—is a privilege of United States citizenship. *Shapiro* v. *Thompson,* 394 U. S. 618; *United States* v. *Guest,* 383 U. S. 745, 757–760; *Truax* v. *Raich,* 239 U. S. 33, 39; *Twining* v. *New Jersey,* 211 U. S. 78, 97; *Crandall* v. *Nevada,* 6 Wall. 35. Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States . . . ." In discussing the privileges of citizens of the United States within the meaning of § 1, Mr. Justice Miller wrote for the Court in the *Slaughter-House Cases:*

> "One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." 16 Wall. 36, 80.

Although § 5 of the Fourteenth Amendment confers on Congress the "power to enforce, by appropriate legislation, the provisions of this article," this Court has sustained the power of Congress to protect and facilitate the exercise of privileges of United States citizenship without reference to § 5. *United States* v. *Guest,* 383 U. S., at 757–760; *United States* v. *Classic,* 313 U. S. 299; *Burroughs* v. *United States,* 290 U. S. 534. These cases and others establish that Congress brings to the protection and facilitation of the exercise of privileges of United States citizenship all of its power under the Necessary and Proper Clause. Consequently, as against the reserved power of the States, it is enough that the end to which Congress has acted be one legitimately within its power and that there be a rational basis for the measures chosen to achieve that end. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421.

In the light of these considerations, § 202 presents no difficulty. Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State. The objective of § 202 is clearly a legitimate one. Federal action is required if the privilege to change residence is not to be undercut by parochial local sanctions. No State could undertake

to guarantee this privilege to its citizens. At most a single State could take steps to resolve that its own laws would not unreasonably discriminate against the newly arrived resident. Even this resolve might not remain firm in the face of discriminations perceived as unfair against those of its own citizens who moved to other States. Thus, the problem could not be wholly solved by a single State, or even by several States, since every State of new residence and every State of prior residence would have a necessary role to play. In the absence of a unanimous interstate compact, the problem could only be solved by Congress. Quite clearly, then, Congress has acted to protect a constitutional privilege that finds its protection in the Federal Government and is national in character. *Slaughter-House Cases,* 16 Wall., at 79.

B

But even though general constitutional power clearly exists, Congress may not overstep the letter or spirit of any constitutional restriction in the exercise of that power. For example, Congress clearly has power to regulate interstate commerce, but it may not, in the exercise of that power, impinge upon the guarantees of the Bill of Rights. I have concluded that, while § 202 applies only to presidential elections, nothing in the Constitution prevents Congress from protecting those who have moved from one State to another from disenfranchisement in any federal election, whether congressional or presidential.

The Constitution withholds from Congress any general authority to change by legislation the qualifications for voters in federal elections. The meaning of the applicable constitutional provisions is perfectly plain. Article I, § 2, and the Seventeenth Amendment prescribe the qualifications for voters in elections to choose Senators and Representatives: they "shall have the Qualifications

requisite for Electors of the most numerous Branch of the State Legislature." The Constitution thus adopts as the federal standard the standard which each State has chosen for itself. *Ex parte Yarbrough,* 110 U. S. 651, 663; *Wiley* v. *Sinkler,* 179 U. S. 58, 64. Accordingly, a state law that purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Art. I, § 2, and the Seventeenth Amendment. By the same token, it cannot be gainsaid that federal legislation that had no objective other than to alter the qualifications to vote in congressional elections would be invalid for the same reasons. What the Constitution has fixed may not be changed except by constitutional amendment.

Contrary to the submission of my Brother BLACK, Art. I, § 4, does not create in the Federal Legislature the power to alter the constitutionally established qualifications to vote in congressional elections. That section provides that the legislatures in each State shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," but reserves in Congress the power to "make or alter such Regulations, except as to the Places of chusing Senators." The "manner" of holding elections can hardly be read to mean the *qualifications* for voters, when it is remembered that § 2 of the same Art. I explicitly speaks of the "qualifications" for voters in elections to choose Representatives. It is plain, in short, that when the Framers meant qualifications they said "qualifications." That word does not appear in Art. I, § 4. Moreover, § 4 does not give Congress the power to do anything that a State might not have done, and, as pointed out above, no State may establish distinct qualifications for congressional elections. The States, of course, are free to pass such laws as are necessary to assure fair elections. Congressional power under § 4 is equally broad with respect to con-

gressional elections. *United States* v. *Classic,* 313 U. S. 299. But the States are not free to prescribe qualifications for voters in federal elections which differ from those prescribed for the most numerous branch of the state legislature. And the power of Congress to do so cannot, therefore, be found in Art. I, § 4.

This view is confirmed by extrinsic evidence of the intent of the Framers of the Constitution. An early draft of the Constitution provided that the States should fix the qualifications of voters in congressional elections subject to the proviso that these qualifications might "at any Time be altered and superseded by the Legislature of the United States." [1] The records of the Committee on Detail show that it was decided to strike the provision granting to Congress the authority to set voting qualifications and to add in its stead a clause making the qualifications "the same from Time to Time as those of the Electors, in the several States, of the most numerous Branch of their own Legislatures." [2] The proposed draft reported by the Committee on Detail to the Convention included the following:

> "The qualifications of the electors shall be the same, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures." Art. IV, § 1.
>
> "The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States." [3] Art. VI, § 1.

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[1] 2 M. Farrand, Records of the Federal Convention of 1787, p. 153 (1911).

[2] *Id.,* at 164.

[3] *Id.,* at 178–179.

On August 7, Gouverneur Morris moved to strike the last clause of the proposed Art. IV, § 1, and either to provide a freehold limitation on suffrage or to add a clause permitting Congress to alter the electoral qualifications.[4] This motion was opposed by Oliver Ellsworth, George Mason, James Madison, and Benjamin Franklin. Ellsworth protested that the proposal favored aristocracy. If the legislature could alter qualifications, it could disqualify a great proportion of the electorate.[5] Mason voiced a similar objection. "A power to alter the qualifications would be a dangerous power in the hands of the Legislature."[6] To the same effect Madison said:

> "The right of suffrage is certainly one of the fundamental articles of republican Government, and ought not to be left to be regulated by the Legislature."[7]

The proposed motion was defeated by a seven-to-one vote,[8] and no substantive change in Art. I, § 2, was proposed or made thereafter.

Thus, Alexander Hamilton accurately reported the intent of the Convention when he wrote in The Federalist No. 60 that the authority of the national government "would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature [*i. e.*, Congress]." (Emphasis in original.)

Different provisions of the Constitution govern the selection of the President and the Vice President. Arti-

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[4] *Id.*, at 201, 207.
[5] *Id.*, at 201.
[6] *Id.*, at 202.
[7] *Id.*, at 203.
[8] *Id.*, at 206.

cle II and the Twelfth Amendment provide for election by electors. Article II specifies that each State shall appoint electors "in such Manner as the Legislature thereof may direct." Because the Constitution does not require the popular election of members of the electoral college, it does not specify the qualifications that voters must have when the selection of electors is by popular election. This is left to the States in the exercise of their power to "direct" the manner of choosing presidential electors. *Williams* v. *Rhodes,* 393 U. S. 23, 29. When electors are chosen by popular election, the Federal Government has the power to assure that such elections are orderly and free from corruption. *Burroughs* v. *United States,* 290 U. S. 534. But in *Burroughs* the Court noted of the Act under review: "Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." 290 U. S., at 544. The Court quoted with approval the following passage from *Ex parte Yarbrough,* 110 U. S. 651: "[T]he importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes." 290 U. S., at 546. And in *United States* v. *Classic,* 313 U. S. 299, the Court was careful to point out that it is the "right of *qualified* voters within a state to cast their ballots and have them counted" which is a privilege of United States citizenship amenable to congressional protection. *Id.,* at 315 (emphasis added). See also *Corfield* v. *Coryell,* 6 F. Cas. 546, 552 (No. 3230) (CCED Pa.).

The issue, then, is whether, despite the intentional withholding from the Federal Government of a general authority to establish qualifications to vote in either congressional or presidential elections, there exists con-

gressional power to do so when Congress acts with the objective of protecting a citizen's privilege to move his residence from one State to another. Although the matter is not entirely free from doubt, I am persuaded that the constitutional provisions discussed above are not sufficient to prevent Congress from protecting a person who exercises his constitutional right to enter and abide in any State in the Union from losing his opportunity to vote, when Congress may protect the right of interstate travel from other less fundamental disabilities. The power of the States with regard to the franchise is subject to the power of the Federal Government to vindicate the unconditional personal rights secured to the citizen by the Federal Constitution. *Williams* v. *Rhodes, supra;* cf. *Shapiro* v. *Thompson, supra.* The power that Congress has exercised in enacting § 202 is not a general power to prescribe qualifications for voters in either federal or state elections. It is confined to federal action against a particular problem clearly within the purview of congressional authority. Finally, the power to facilitate the citizen's exercise of his constitutional privilege to change residence is one that cannot be left for exercise by the individual States without seriously diminishing the level of protection available. As I have sought to show above, federal action is required if this privilege is to be effectively maintained. We should strive to avoid an interpretation of the Constitution that would withhold from Congress the power to legislate for the protection of those constitutional rights that the States are unable effectively to secure. For all these reasons, I conclude that it was within the power of Congress to enact § 202.[9]

[9] Whether a particular State's durational residency requirement for voters may violate the Equal Protection Clause of the Fourteenth Amendment presents questions that are for me quite different from those attending the constitutionality of § 202. See *Howe* v. *Brown,*

III

Section 302 added by the Voting Rights Act Amendments of 1970 undertakes to enfranchise in all federal, state, and local elections those citizens 18 years of age or older who are now denied the right to vote by state law because they have not reached the age of 21. Although it was found necessary to amend the Constitution in order to confer a federal right to vote upon Negroes [10] and upon females,[11] the Government asserts that a federal right to vote can be conferred upon people between 18 and 21 years of age simply by this Act of Congress. Our decision in *Katzenbach* v. *Morgan,* 384 U. S. 641, it is said, established the power of Congress, under § 5 of the Fourteenth Amendment, to nullify state laws requiring voters to be 21 years of age or older if Congress could rationally have concluded that such laws are not supported by a "compelling state interest."

In my view, neither the *Morgan* case, nor any other case upon which the Government relies, establishes such congressional power, even assuming that all those cases [12] were rightly decided. MR. JUSTICE BLACK is surely

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319 F. Supp. 862 (ND Ohio 1970); *Cocanower* v. *Marston,* 318 F. Supp. 402 (Ariz. 1970); *Burg* v. *Canniffe,* 315 F. Supp. 380 (Mass. 1970); *Blumstein* v. *Ellington,* — F. Supp. — (MD Tenn. 1970); *Hadnott* v. *Amos,* 320 F. Supp. 107 (MD Ala. 1970); *Bufford* v. *Holton,* 319 F. Supp. 843 (ED Va. 1970); *Lester* v. *Board of Elections,* 319 F. Supp. 505 (DC 1970).

[10] U. S. Const., Amdt. XV.

[11] U. S. Const., Amdt. XIX; see also *Minor* v. *Happersett,* 21 Wall. 162.

[12] *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Louisiana* v. *United States,* 380 U. S. 145 (1965); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966); *Kramer* v. *Union School District,* 395 U. S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); *Evans* v. *Cornman,* 398 U. S. 419 (1970); *Phoenix* v. *Kolodziejski,* 399 U. S. 204 (1970).

correct when he writes, "It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States." *Ante,* at 125. For the reasons that I have set out in Part II of this opinion, it is equally plain to me that the Constitution just as completely withholds from Congress the power to alter by legislation qualifications for voters in federal elections, in view of the explicit provisions of Article I, Article II, and the Seventeenth Amendment.

To be sure, recent decisions have established that state action regulating suffrage is not immune from the impact of the Equal Protection Clause.[13] But we have been careful in those decisions to note the undoubted power of a State to establish a qualification for voting based on age. See, *e. g., Kramer* v. *Union School District,* 395 U. S. 621, 625; *Lassiter* v. *Northampton Election Board,* 360 U. S., at 51. Indeed, none of the opinions filed today suggest that the States have anything but a constitutionally unimpeachable interest in establishing some age qualification as such. Yet to test the power to establish an age qualification by the "compelling interest" standard is really to deny a State any choice at all, because no State could demonstrate a "compelling interest" in drawing the line with respect to age at one point rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose

[13] See, *e. g.,* cases cited *supra,* n. 12.

21 as a reasonable voting age, as the vast majority of the States have done.[14]

Katzenbach v. *Morgan, supra,* does not hold that Congress has the power to determine what are and what are not "compelling state interests" for equal protection purposes. In *Morgan* the Court considered the power of Congress to enact a statute whose principal effect was to enfranchise Puerto Ricans who had moved to New York after receiving their education in Spanish-language Puerto Rican schools and who were denied the right to vote in New York because they were unable to read or write English. The Court upheld the statute on two grounds: that Congress could conclude that enhancing the political power of the Puerto Rican community by conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services; and that Congress could conclude that the New York statute was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans,

[14] If the Government is correct in its submission that a particular age requirement must meet the "compelling interest" standard, then, of course, a substantial question would exist whether a 21-year-old voter qualification is constitutional even in the absence of congressional action, as my Brothers point out. *Ante,* at 241–246. Yet it is inconceivable to me that this Court would ever hold that the denial of the vote to those between the ages of 18 and 21 constitutes such an invidious discrimination as to be a denial of the equal protection of the laws. The establishment of an age qualification is not state action aimed at any discrete and insular minority. Cf. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 n. 4. Moreover, so long as a State does not set the voting age higher than 21, the reasonableness of its choice is confirmed by the very Fourteenth Amendment upon which the Government relies. Section 2 of that Amendment provides for sanctions when the right to vote "is denied to any of the male inhabitants of such State, *being twenty-one years of age,* and citizens of the United States . . . ." (Emphasis added.)

an undoubted invidious discrimination under the Equal Protection Clause. Both of these decisional grounds were farreaching. The Court's opinion made clear that Congress could impose on the States a remedy for the denial of equal protection that elaborated upon the direct command of the Constitution, and that it could override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion. Cf. *Swain* v. *Alabama,* 380 U. S. 202.

But it is necessary to go much further to sustain § 302. The state laws that it invalidates do not invidiously discriminate against any discrete and insular minority. Unlike the statute considered in *Morgan,* § 302 is valid only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are "compelling." I concurred in MR. JUSTICE HARLAN's dissent in *Morgan.* That case, as I now read it, gave congressional power under § 5 the furthest possible legitimate reach. Yet to sustain the constitutionality of § 302 would require an enormous extension of that decision's rationale. I cannot but conclude that § 302 was beyond the constitutional power of Congress to enact.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO

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

No. 40. Argued November 18, 1970—Decided January 12, 1971*

A general contractor (Burns) subcontracted construction work to three companies, all of which employed operating engineers who belonged to respondent union. That union, disputing the assignment by one of the subcontractors (White) of an operation involving an electric welding machine to members of another labor organization, advised Burns that all respondent's members on the jobsite would strike unless Burns bound itself and the subcontractors to give respondent jurisdiction over electric welding machines. The union went on strike when the employers refused to accede to its demands. After an arbitrator, to whom Burns had referred the matter, held that there was no reason to change the disputed work assignment, respondent union physically prevented operation of the welding machine. Thereafter an unfair labor practices proceeding against the union was brought. The National Labor Relations Board (NLRB) found that by inducing the subcontractors' employees to strike to force White to assign the disputed work to the operating engineers the union had violated § 8 (b) (4) (D) of the National Labor Relations Act, which bars strikes for the object of "forcing . . . any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . . ." The NLRB also found that by applying economic pressure on the neutral employers the union had violated § 8 (b) (4) (B), which bars a union from exerting coercive pressure on a neutral or secondary employer where "an object thereof" is forcing him, *inter alia,* "to cease doing business with any other person." On the NLRB's petition for enforcement, the Court of Appeals sustained the NLRB's § 8 (b) (4) (D) finding but set aside its § 8 (b) (4) (B) finding, concluding that the union's objective was to force Burns "to use its influence with the subcontractor to change

*Together with No. 42, *Burns & Roe, Inc., et al.* v. *Local 825, International Union of Operating Engineers, AFL–CIO, et al.*

the subcontractor's conduct, not to terminate their relationship." *Held:*

1. In seeking to force Burns to bind all the subcontractors on the project to a particular form of job assignments and implying by its demands that Burns would have to force a change in White's policy or terminate White's contract, respondent union engaged in flagrant secondary conduct within the prohibition of § 8 (b) (4) (B). Pp. 302–305.

2. Section 8 (b) (4) (D) is not an exclusive remedy for secondary pressure aimed at involving a neutral employer in a jurisdictional dispute over work assignments made by the primary employer. Pp. 305–306.

410 F. 2d 5, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 306.

Arnold Ordman argued the cause for the National Labor Relations Board, petitioner in No. 40 and respondent in No. 42. With him on the brief were *Solicitor General Griswold, Peter L. Strauss, Dominick L. Manoli,* and *Norton J. Come. Vincent J. Apruzzese* argued the cause for petitioners in No. 42. With him on the brief were *Francis A. Mastro* and *Merritt T. Viscardi.*

Earl S. Aronson argued the cause for respondent Local 825, International Union of Operating Engineers, in both cases. With him on the brief was *Thomas E. Durkin, Jr.*

Laurence Gold argued the cause for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance in both cases. With him on the brief were *J. Albert Woll* and *Thomas E. Harris.*

Briefs of *amici curiae* urging reversal in both cases were filed by *William B. Barton* and *Harry J. Lambeth* for Associated Builders & Contractors, Inc., and by *Winthrop A. Johns* and *Lawrence T. Zimmerman* for the Associated General Contractors of America et al.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this cause we are asked to determine whether strikes by Operating Engineers at the site of the construction of a nuclear power generator plant at Oyster Creek, New Jersey, violated § 8 (b)(4)(B) [1] of the National Labor Relations Act. Although the National Labor Relations Board found the strikes to be in violation of this section, the Court of Appeals refused to enforce the Board's order.[2] We believe the Court of Appeals construed the Act too narrowly. Accordingly, we reverse and remand the case for consideration of the propriety of the Board's order.

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[1] Sec. 8 (b) "It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ." 61 Stat. 141, as amended, 73 Stat. 542, 29 U. S. C. § 158 (b)(4)(B).

[2] 410 F. 2d 5.

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The general contractor for the project, Burns & Roe, Inc., subcontracted all of the construction work to three companies—White Construction Co., Chicago Bridge & Iron Co., and Poirier & McLane Corp. All three employed operating engineers who were members of Local 825, International Union of Operating Engineers. But White, unlike Chicago Bridge and Poirier, did not have a collective-bargaining agreement with Local 825.

In the latter part of September 1965, White installed an electric welding machine and assigned the job of pushing the buttons that operated the machine to members of the Ironworkers Union, who were to perform the actual welding. Upon learning of this work assignment, Local 825's job steward and its lead engineer threatened White with a strike if operating engineers were not given the work. White, however, refused to meet the demand. On September 29, 1965, the job steward and lead engineer met with the construction manager for Burns, the general contractor. They informed him that the members of Local 825 working at the jobsite had voted to strike unless Burns signed a contract, which would be binding [3] on all three subcontractors as well as Burns, giving Local 825 jurisdiction over all power equipment, including electric welding machines, operated on the jobsite. On October 1, after White and Burns refused to

[3] The proposed contract provided in part:

"This Agreement shall bind all sub-contractors while working for an Employer who is a party to this Agreement. Any Employer who sublets any of his work must sublet the same subject to all the terms and conditions of this Agreement.

"The Employer agrees that he will not subcontract any of his work, which is covered by the terms of this Collective Bargaining Agreement, to any subcontractor, unless said subcontractor agrees in writing to perform said work subject to all terms and conditions of this Agreement between the Employer and the Union, including an agreement to submit work jurisdictional disputes for determination as provided below."

accede to the demands, the operating engineers employed by Chicago Bridge and Poirier as well as those employed by White walked off the job. They stayed out from 8 a. m. to 1 p. m., returning to work when negotiations over their demands started.

On October 6, Burns submitted the work assignment dispute to the National Joint Board for the Settlement of Jurisdictional Disputes for the Construction Industry.[4] The same day, Local 825 threatened Burns and all the subcontractors with another work stoppage unless the contracts were signed and the work transferred to the operating engineers. The employers again refused, and the operating engineers walked off the project. This strike lasted from October 7 to October 11.

On October 20, the Joint Board notified the parties that there was no reason to change the assignment of the disputed work. Local 825 did not accept this resolution; and when the welding machine was started on November 4, the operating engineers surrounded the machine and physically prevented its operation. On November 8, the NLRB Regional Director obtained from the United States District Court a temporary injunction under § 10 (*l*)[5] of the Act restraining the union from coercing a cessation of business on the project or to compel White to change the work assignment.[6]

[4] A private organization that arbitrates jurisdictional disputes in the construction industry.

[5] 29 U. S. C. § 160 (*l*).

[6] The Operating Engineer's activity did not stop with the issuance of the injunction. White's engineers struck again on November 17, this time ostensibly over a dispute concerning the number of employees assigned to operate a recently installed electrical pump. Local 825 representatives in a discussion with White said, however, that this walkout "was more or less because of the electric welding machine being in operation." The strike lasted until December 21. Of course the activity like that on November 4 did not involve § 8 (b) (4) (B) violations since only the engineers working for White were involved.

An unfair labor practice proceeding against Local 825 subsequently ensued. The Board found that the union had violated § 8 (b)(4)(D)[7] of the Act by inducing employees of White, Chicago Bridge, and Poirier to strike to force White to take the disputed work away from the Ironworkers and assign it to the Operating Engineers. The Court of Appeals' approval of this finding is not questioned here. But the Board's finding that Local 825's encouragement of the Chicago Bridge and Poirier employees to strike and the union's coercion of Burns violated § 8 (b)(4)(B) of the Act was not approved by the Court of Appeals and is in issue here.

I

Congressional concern over the involvement of third parties in labor disputes not their own prompted § 8 (b)(4)(B). This concern was focused on the "secondary boycott," [8] which was conceived of as pressure brought to

[7] Sec. 8 (b) "It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . ." 29 U. S. C. § 158 (b)(4)(D).

[8] See *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 386–390 (1969); *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612, 624 (1967).

bear, not "upon the employer who alone is a party [to a dispute], but upon some third party who has no concern in it" [9] with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands.[10]

Section 8 (b)(4)(B) is, however, the product of legislative compromise and also reflects a concern with protecting labor organizations' right to exert legitimate pressure aimed at the employer with whom there is a primary dispute.[11] This primary activity is protected even though it may seriously affect neutral third parties. *Steelworkers* (Carrier Corp.) v. *NLRB,* 376 U. S. 492, 502 (1964); *Electrical Workers* (General Electric) v. *NLRB,* 366 U. S. 667, 673 (1961).

Thus there are two threads to § 8 (b)(4)(B) that require disputed conduct to be classified as either "primary" or "secondary." And the tapestry that has been woven in classifying such conduct is among the labor law's most intricate. See *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S. 369 (1969). But here the normally difficult task of classifying union conduct is easy. As the Court of Appeals said, the "record amply justifies the conclusion that [Burns and the neutral subcontractors] were subjected to coercion in the

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[9] *Electrical Workers, Local 501* v. *NLRB,* 181 F. 2d 34, 37 (CA2 1950), aff'd, 341 U. S. 694 (1951).

[10] The House Conference Report explained this idea:

"Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43 (1947).

[11] The section contains a specific proviso, which was added by the 1959 amendment to the Act, that protects a "primary strike or primary picketing" that is "not otherwise unlawful." See n. 1, *supra.*

form of threats or walkouts, or both." 410 F. 2d, at 9. And, as the Board said, it is clear that this coercion was designed "to achieve the assignment of [the] disputed work" to operating engineers. 162 N. L. R. B. 1617, 1621.

Local 825's coercive activity was aimed directly at Burns and the subcontractors that were not involved in the dispute. The union engaged in a strike against these neutral employers for the specific, overt purpose of forcing them to put pressure on White to assign the job of operating the welding machine to operating engineers. Local 825 was not attempting to apply the full force of primary action by directing its efforts at all phases of Burns' normal operation as was the case in *Steelworkers* (Carrier) v. *NLRB,* 376 U. S. 492 (1964), and *Electrical Workers* (General Electric) v. *NLRB,* 366 U. S. 667 (1961). It was instead using a sort of pressure that was unmistakably and flagrantly secondary. *NLRB* v. *Denver Building & Construction Trades Council,* 341 U. S. 675 (1951).

The more difficult task is to determine whether one of Local 825's objectives was to force Burns and the other neutrals to "cease doing business" with White as § 8 (b)(4)(B) requires. The Court of Appeals concluded that the union's objective was to force Burns "to use its influence with the subcontractor to change the subcontractor's conduct, not to terminate their relationship" and that this was not enough. 410 F. 2d, at 10. That court read the statute as requiring that the union demand nothing short of a complete termination of the business relationship between the neutral and the primary employer. Such a reading is too narrow.

Some disruption of business relationships is the necessary consequence of the purest form of primary activity. These foreseeable disruptions are, however, clearly protected. *Steelworkers* (Carrier), 376 U. S., at 496; *Electrical Workers* (General Electric), 366 U. S., at 682.

Likewise, secondary activity could have such a limited goal and the foreseeable result of the conduct could be, while disruptive, so slight that the "cease doing business" requirement is not met.

Local 825's goal was not so limited nor were the foreseeable consequences of its secondary pressure slight. The operating engineers sought to force Burns to bind all the subcontractors on the project to a particular form of job assignments. The clear implication of the demands was that Burns would be required either to force a change in White's policy or to terminate White's contract. The strikes shut down the whole project. If Burns was unable to obtain White's consent, Local 825 was apparently willing to continue disruptive conduct that would bring all the employers to their knees.

Certainly, the union would have preferred to have the employers capitulate to its demands; it wanted to take the job of operating the welding machines away from the Ironworkers. It was willing, however, to try to obtain this capitulation by forcing neutrals to compel White to meet union demands. To hold that this flagrant secondary conduct with these most serious disruptive effects was not prohibited by § 8 (b)(4)(B) would be largely to ignore the original congressional concern. *NLRB* v. *Carpenters Dist. Council,* 407 F. 2d 804, 806 (CA5 1969).

II

In addition to its argument that § 8 (b)(4)(B) does not cover its conduct, Local 825 argues that § 8 (b)(4)(D) provides the exclusive remedy. Clearly, § 8 (b)(4)(D) is, as the Board and Court of Appeals held, applicable. But that section is aimed at protecting "the employer trapped between the . . . claims" of rival unions. *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, 625 (1967). Although § 8 (b)(4)(D) also

applies to neutrals, the basic purpose is different from that of § 8 (b)(4)(B). The practices here were unfair under both sections and there is no indication that Congress intended either section to have exclusive application.

III

Since the Court of Appeals did not believe that § 8 (b)(4)(B) was applicable, it did not consider the propriety of the portion of the Board's order relating to that section. But the order was not narrowly confined to the conduct involved here; so we must remand these cases for the Court of Appeals to consider whether the order is necessary to further the goals of the Act. See *Communications Workers* v. *NLRB,* 362 U. S. 479 (1960); *NLRB* v. *Express Publishing Co.,* 312 U. S. 426 (1941).

Reversed and remanded.

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

If we take the words of the Act, rather than what the courts have interpolated, and lay them alongside the facts of this cause, I do not see how we can fairly say that Local 825 engaged in an "unfair labor practice" within the meaning of § 8 (b)(4)(B). Local 825 did use coercion to get jobs from White for its workers. The Board termed it "causing a disruption of the business relationship among the various employers at the jobsite," which it held was within the ban of § 8 (b)(4)(B) since Local 825's aim, though not "a total cancellation of a business relationship" with White, constituted a "cease doing business" purpose. The Board said: "an object of the Respondent was to force Burns to cease doing business with White, and to force Chicago Bridge and Poirier to cease doing business with Burns in order to compel

Burns to cease doing business with White." 162 N. L. R. B. 1617, 1621–1622.

Yet as the Trial Examiner found: "Respondent never indicated it wanted White off the job—it wanted to harass White to gain compliance with its requests. Nor was any demand made upon Burns to cease doing business with White. . . . All Respondent wanted was the work, not a substitution of contractors nor a termination of contractual relationships between the contractors."

Our question turns not on the findings of fact but on the question of law which emerges, whether what was done had as its purpose to induce the general contractor and subcontractor to "cease doing business" with White.

We held in *NLRB* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 688, that an effort "to force" a subcontractor in the position of White "off the job" satisfied the "cease doing business" test though that purpose was not the exclusive one. A strike to achieve that end, we held in *Electrical Workers* v. *NLRB,* 341 U. S. 694, 700, also brought the coercive means within the same ban. And in *Steelworkers* v. *NLRB,* 376 U. S. 492, 496, we held that a union on strike against an employer, Carrier, had not violated the "cease doing business" ban, when it picketed at an entrance used exclusively by railroad personnel "to induce the railroad to cease providing freight service to Carrier for the duration of the strike."

The case here is plainly different. The aim was not to freeze out White or to close it down for an hour or for the duration. It was merely to get the work, whose assignment it controlled, for members of Local 825. The case is therefore the classic jurisdictional conflict covered by § 8 (b)(4)(D) which makes "forcing or requiring any employer to assign particular work to employees

in a particular labor organization" an unfair labor practice.

The Board properly issued a cease-and-desist order concerning the jurisdictional dispute condemned by § 8 (b)(4)(D). The fact that (D) may be involved does not necessarily mean that (B) may not also be involved, as the two are not "mutually exclusive." *Local 5, Plumbing & Pipe Fitting Industry,* 137 N. L. R. B. 828, 832.* But where the facts show only the jurisdictional dispute condemned by § 8 (b)(4)(D) and no plan to close down White either permanently or for a day or even an hour, we should not only hold that § 8 (b)(4)(B) is not satisfied; we should also hold that (D) cannot do service for (B) where there is no element of "ceasing" to do business present.

*And see *Local 5, Plumbing & Pipe Fitting Industry,* 145 N. L. R. B. 1580; *Millwrights Local 1102,* 162 N. L. R. B. 217.

Syllabus

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

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

No. 69. Argued October 20, 1970—Decided January 12, 1971

New York's Aid to Families with Dependent Children (AFDC) program, stressing "close contact" with beneficiaries, requires home visits by caseworkers as a condition for assistance "in order that any treatment or service tending to restore [beneficiaries] to a condition of self-support and to relieve their distress may be rendered and . . . that assistance or care may be given only in such amount and as long as necessary." Visitation with a beneficiary, who is the primary source of information to welfare authorities as to eligibility for assistance, is not permitted outside working hours, and forcible entry and snooping are prohibited. Appellee, a beneficiary under the AFDC program, after receiving several days' advance notice, refused to permit a caseworker to visit her home and, following a hearing and advice that assistance would consequently be terminated, brought this suit for injunctive and declaratory relief, contending that a home visitation is a search and, when not consented to or supported by a warrant based on probable cause, would violate her Fourth and Fourteenth Amendment rights. The District Court upheld appellee's constitutional claim. *Held:* The home visitation provided for by New York law in connection with the AFDC program is a reasonable administrative tool and does not violate any right guaranteed by the Fourth and Fourteenth Amendments. Pp. 315–326.

(a) Home visitation, which is not forced or compelled, is not a search in the traditional criminal law context of the Fourth Amendment. Pp. 317–318.

(b) Even assuming that the home visit has some of the characteristics of a traditional search, New York's program is reasonable, as it serves the paramount needs of the dependent child; enables the State to determine that the intended objects of its assistance benefit from its aid and that state funds are being properly used; helps attain parallel federal relief objectives; stresses privacy by not unnecessarily intruding on the beneficiary's rights in her home; provides essential information not obtainable through secondary sources; is conducted, not by a law enforce-

ment officer, but by a caseworker; is not a criminal investigation; and (unlike the warrant procedure, which necessarily implies criminal conduct) comports with the objectives of welfare administration. Pp. 318–324.

(c) The consequence of refusal to permit home visitation, which does not involve a search for violations, is not a criminal prosecution but the termination of relief benefits. *Camara* v. *Municipal Court,* 387 U. S. 523; *See* v. *City of Seattle,* 387 U. S. 541, distinguished. Pp. 324–325.

303 F. Supp. 935, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, and STEWART, JJ., and WHITE, J. (except for Part IV) joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 326. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 338.

Brenda Soloff, Assistant Attorney General of New York, argued the cause for appellant Wyman. With her on the brief were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General, for appellant Wyman, and *J. Lee Rankin* for appellant Goldberg, Commissioner of Social Services of the City of New York.

Jonathan Weiss argued the cause for appellee. With him on the brief was *David Gilman.*

Briefs of *amici curiae* urging affirmance were filed by *Stephen F. Gordon* and *Ernest Fleischman* for the Social Service Employees Union Local 371, AFSCME, AFL–CIO, and by *Lois P. Sheinfeld* for the Legal Aid Society of San Mateo County.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This appeal presents the issue whether a beneficiary of the program for Aid to Families with Dependent Children (AFDC)[1] may refuse a home visit by the caseworker without risking the termination of benefits.

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[1] In *Goldberg* v. *Kelly,* 397 U. S. 254, 256 n. 1 (1970), the Court observed that AFDC is a categorical assistance program supported

The New York State and City social services commissioners appeal from a judgment and decree of a divided three-judge District Court holding invalid and unconstitutional in application § 134 of the New York Social Services Law,[2] § 175 of the New York Policies Governing

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by federal grants-in-aid but administered by the States according to regulations of the Secretary of Health, Education, and Welfare. See New York Social Services Law §§ 343–362 (1966 and Supp. 1969–1970). Aspects of AFDC have been considered in *King* v. *Smith,* 392 U. S. 309 (1968); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Goldberg* v. *Kelly, supra; Rosado* v. *Wyman,* 397 U. S. 397 (1970); and *Dandridge* v. *Williams,* 397 U. S. 471 (1970).

[2] "§ 134. Supervision

"The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department or required by the circumstances of the case, in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary. . . . The circumstances of a person receiving continued care shall be reinvestigated as frequently as the rules of the board or regulations of the department may require."

Section 134–a, as added by Laws 1967, c. 183, effective April 1, 1967, provides:

"In accordance with regulations of the department, any investigation or reinvestigation of eligibility . . . shall be limited to those factors reasonably necessary to insure that expenditures shall be in accord with applicable provisions of this chapter and the rules of the board and regulations of the department and shall be conducted in such manner so as not to violate any civil right of the applicant or recipient. In making such investigation or reinvestigation, sources of information, other than public records, shall be consulted only with the permission of the applicant or recipient. However, if such permission is not granted by the applicant or recipient, the appropriate public welfare official may deny, suspend or discontinue public assistance or care until such time as he may be satisfied that such applicant or recipient is eligible therefor."

the Administration of Public Assistance,[3] and §§ 351.10 and 351.21 of Title 18 of the New York Code of Rules and Regulations,[4] and granting injunctive relief. *James* v. *Goldberg*, 303 F. Supp. 935 (SDNY 1969). This Court noted probable jurisdiction but, by a divided vote, denied a requested stay. 397 U. S. 904.

The District Court majority held that a mother receiving AFDC relief may refuse, without forfeiting her right to that relief, the periodic home visit which the cited New York statutes and regulations prescribe as a condition for the continuance of assistance under the program. The beneficiary's thesis, and that of the Dis-

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[3] "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving . . . Aid to Dependent Children . . . ."

[4] "Section 351.10. *Required home visits and contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

"a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy. . . ."

"Section 351.21. *Required contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence, reports on resources and other necessary documentation."

Section 369.2 of Title 18 provides in part: "(c) *Welfare of child or minor.* A child or minor shall be considered to be eligible for ADC if his home situation is one in which his physical, mental and moral well-being will be safeguarded and his religious faith preserved and protected. (1) In determining the ability of a parent or relative to care for the child so that this purpose is achieved, the home shall be judged by the same standards as are applied to self-maintaining families in the community. When, at the time of application, a home does not meet the usual standards of health and decency but the welfare of the child is not endangered, ADC shall be granted and defined services provided in an effort to improve the situation. Where appropriate, consultation or direct service shall be requested from child welfare."

trict Court majority, is that home visitation is a search and, when not consented to or when not supported by a warrant based on probable cause, violates the beneficiary's Fourth and Fourteenth Amendment rights.

Judge McLean, in dissent, thought it unrealistic to regard the home visit as a search; felt that the requirement of a search warrant to issue only upon a showing of probable cause would make the AFDC program "in effect another criminal statute" and would "introduce a hostile arm's length element into the relationship" between worker and mother, "a relationship which can be effective only when it is based upon mutual confidence and trust"; and concluded that the majority's holding struck "a damaging blow" to an important social welfare program. 303 F. Supp., at 946.

I

The case comes to us on the pleadings and supporting affidavits and without the benefit of testimony which an extended hearing would have provided. The pertinent facts, however, are not in dispute.

Plaintiff Barbara James is the mother of a son, Maurice, who was born in May 1967. They reside in New York City. Mrs. James first applied for AFDC assistance shortly before Maurice's birth. A caseworker made a visit to her apartment at that time without objection. The assistance was authorized.

Two years later, on May 8, 1969, a caseworker wrote Mrs. James that she would visit her home on May 14. Upon receipt of this advice, Mrs. James telephoned the worker that, although she was willing to supply information "reasonable and relevant" to her need for public assistance, any discussion was not to take place at her home. The worker told Mrs. James that she was required by law to visit in her home and that refusal to

permit the visit would result in the termination of assistance. Permission was still denied.

On May 13 the City Department of Social Services sent Mrs. James a notice of intent to discontinue assistance because of the visitation refusal. The notice advised the beneficiary of her right to a hearing before a review officer. The hearing was requested and was held on May 27. Mrs. James appeared with an attorney at that hearing.[5] They continued to refuse permission for a worker to visit the James home, but again expressed willingness to cooperate and to permit visits elsewhere. The review officer ruled that the refusal was a proper ground for the termination of assistance. His written decision stated:

> "The home visit which Mrs. James refuses to permit is for the purpose of determining if there are any changes in her situation that might affect her eligibility to continue to receive Public Assistance, or that might affect the amount of such assistance, and to see if there are any social services which the Department of Social Services can provide to the family."

A notice of termination issued on June 2.

Thereupon, without seeking a hearing at the state level, Mrs. James, individually and on behalf of Maurice, and purporting to act on behalf of all other persons similarly situated, instituted the present civil rights suit under 42 U. S. C. § 1983. She alleged the denial of rights guaranteed to her under the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Fourteenth Amendments, and under Subchapters IV and XVI of the Social Security Act and regulations issued thereunder. She further alleged that

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[5] No issue of procedural due process is raised in this case. Cf. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), and *Wheeler* v. *Montgomery*, 397 U. S. 280 (1970).

she and her son have no income, resources, or support other than the benefits received under the AFDC program. She asked for declaratory and injunctive relief. A temporary restraining order was issued on June 13, *James* v. *Goldberg,* 302 F. Supp. 478 (SDNY 1969), and the three-judge District Court was convened.

II

The federal aspects of the AFDC program deserve mention. They are provided for in Subchapter IV, Part A, of the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U. S. C. §§ 601–610 (1964 ed. and Supp. V). Section 401 of the Act, 42 U. S. C. § 601 (1964 ed., Supp. V), specifies its purpose, namely, "encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life . . . ." The same section authorizes the federal appropriation for payments to States that qualify. Section 402, 42 U. S. C. § 602 (1964 ed., Supp. V), provides that a state plan, among other things, must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness"; must "provide that the State agency will make such reports . . . as the Secretary [of Health, Education, and Welfare] may from time to time require"; must "provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid"; and must "provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of

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such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State . . . ." Section 405, 42 U. S. C. § 605, provides that

> "Whenever the State agency has reason to believe that any payments of aid . . . made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative . . . in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments . . . or in seeking the appointment of a guardian . . . or in the imposition of criminal or civil penalties . . . ."

III

When a case involves a home and some type of official intrusion into that home, as this case appears to do, an immediate and natural reaction is one of concern about Fourth Amendment rights and the protection which that Amendment is intended to afford. Its emphasis indeed is upon one of the most precious aspects of personal security in the home: "The right of the people to be secure in their persons, houses, papers, and effects . . . ." This Court has characterized that right as "basic to a free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949); *Camara* v. *Municipal Court,* 387 U. S. 523, 528 (1967). And over the years the Court consistently has been most protective of the privacy of the dwelling. See, for example, *Boyd* v. *United States,* 116 U. S. 616, 626–630 (1886); *Mapp* v. *Ohio,* 367 U. S. 643 (1961); *Chimel* v. *California,* 395 U. S. 752 (1969); *Vale* v. *Louisiana,* 399

U. S. 30 (1970). In *Camara* MR. JUSTICE WHITE, after noting that the "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task," went on to observe,

> "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U. S., at 528–529.

He pointed out, too, that one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior. 387 U. S., at 530.

IV

This natural and quite proper protective attitude, however, is not a factor in this case, for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term. It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context. We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes

place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

V

If however, we were to assume that a caseworker's home visit, before or subsequent to the beneficiary's initial qualification for benefits, somehow (perhaps because the average beneficiary might feel she is in no position to refuse consent to the visit), and despite its interview nature, does possess some of the characteristics of a search in the traditional sense, we nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness. It is unreasonableness which is the Fourth Amendment's standard. *Terry* v. *Ohio,* 392 U. S. 1, 9 (1968); *Elkins* v. *United States,* 364 U. S. 206, 222 (1960). And Mr. Chief Justice Warren observed in *Terry* that "the specific content and incidents of this right must be shaped by the context in which it is asserted." 392 U. S., at 9.

There are a number of factors that compel us to conclude that the home visit proposed for Mrs. James is not unreasonable:

1. The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent.* There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.

2. The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency,

has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses. Surely it is not unreasonable, in the Fourth Amendment sense or in any other sense of that term, that the State have at its command a gentle means, of limited extent and of practical and considerate application, of achieving that assurance.

3. One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same. It might well expect more, because of the trust aspect of public funds, and the recipient, as well as the caseworker, has not only an interest but an obligation.

4. The emphasis of the New York statutes and regulations is upon the home, upon "close contact" with the beneficiary, upon restoring the aid recipient "to a condition of self-support," and upon the relief of his distress. The federal emphasis is no different. It is upon "assistance and rehabilitation," upon maintaining and strengthening family life, and upon "maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." 42 U. S. C. § 601 (1964 ed., Supp. V); *Dandridge* v. *Williams*, 397 U. S. 471, 479 (1970), and *id.*, at 510 (MARSHALL, J., dissenting). It requires cooperation from the state agency upon specified standards and in specified ways. And it is concerned about any possible exploitation of the child.

5. The home visit, it is true, is not required by federal statute or regulation.[6] But it has been noted that the

[6] The federal regulations require only periodic redeterminations of eligibility. HEW Handbook of Public Assistance Administration, pt. IV, § 2200 (d). But they also require verification of eligibility by making field investigations "including home visits" in a selected sample of cases. Pt. II, § 6200 (a) (3).

visit is "the heart of welfare administration"; that it affords "a personal, rehabilitative orientation, unlike that of most federal programs"; and that the "more pronounced service orientation" effected by Congress with the 1956 amendments to the Social Security Act "gave redoubled importance to the practice of home visiting." Note, Rehabilitation, Investigation and the Welfare Home Visit, 79 Yale L. J. 746, 748 (1970). The home visit is an established routine in States besides New York.[7]

6. The means employed by the New York agency are significant. Mrs. James received written notice several days in advance of the intended home visit.[8] The date

[7] See, *e. g.*, Ala., Manual for Administration of Public Assistance, pt. I–8 (B) (1968 rev.); Ariz., Regulations promulgated pursuant to Rev. Stat. Ann. § 46–203 (1956), Reg. 3–203.6 (1968); Ark. Stat. Ann. § 83–131 (1960); Cal. State Dept. of Social Welfare Handbook, C–012.50 (1964); Colo. Rev. Stat. Ann. § 119–9–1 *et seq.* (Supp. 1967), as amended, Laws 1969, c. 279; Fla. Public Assistance c. 100; Ga. Division of Social Administration—Public Assistance Manual, pt. III, § V (D)(2), pt. VIII (A)(1)(b) (1969); Ill. Rev. Stat., c. 23, § 4–7 (1967); Ind. Ann. Stat. § 52–1247 (1964), Dept. Pub. Welfare, Rules & Regs., Reg. 2–403 (1965); Mich. Public Assistance Manual, Item 243 (3)(F) (Rev.) (1967); Miss. Code Ann. § 7177 (1942) (Laws of 1940, c. 294); Mo. Public Assistance Manual, Dept. of Welfare, § III (1969); Nebraska, State Plan and Manual Regulations, pt. IX, §§ 5760, 5771; N. J., Manual of Administration, Division of Public Welfare, pt. II, §§ 2120, 2122 (1969); N. M. Stat. Ann. § 13–1–13 (1953), Health and Social Services Dept. Manual, §§ 211.5, 272.11; S. C. Dept. of Public Welfare Manual, Vol. IV (D)(2); S. D. Comp. Laws Ann. § 28–7–7 (1967) (formerly S. D. Code § 55.3805); Tenn. Code Ann. § 14–309 (1955), Public Assistance Manual, Vol. II, p. 212 (1968 rev.); Wis. Stat. § 49.19 (2) (1967).

[8] It is true that the record contains 12 affidavits, all essentially identical, of aid recipients (other than Mrs. James) which recite that a caseworker "most often" comes without notice; that when he does, the plans the recipient had for that time cannot be carried out; that the visit is "very embarrassing to me if the caseworker comes when I have company"; and that the caseworker "sometimes asks very personal questions" in front of children.

was specified. Section 134–a of the New York Social Services Law, effective April 1, 1967, and set forth in n. 2, *supra,* sets the tone. Privacy is emphasized. The applicant-recipient is made the primary source of information as to eligibility. Outside informational sources, other than public records, are to be consulted only with the beneficiary's consent. Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden. HEW Handbook of Public Assistance Administration, pt. IV, §§ 2200 (a) and 2300; 18 NYCRR §§ 351.1, 351.6, and 351.7. All this minimizes any "burden" upon the homeowner's right against unreasonable intrusion.

7. Mrs. James, in fact, on this record presents no specific complaint of any unreasonable intrusion of her home and nothing that supports an inference that the desired home visit had as its purpose the obtaining of information as to criminal activity. She complains of no proposed visitation at an awkward or retirement hour. She suggests no forcible entry. She refers to no snooping. She describes no impolite or reprehensible conduct of any kind. She alleges only, in general and nonspecific terms, that on previous visits and, on information and belief, on visitation at the home of other aid recipients, "questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility." Paradoxically, this same complaint could be made of a conference held elsewhere than in the home, and yet this is what is sought by Mrs. James. The same complaint could be made of the census taker's questions. See Mr. Justice Marshall's opinion, as United States Circuit Judge, in *United States* v. *Rickenbacker,* 309 F. 2d 462 (CA2 1962), cert. denied, 371 U. S. 962. What Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own

informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind.[9]

8. We are not persuaded, as Mrs. James would have us be, that all information pertinent to the issue of eligibility can be obtained by the agency through an interview at a place other than the home, or, as the District Court majority suggested, by examining a lease or a birth certificate, or by periodic medical examinations, or by interviews with school personnel. 303 F. Supp., at 943. Although these secondary sources might be helpful, they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits,[10] or of impending medical needs. And, of course, little children, such as Maurice James, are not yet registered in school.

9. The visit is not one by police or uniformed authority. It is made by a caseworker of some training [11] whose

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[9] We have examined Mrs. James' case record with the New York City Department of Social Services, which, as an exhibit, accompanied defendant Wyman's answer. It discloses numerous interviews from the time of the initial one on April 27, 1967, until the attempted termination in June 1969. The record is revealing as to Mrs. James' failure ever really to satisfy the requirements for eligibility; as to constant and repeated demands; as to attitude toward the caseworker; as to reluctance to cooperate; as to evasiveness; and as to occasional belligerency. There are indications that all was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite). The picture is a sad and unhappy one.

[10] § 406 (a) of the Social Security Act, as amended, 42 U. S. C. § 606 (a) (1964 ed., Supp. V); § 349B1 of the New York Social Services Law.

[11] The *amicus* brief submitted on behalf of the Social Services Employees Union Local 371, AFSCME, AFL–CIO, the bargaining representative for the social service staff employed in the New York City Department of Social Services, recites that "caseworkers are either badly trained or untrained" and that "[g]enerally, a caseworker is not only poorly trained, but also young and inexperi-

primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility. As has already been stressed, the program concerns dependent children and the needy families of those children. It does not deal with crime or with the actual or suspected perpetrators of crime. The caseworker is not a sleuth but rather, we trust, is a friend to one in need.

10. The home visit is not a criminal investigation, does not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would join her, is not in aid of any criminal proceeding. If the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect. And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow,[12] then, even assuming that the evidence discovered upon the home visitation is admissible, an issue upon which we express no opinion, that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.

11. The warrant procedure, which the plaintiff appears to claim to be so precious to her, even if civil in nature, is not without its seriously objectionable features in the welfare context. If a warrant could be obtained (the plaintiff affords us little help as to how it would be obtained), it presumably could be applied for *ex parte,* its execution would require no notice, it would justify entry

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enced . . . ." Despite this astonishing description by the union of the lack of qualification of its own members for the work they are employed to do, we must assume that the caseworker possesses at least some qualifications and some dedication to duty.

[12] See, for example, New York Social Services Law § 145.

by force, and its hours for execution [13] would not be so limited as those prescribed for home visitation. The warrant necessarily would imply conduct either criminal or out of compliance with an asserted governing standard. Of course, the force behind the warrant argument, welcome to the one asserting it, is the fact that it would have to rest upon probable cause, and probable cause in the welfare context, as Mrs. James concedes, requires more than the mere need of the caseworker to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it. In this setting the warrant argument is out of place.

It seems to us that the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of a tapayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his "rights" in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So here Mrs. James has the "right" to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved.

VI

Camara v. *Municipal Court,* 387 U. S. 523 (1967), and its companion case, *See* v. *City of Seattle,* 387 U. S. 541 (1967), both by a divided Court, are not incon-

[13] New York Code Crim. Proc. § 801.

sistent with our result here. Those cases concerned, respectively, a refusal of entry to city housing inspectors checking for a violation of a building's occupancy permit, and a refusal of entry to a fire department representative interested in compliance with a city's fire code. In each case a majority of this Court held that the Fourth Amendment barred prosecution for refusal to permit the desired warrantless inspection. *Frank* v. *Maryland,* 359 U. S. 360 (1959), a case that reached an opposing result and that concerned a request by a health officer for entry in order to check the source of a rat infestation, was *pro tanto* overruled. Both *Frank* and *Camara* involved dwelling quarters. *See* had to do with a commercial warehouse.

But the facts of the three cases are significantly different from those before us. Each concerned a true search for violations. *Frank* was a criminal prosecution for the owner's refusal to permit entry. So, too, was *See*. *Camara* had to do with a writ of prohibition sought to prevent an already pending criminal prosecution. The community welfare aspects, of course, were highly important, but each case arose in a criminal context where a genuine search was denied and prosecution followed.

In contrast, Mrs. James is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted. Her wishes in that respect are fully honored. We have not been told, and have not found, that her refusal is made a criminal act by any applicable New York or federal statute. The only consequence of her refusal is that the payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits. If a statute made her refusal a criminal offense, and if this case were one concerning her prosecution under that statute, *Camara* and *See* would have conceivable pertinency.

VII

Our holding today does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances. The early morning mass raid upon homes of welfare recipients is not unknown. See *Parrish* v. *Civil Service Comm'n,* 66 Cal. 2d 260, 425 P. 2d 223 (1967); Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L. J. 1347 (1963). But that is not this case. Facts of that kind present another case for another day.

We therefore conclude that the home visitation as structured by the New York statutes and regulations is a reasonable administrative tool; that it serves a valid and proper administrative purpose for the dispensation of the AFDC program; that it is not an unwarranted invasion of personal privacy; and that it violates no right guaranteed by the Fourth Amendment.

Reversed and remanded with directions to enter a judgment of dismissal.

It is so ordered.

MR. JUSTICE WHITE concurs in the judgment and joins the opinion of the Court with the exception of Part IV thereof.

MR. JUSTICE DOUGLAS, dissenting.

We are living in a society where one of the most important forms of property is government largesse which some call the "new property."[1] The payrolls of government are but one aspect of that "new property." Defense contracts, highway contracts, and the other multifarious forms of contracts are another part. So are subsidies to air, rail, and other carriers. So are

[1] See Reich, The New Property, 73 Yale L. J. 733, 737–739.

disbursements by government for scientific research.[2] So are TV and radio licenses to use the air space which of course is part of the public domain. Our concern here is not with those subsidies but with grants that directly or indirectly implicate the *home life* of the recipients.

In 1969 roughly 127 billion dollars were spent by the federal, state, and local governments on "social welfare." [3] To farmers alone almost four billion dollars were paid, in part for not growing certain crops. Almost 129,000 farmers received $5,000 or more, their total benefits exceeding $1,450,000,000.[4] Those payments were in some instances very large, a few running a million or more a year. But the majority were payments under $5,000 each.

Yet almost every beneficiary whether rich or poor, rural or urban, has a "house"—one of the places protected by the Fourth Amendment against "unreasonable searches and seizures." [5] The question in this case is whether receipt of largesse from the government makes the *home* of the beneficiary subject to access by an inspector of the agency of oversight, even though the beneficiary objects to the intrusion and even though the Fourth Amendment's procedure for access to one's *house* or *home* is not followed. The penalty here is not, of course, invasion of the privacy of Barbara James, only her loss of federal or state largesse. That, however, is merely rephrasing the problem. Whatever the seman-

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[2] See Ginzburg, What Science Policy?, Columbia Forum, Fall 1970, p. 12.

[3] See Appendix I to this opinion.

[4] See Appendix II to this opinion.

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

tics, the central question is whether the government by force of its largesse has the power to "buy up" rights guaranteed by the Constitution.[6] But for the assertion of her constitutional right, Barbara James in this case would have received the welfare benefit.

We spoke in *Speiser* v. *Randall*, 357 U. S. 513, of the denial of tax exemptions by a State because of exercise of First Amendment rights.

> "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Id.*, at 518.

Likewise, while second-class mail rates may be granted or withheld by the Government, we would not allow them to be granted "on condition that certain economic or political ideas not be disseminated." *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156.

In *Sherbert* v. *Verner*, 374 U. S. 398, a State providing unemployment insurance required recipients to accept suitable employment when it became available or lose the benefits. An unemployed lady was offered a job requiring her to work Saturdays but she refused because she was a Seventh Day Adventist to whom Saturday was the Sabbath. The State canceled her unemployment benefits and we reversed, saying:

> "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on

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[6] See Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595, 1599.

the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

"Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege . . . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.*, at 404, 406.

These cases are in the tradition of *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 328–329,[7] where Mr. Justice Sutherland, writing for the Court, said:

"[T]he rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." [8]

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[7] And see Hale, Unconstitutional Conditions and Constitutional Rights, 35 Col. L. Rev. 321 (1935); *Frost & Frost Co.* v. *Railroad Comm'n*, 271 U. S. 583, 594.

[8] *Flemming* v. *Nestor*, 363 U. S. 603, is not in accord with that tradition. There we upheld the right of Congress to strip away accrued social security benefits. Nestor, an alien, came to this country in 1913. From the enactment of the Social Security Act until 1955 Nestor and his employers contributed payments to the fund. In 1955 Nestor became eligible for old-age benefits. One year later he was deported for having been a member of the

What we said in those cases is as applicable to Fourth Amendment rights as to those of the First. The Fourth, of course, speaks of "unreasonable" searches and seizures, while the First is written in absolute terms. But the right of privacy which the Fourth protects is perhaps as vivid in our lives as the right of expression sponsored by the First. *Griswold* v. *Connecticut,* 381 U. S. 479, 484. If the regime under which Barbara James lives were enterprise capitalism as, for example, if she ran a small factory geared into the Pentagon's procurement program, she certainly would have a right to deny inspectors access to her *home* unless they came with a warrant.

Communist Party between 1933 and 1939—a time when it was perfectly legal to be a member. In 1954 Congress passed a law which provided for the loss of social security benefits for anyone deported for having been a member of the Communist Party. Like the law providing for deportation for membership this law, too, was fully retroactive. Thus Nestor was deported after he had retired based on a law condemning membership in the Communist Party at the time when it was legal to be a member, and stripped of his retirement income based on a law which was triggered by that deportation. We upheld the constitutionality of the 1954 law by a 5–4 majority.

The majority stated Nestor's property had not been taken without due process because Nestor had no property rights; his interest was "noncontractual" and could "not be soundly analogized to that of the holder of an annuity." 363 U. S., at 610. The majority then went on to hold social security benefits were only protected from congressional action which is "utterly lacking in rational justification." *Id.,* at 611.

If it was unconstitutional in *Speiser* to condition a tax exemption on a limitation on freedom of speech, it was equally unconstitutional to withhold a social security benefit conditioned on a limitation of freedom of association. A right-privilege distinction was implicitly rejected in *Speiser* and explicitly rejected in *Sherbert.* Today's decision when dealing with a state statute joins *Flemming* as an anomaly in the cases dealing with unconstitutional conditions.

That is the teaching of *Camara* v. *Municipal Court,* 387 U. S. 523, and *See* v. *City of Seattle,* 387 U. S. 541. In those cases we overruled *Frank* v. *Maryland,* 359 U. S. 360, and held the Fourth Amendment applicable to administrative searches of both the *home* and a business. The applicable principle, as stated in *Camara* as "justified by history and by current experience" is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U. S., at 528–529. In *See* we added that the "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.,* at 543. There is not the slightest hint in *See* that the Government could condition a business license on the "consent" of the licensee to the administrative searches we held violated the Fourth Amendment. It is a strange jurisprudence indeed which safeguards the businessman at his place of work from warrantless searches but will not do the same for a mother in her *home.*

Is a search of her home without a warrant made "reasonable" merely because she is dependent on government largesse?

Judge Skelly Wright has stated the problem succinctly:

> "Welfare has long been considered the equivalent of charity and its recipients have been subjected to all kinds of dehumanizing experiences in the government's effort to police its welfare payments. In fact, over half a billion dollars are expended annually for administration and policing in connection with the Aid to Families with Dependent Children pro-

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gram. Why such large sums are necessary for administration and policing has never been adequately explained. No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few. The truth is that in this subsidy area society has simply adopted a double standard, one for aid to business and the farmer and a different one for welfare." Poverty, Minorities, and Respect For Law, 1970 Duke L. J. 425, 437–438.

If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? Welfare in aid of dependent children, like social security and unemployment benefits, has an aura of suspicion.[9] There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential. But constitutional rights—here the privacy of the *home*—are obviously not dependent on the poverty or on the affluence of the beneficiary. It is the precincts of the *home* that the Fourth Amendment protects; and

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[9] Juvenal wrote:

"Poverty's greatest curse, much worse than the fact of it, is that it makes men objects of mirth, ridiculed, humbled, embarrassed." Satires 39 (Indiana Univ. Press 1958).

In the 1837 Term the Court held in *City of New York* v. *Miln*, 11 Pet. 102, that New York could require ships coming in from abroad to report the names, ages, etc., of every person brought to these shores. The Court said: "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease." *Id.*, at 142.

I regretfully conclude that today's decision is ideologically of the same vintage.

their privacy is as important to the lowly as to the mighty.[10]

> "[S]tudies tell us that the typical middle income American reaches retirement age with a whole

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[10] An individual who refuses to allow the home visit could either be a welfare recipient at the time or an applicant for assistance. In neither case would the outcome of the refusal be different.

If the mother is already a recipient, Social Services Regulations § 351.21, 18 NYCRR § 351.21, requires continuing contacts at home between the recipient and the social worker. Should a recipient refuse a visit then § 175 of the Policies Governing the Administration of Public Assistance ("Mandatory visits must be made in accordance with law that requires that persons be visited . . . .") would require termination. When the decision to "discontinue, suspend or reduce" benefits is made, the recipient would receive a hearing under § 351.26 at which the recipient could present "written and oral relevant evidence and argument to demonstrate why his grant should not be discontinued, suspended or reduced." Since § 134 of the Social Services Law requires visits, the refusal to allow the visit would apparently be dispositive of the matter.

That seems to be conceded here by the commissioner. In light of that fact, the failure of appellee, who went to a hearing and was denied relief, to pursue any further state remedy seems irrelevant as the only question posed was the constitutionality under the Fourth Amendment of the termination of assistance for failure to agree to the warrantless entry into her home.

Except in very limited circumstances (Social Services Regulations §§ 351.10 and 372 (Emergency Assistance)) an initial home visit and investigation is necessary before receiving benefits. Should a potential recipient refuse the initial visit, he would be notified under § 351.14 (b) of the reason for the denial. Then he could request a "fair hearing" under Board Rule 85 and Social Services Regulations § 358. Again it appears that refusing the visit would be dispositive of the claim.

The extent to which a person could receive emergency assistance after refusal of a visit is unclear. Social Services Regulations § 372.3 recognizes that emergency assistance could be available to a person while the "fair hearing" is pending. It would seem, however, that implicit in § 372.3 is the notion that, if the claim is disposed of, then the emergency assistance would terminate. Also emergency assistance is limited to periods not in excess of 30 consecutive days in any 12-month period. Social Services Regulations § 372.1.

> bundle of interests and expectations: as homeowner, as small investor, and as social security 'beneficiary.' Of these, his social security retirement benefits are probably his most important resource. Should this, the most significant of his rights, be entitled to a quality of protection inferior to that afforded his other interests? It becomes the task of the rule of law to surround this new 'right' to retirement benefits with protections against arbitrary government action, with substantive and procedural safeguards that are as effective in context as the safeguards enjoyed by traditional rights of property in the best tradition of the older law." [11]

It may be that in some tenements one baby will do service to several women and call each one "mom." It may be that other frauds, less obvious, will be perpetrated. But if inspectors want to enter the precincts of the home against the wishes of the lady of the house, they must get a warrant. The need for exigent action as in cases of "hot pursuit" is not present, for the lady will not disappear; nor will the baby.

I would place the same restrictions on inspectors entering the *homes* of welfare beneficiaries as are on inspectors entering the *homes* of those on the payroll of government, or the *homes* of those who contract with the government, or the *homes* of those who work for those having government contracts. The values of the *home* protected by the Fourth Amendment are not peculiar to capitalism as we have known it; they are equally relevant to the new form of socialism which we are entering. Moreover, as the numbers of functionaries and inspectors multiply, the need for protection of the individual be-

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[11] Jones, The Rule of Law and the Welfare State, 58 Col. L. Rev. 143, 154–155 (1958).

comes indeed more essential if the values of a free society are to remain.

What Lord Acton wrote Bishop Creighton [12] about the corruption of power is increasingly pertinent today:

> "I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority."

The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It pries more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harassments of modern life.[13] Isolation is not a constitutional guarantee; but the sanctity of the sanctuary of the *home* is such—as marked and defined by the Fourth Amendment, *McDonald* v. *United States,* 335 U. S. 451, 453. What we do today is to depreciate it.

I would sustain the judgment of the three-judge court in the present case.

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[12] J. Acton, Essays on Freedom and Power 364 (H. Finer ed. 1948).

[13] Mass raids upon the homes of welfare recipients are matters of record. See *Parrish* v. *Civil Service Comm'n,* 66 Cal. 2d 260, 425 P. 2d 223, where an inspector was discharged because he refused to engage in such "illegal activity" and was granted relief by way of back pay.

APPENDIX I TO OPINION OF DOUGLAS, J., DISSENTING

STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, p. 277.

SOCIAL WELFARE EXPENDITURES, BY SOURCE OF FUNDS AND PUBLIC PROGRAM: 1967 TO 1969

(In millions of dollars)

PROGRAM	1967		1968		1969 (prel.)	
	Federal	State and local	Federal	State and local	Federal	State and local
Total	**53,244**	**46,449**	**60,548**	**51,497**	**68,595**	**58,206**
Social insurance	**30,544**	**6,724**	**35,391**	**7,302**	**40,824**	**7,896**
Old-age, survivors, disability, health ins.	24,581	(X)	28,748	(X)	33,389	(X)
Health insurance for the aged	3,395	(X)	5,347	(X)	6,598	(X)
Railroad retirement	1,278	(X)	1,417	(X)	1,547	(X)
Public employee retirement [1]	3,725	2,178	4,167	2,416	4,739	2,740
Unemployment ins. and employment serv.[2]	790	1,963	873	2,055	932	2,021
Railroad unemployment insurance	38	(X)	46	(X)	45	(X)
Railroad temporary disability insurance	38	(X)	36	(X)	58	(X)
State temporary disability insurance [3]	(X)	530	(X)	574	(X)	635
Hospital and medical benefits	(X)	54	(X)	55	(X)	58
Workmen's compensation [4]	94	2,054	103	2,257	114	2,500
Hospital and medical benefits	14	681	15	750	17	833
Public aid	**5,244**	**3,567**	**6,455**	**4,637**	**7,851**	**5,592**
Public assistance	4,266	3,567	5,250	4,637	6,389	5,592
Vendor medical payments	1,157	1,226	1,760	1,821	2,186	2,235
Other [5]	979	–	1,205	–	1,462	–
Health and medical programs [6]	**3,681**	**4,128**	**4,233**	**4,038**	**4,497**	**4,321**
Hospital and medical care	1,596	2,658	1,835	2,708	1,967	2,827
Civilian programs	164	2,658	187	2,708	200	2,827
Defense Department [7]	1,432	(X)	1,648	(X)	1,766	(X)
Maternal and child health programs [8]	139	171	161	176	192	190
Medical research	1,290	65	1,479	69	1,401	73
School health (educational agencies)	(X)	178	(X)	190	(X)	204
Other public health activities [9]	373	667	427	434	551	527
Medical facilities construction	284	389	332	461	386	500
Defense Department	50	(X)	29	(X)	59	(X)
Other	234	389	305	461	327	500
Veterans programs	**6,857**	**23**	**7,329**	**33**	**7,996**	**40**
Pensions and compensation [10]	4,487	(X)	4,716	(X)	5,041	(X)
Health and medical programs	1,346	(X)	1,465	(X)	1,585	(X)
Hospital and medical care	1,250	(X)	1,372	(X)	1,478	(X)
Hospital construction	49	(X)	46	(X)	54	(X)
Medical and prosthetic research	47	(X)	46	(X)	53	(X)
Education	297	(X)	466	(X)	671	(X)
Life insurance [11]	548	(X)	504	(X)	503	(X)
Welfare and other	179	23	179	33	197	40
Education [12]	**5,279**	**30,389**	**5,108**	**33,648**	**5,079**	**37,954**
Elementary and secondary	2,497	25,247	2,638	28,065	2,472	31,963
Construction [13]	33	3,937	35	4,184	34	4,620
Higher	2,089	4,400	1,807	4,800	1,943	5,100
Construction	710	900	474	1,000	431	1,100
Vocational and adult [13]	552	742	519	783	514	891
Housing	**283**	**95**	**325**	**103**	**446**	**110**
Other social welfare	**1,356**	**1,524**	**1,706**	**1,736**	**1,903**	**2,293**
Vocational rehabilitation, total	319	91	363	106	431	127
Medical services and research	78	17	98	26	116	31
Institutional care [14]	15	880	23	1,015	26	1,495
School meals	442	147	544	162	624	171
Child welfare [15]	47	406	50	453	50	500
Special OEO programs [16]	452	(X)	608	(X)	647	(X)
Social welfare, not elsewhere classified [17]	81	(X)	118	(X)	124	(X)

– Represents zero. X Not applicable.

[1] Excludes refunds to those leaving service. Federal data include military retirement.

[2] Includes compensation for Federal employees and ex-servicemen, and trade adjustment and cash training allowances.

[3] Programs operate in 4 States only: Calif., N.J., N.Y., and R.I. [4] Benefits by private insurance carriers, State funds, and self-insurers. [5] Work relief, other emergency aid, surplus food for the needy, food stamps, and Job Corps, Neighborhood Youth Corps, and Work-Experience programs under the Economic Opportunity Act.

[6] Excludes domiciliary care in institutions other than mental or tuberculosis, and services included with other programs in social welfare series. [7] Includes cost of medical care for military dependent families.

[8] Includes services for crippled children. [9] Excludes water supply and sanitation services.

[10] Includes burial awards. [11] Excludes servicemen's group life insurance. [12] Federal expenditures for administrative costs (Office of Education) and research not shown separately but included in total.

[13] Construction costs of vocational and adult education programs included under elementary-secondary expenditures.

[14] Represents primarily surplus food for nonprofit institutions. [15] Represents primarily child welfare services under title V of the Social Security Act. [16] Includes community action, migrant workers, and VISTA programs and all administrative expenses of the Office of Economic Opportunity.

[17] Includes administrative expenses of the Secretary of Health, Education, and Welfare; Indian welfare; aging activities; certain manpower activities; and other items.

Source: Dept. of Health, Education, and Welfare, Social Security Administration; *Social Security Bulletin*, December 1969.

APPENDIX II TO OPINION OF DOUGLAS, J., DISSENTING

Hearings on H. R. 17923 before the Senate Committee on Appropriations, 91st Cong., 2d Sess., pt. 3, p. 1979.

U. S. Department of Agriculture
Agricultural Stabilization and Conservation Service
ASCS Payments to Producers, All Programs,[1] Calendar Year 1969

	Amount	Percent of total
Total payments	$3,794,996,353	100
Payments below $5,000	2,078,439,326	55
Payments $5,000 or above	1,457,635,442	38
Undistributed [2]	258,921,585	7

[1] Includes acreage diversion payments on cotton, feed grain, and wheat; price support payments on cotton and feed grain; wheat marketing certificates; cost-share payments under the Agricultural Conservation Program, emergency conservation and Appalachia programs; land retirement and conservation assistance payments under the cropland conversion, cropland adjustment, and conservation reserve programs; and the milk indemnity payment program. Does not include any price support loans or purchases, and payments under the Sugar Act and the National Wool Act.

[2] Includes payments to producers under the Sugar Act and the National Wool Act and payments to vendors for costs of conservation materials and services and funds transferred to other agencies for conservation technical services under the Agricultural Conservation Program; promotion fund deduction withheld under the National Wool Act which were transferred to the National Sheep Producers Council.

ASCS Payments by Size Groupings $5,000 and over
(Excludes sugar and wool payments)

Range	Number	Amount
$5,000 to $7,499	61,330	$ 370,839,000
$7,500 to $9,999	25,859	222,488,754
$10,000 to $14,999	21,147	254,979,861
$15,000 to $24,999	12,856	242,547,832
$25,000 to $49,999	6,029	200,524,421
$50,000 to $99,999	1,404	91,191,225
$100,000 to $499,999	346	55,113,824
$500,000 to $999,999	11	7,668,176
$1,000,000 and over	5	12,282,349
Total	128,987	$1,457,635,442

MR. JUSTICE MARSHALL, whom MR. JUSTICE BRENNAN joins, dissenting.

Although I substantially agree with its initial statement of the issue in this case, the Court's opinion goes on to imply that the appellee has refused to provide information germane to a determination of her eligibility for AFDC benefits. The record plainly shows, however, that Mrs. James offered to furnish any information that the appellants desired and to be interviewed at any place other than her home. Appellants rejected her offers and terminated her benefits solely on the ground that she refused to permit a home visit. In addition, appellants make no contention that any sort of probable cause exists to suspect appellee of welfare fraud or child abuse.

Simply stated, the issue in this case is whether a state welfare agency can require all recipients of AFDC benefits to submit to warrantless "visitations" of their homes. In answering that question, the majority dodges between constitutional issues to reach a result clearly inconsistent with the decisions of this Court. We are told that there is no search involved in this case; that even if there were a search, it would not be unreasonable; and that even if this were an unreasonable search, a welfare recipient waives her right to object by accepting benefits. I emphatically disagree with all three conclusions. Furthermore, I believe that binding regulations of the Department of Health, Education, and Welfare prohibit appellants from requiring the home visit.

I

The Court's assertion that this case concerns no search "in the Fourth Amendment meaning of that term" is neither "obvious" nor "simple." I should have thought that the Fourth Amendment governs all intrusions by agents of the public upon personal security,

Terry v. *Ohio,* 392 U. S. 1, 18 n. 15 (1968). As MR. JUSTICE HARLAN has said:

> "[T]he Constitution protects the privacy of the home against all unreasonable intrusion of whatever character. . . . '[It applies] to all invasions on the part of the government and its employés of the sanctity of a man's home,' " *Poe* v. *Ullman,* 367 U. S. 497, 550–551 (1961) (dissenting opinion).

This Court has rejected as "anomalous" the contention that only suspected criminals are protected by the Fourth Amendment, *Camara* v. *Municipal Court,* 387 U. S. 523, 530 (1967). In an era of rapidly burgeoning governmental activities and their concomitant inspectors, caseworkers, and researchers, a restriction of the Fourth Amendment to "the traditional criminal law context" tramples the ancient concept that a man's home is his castle. Only last Term, we reaffirmed that this concept has lost none of its vitality, *Rowan* v. *United States Post Office,* 397 U. S. 728, 738 (1970).

Even if the Fourth Amendment does not apply to each and every governmental entry into the home, the welfare visit is not some sort of purely benevolent inspection. No one questions the motives of the dedicated welfare caseworker. Of course, caseworkers seek to be friends, but the point is that they are also required to be sleuths. The majority concedes that the "visitation" is partially investigative, but claims that this investigative aspect has been given too much emphasis. Emphasis has indeed been given. Time and again, in briefs and at oral argument, appellants emphasized the need to enter AFDC homes to guard against welfare fraud and child abuse, both of which are felonies.[1] The New York

[1] For example, appellants' Reply Brief offers two specific illustrations of the home visit's efficacy. In the first, a man was discovered in the home and benefits were terminated. In the second, child abuse was discovered.

statutes provide emphasis by requiring all caseworkers to report any evidence of fraud that a home visit uncovers, N. Y. Social Services Law § 145. And appellants have strenuously emphasized the importance of the visit to provide evidence leading to civil forfeitures including elimination of benefits and loss of child custody.

Actually, the home visit is precisely the type of inspection proscribed by *Camara* and its companion case, *See* v. *City of Seattle*, 387 U. S. 541 (1967), except that the welfare visit is a more severe intrusion upon privacy and family dignity. Both the home visit and the searches in those cases may convey benefits to the householder. Fire inspectors give frequent advice concerning fire prevention, wiring capacity, and other matters, and obvious self-interest causes many to welcome the fire or safety inspection. Similarly, the welfare caseworker may provide welcome advice on home management and child care. Nonetheless, both searches may result in the imposition of civil penalties—loss or reduction of welfare benefits or an order to upgrade a housing defect. The fact that one purpose of the visit is to provide evidence that may lead to an elimination of benefits is sufficient to grant appellee protection since *Camara* stated that the Fourth Amendment applies to inspections which can result in only civil violations, 387 U. S., at 531. But here the case is stronger since the home visit, like many housing inspections, may lead to criminal convictions.

The Court attempts to distinguish *See* and *Camara* by telling us that those cases involved "true" and "genuine" searches. The only concrete distinction offered is that *See* and *Camara* concerned criminal prosecutions for refusal to permit the search. The *Camara* opinion did observe that one could be prosecuted for a refusal to allow that search; but, apart from the issue of consent, there is neither logic in, nor precedent for, the view that the

ambit of the Fourth Amendment depends not on the character of the governmental intrusion but on the size of the club that the State wields against a resisting citizen. Even if the magnitude of the penalty were relevant, which sanction for resisting the search is more severe? For protecting the privacy of her home, Mrs. James lost the sole means of support for herself and her infant son. For protecting the privacy of his commercial warehouse, Mr. See received a $100 suspended fine.

Conceding for the sake of argument that someone might view the "visitation" as a search, the majority nonetheless concludes that such a search is not unreasonable. However, its mode of reaching that conclusion departs from the entire history of Fourth Amendment case law. Of course, the Fourth Amendment test is reasonableness, but in determining whether a search is reasonable, this Court is not free merely to balance, in a totally ad hoc fashion, any number of subjective factors. An unbroken line of cases holds that, subject to a few narrowly drawn exceptions, any search without a warrant is constitutionally unreasonable, see, *e. g., Agnello* v. *United States.,* 269 U. S. 20, 32 (1925); *Johnson* v. *United States,* 333 U. S. 10, 13–14 (1948); *Chapman* v. *United States,* 365 U. S. 610, 613–615 (1961); *Camara* v. *Municipal Court,* 387 U. S. 523, 528–529 (1967); *Chimel* v. *California,* 395 U. S. 752, 762 (1969); *Vale* v. *Louisiana,* 399 U. S. 30, 34–35 (1970). In this case, no suggestion that evidence will disappear, that a criminal will escape, or that an officer will be injured, justifies the failure to obtain a warrant. Instead, the majority asserts what amounts to three state interests that allegedly render this search reasonable. None of these interests is sufficient to carve out a new exception to the warrant requirement.

First, it is argued that the home visit is justified to protect dependent children from "abuse" and "exploita-

tion." These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy.

Second, the Court contends that caseworkers must enter the homes of AFDC beneficiaries to determine eligibility. Interestingly, federal regulations do not require the home visit. In fact, the regulations specify the recipient himself as the primary source of eligibility information thereby rendering an inspection of the home only one of several alternative secondary sources.[2] The majority's implication that a biannual home visit somehow assures the verification of actual residence or actual physical presence in the home strains credulity in the context of urban poverty. Despite the caseworker's responsibility for dependent children, he is not even required to see the children as a part of the home visit.[3] Appellants offer scant explanation for their refusal even to attempt to utilize public records, expenditure receipts, documents such as leases, non-home interviews, personal financial records, sworn declarations, etc.—all sources that governmental agencies regularly accept as ade-

[2] HEW Handbook of Public Assistance Administration, pt. IV, § 2200 (e) (1).

[3] Appellants respond by asserting that if the caseworker becomes suspicious concerning the child's absence, further investigation may take place. One certainly would hope that the caseworker would continue his investigation, but the fact remains that the failure to require that the child be seen undercuts the argument that the home visit is designed to protect the child's welfare and necessary to verify his presence in the home.

quate to establish eligibility for other public benefits. In this setting, it ill behooves appellants to refuse to utilize informational sources less drastic than an invasion of the privacy of the home.

We are told that the plight of Mrs. James is no different from that of a taxpayer who is required to document his right to a tax deduction, but this analogy is seriously flawed. The record shows that Mrs. James has offered to be interviewed anywhere other than her home, to answer any questions, and to provide any documentation that the welfare agency desires. The agency curtly refused all these offers and insisted on its "right" to pry into appellee's home. Tax exemptions are also governmental "bounty." A true analogy would be an Internal Revenue Service requirement that in order to claim a dependency exemption, a taxpayer *must* allow a specially trained IRS agent to invade the home for the purpose of questioning the occupants and looking for evidence that the exemption is being properly utilized for the benefit of the dependent. If such a system were even proposed, the cries of constitutional outrage would be unanimous.

Appellants offer a third state interest that the Court seems to accept as partial justification for this search. We are told that the visit is designed to rehabilitate, to provide aid. This is strange doctrine indeed. A paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation's philosophy. More than 40 years ago, Mr. Justice Brandeis warned:

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead* v. *United States*, 277 U. S. 438, 479 (1928) (dissenting opinion).

Throughout its opinion, the majority alternates between two views of the State's interest in requiring the home visit. First we are told that the State's purpose is benevolent so that no search is involved. Next we are told that the State's need to prevent child abuse and to avoid the misappropriation of welfare funds justifies dispensing with the warrant requirement. But when all the State's purposes are considered at one time, I can only conclude that the home visit is a search and that, absent a warrant, that search is unreasonable.[4]

Although the Court does not agree with my conclusion that the home visit is an unreasonable search, its opinion suggests that even if the visit were unreasonable, appellee has somehow waived her right to object. Surely the majority cannot believe that valid Fourth Amendment consent can be given under the threat of the loss of one's sole means of support. Nor has Mrs. James waived her rights. Had the Court squarely faced the question of whether the State can condition welfare payments on the waiver of clear constitutional rights, the answer would be plain. The decisions of this Court do not support the notion that a State can use welfare benefits as a wedge to coerce "waiver" of Fourth Amendment rights, see Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L. J. 1347, 1349–1350 (1963); Note, Rehabilitation, Investigation and the Welfare Home Visit, 79 Yale L. J. 746, 758

[4] Since the majority refuses to sanction the warrant procedure in any form, I have not discussed what standard should be required for a warrant to issue. Certainly, if one of the purposes of the welfare search is to obtain evidence of criminal conduct, that is no reason to permit less than probable cause. And because the home visit is a more severe intrusion than is the housing inspection and there are less drastic means to obtain eligibility information, I would apply the analysis of *Camara* and would be inclined to utilize a traditional probable cause standard.

(1970). In *Sherbert* v. *Verner*,[5] this Court did not say, "Aid merely ceases. There is no abridgment of religious freedom." Nor did the Court say in *Speiser* v. *Randall*,[6] "The tax is simply increased. No one is compelled to relinquish First Amendment rights." As my Brother DOUGLAS points out, the majority's statement that Mrs. James' "choice [to be searched or to lose her benefits] is entirely hers, and nothing of constitutional magnitude is involved" merely restates the issue. To MR. JUSTICE DOUGLAS' eloquent discussion of the law of unconstitutional conditions, I would add only that this Court last Term reaffirmed *Sherbert* and *Speiser* as applicable to the law of public welfare:

> "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation . . . denial of a tax exemption . . . or . . . discharge from public employment." *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970).

II

The Court's examination of the constitutional issues presented by this case has constrained me to respond. It would not have been necessary to reach these questions for I believe that HEW regulations, binding on the States, prohibit the unconsented home visit.[7]

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[5] 374 U. S. 398 (1963).

[6] 357 U. S. 513 (1958).

[7] It is a time-honored doctrine that statutes and regulations are first examined by a reviewing court to see if constitutional questions can be avoided, *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring); see, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *King* v. *Smith*, 392 U. S. 309 (1968). The court below chose not to invoke this doctrine, and litigation in this Court has emphasized the constitutional issues. However, the nonconstitutional questions were briefed by an *amicus curiae* and

The federal Handbook of Public Assistance Administration provides:

> "The [state welfare] agency especially guards against violations of legal rights and common decencies in such areas as entering a home by force, *or without permission,* or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours . . . ." Part IV, § 2300 (a) (emphasis supplied).

Although the tone of this language is descriptive, HEW requirements are stated in terms of principles and objectives, Handbook, pt. I, § 4210 (3); and appellants do not contend that this regulation is merely advisory. Instead, appellants respond with the tired assertion that consent obtained by threatening termination of benefits constitutes valid permission under this regulation. There is no reason to suspect that HEW shares this crabbed view of consent. The Handbook, itself, insists on careful scrutiny of purported consent, pt. IV, § 2400. Section 2200 (a) is designed to protect the privacy of welfare recipients, and it would be somewhat ironic to adopt a construction of the regulation that provided that any person who invokes his privacy rights ceases to be a recipient.

Appellants next object that the home visit has long been a part of welfare administration and has never been disapproved by HEW. The short answer to this is that we deal with only the *unconsented* home visit. The general utility and acceptance of the home visit casts little light on whether HEW might prefer not to impose the visit on unwilling recipients. Appellants also remind us that the Federal Government itself requires a limited number of home visits for sampling purposes.

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appellants responded fully in their Reply Brief. The parties may prefer a decision on constitutional grounds; but we, of course, are not bound by their litigation strategies.

However, while there may well be a special need to employ mandatory visits as a part of quality control samples, Mrs. James' home was not a part of such a sample. Furthermore appellants admit that § 2200 (a) governs the quality control program; so it is not clear that unconsented home visits are allowed even for sampling purposes. Although there appears to be no regulatory history, appellants tell us § 2200 (a) merely permits a recipient to refuse a particular home visit and does not allow him to forbid home visits altogether. I suppose that one could read such a limitation into the section, but given the regulation's explicit language, given that HEW does not require home visits and views the visits as only one of several alternative sources of eligibility information, given HEW's concern for the privacy of its clients, and given the durable principle of this Court that doubtful questions of interpretation should be resolved in a manner which avoids constitutional questions, *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407 (1909), I would conclude that Mrs. James is protected by § 2200 (a).

III

In deciding that the homes of AFDC recipients are not entitled to protection from warrantless searches by welfare caseworkers, the Court declines to follow prior case law and employs a rationale that, if applied to the claims of all citizens, would threaten the vitality of the Fourth Amendment. This Court has occasionally pushed beyond established constitutional contours to protect the vulnerable and to further basic human values. I find no little irony in the fact that the burden of today's departure from principled adjudication is placed upon the lowly poor. Perhaps the majority has explained why a commercial warehouse deserves more protection than does this poor woman's home. I am not convinced; and, therefore, I must respectfully dissent.

406-342 O - 71 - 29

DECKER, U. S. DISTRICT JUDGE, ET AL. *v.* HARPER & ROW PUBLISHERS, INC., ET AL.

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

No. 113. Argued December 16, 1970—Decided January 12, 1971

423 F. 2d 487, affirmed by an equally divided Court.

Lee A. Freeman, Jr., argued the cause for petitioners. With him on the briefs were *Lee A. Freeman, William J. Scott*, Attorney General of Illinois, and *John P. Meyer*, Special Assistant Attorney General, *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, and *Gene Hal Williams*, Deputy Attorney General, *Theodore L. Sendak*, Attorney General of Indiana, and *Wendell C. Hamacher*, Assistant Attorney General, *Crawford C. Martin*, Attorney General of Texas, and *Wayne R. Rodgers*, Assistant Attorney General, *Paul W. Brown*, Attorney General of Ohio, and *Donald Weckstein* and *Ted B. Clevenger*, Assistant Attorneys General, *Douglas M. Head*, Attorney General of Minnesota, and *Eric Miller*, Assistant Attorney General, *Robert W. Warren*, Attorney General of Wisconsin, and *George F. Sieker* and *Theodore L. Priebe*, Assistant Attorneys General, *Kent Frizzel*, Attorney General of Kansas, and *J. Eugene Balloun*, Special Assistant Attorney General, *Richard L. Curry, David J. Young, Charles E. Griffith III*, and *Robert E. Kendrick*.

H. Templeton Brown argued the cause for respondents. With him on the brief were *Robert L. Stern, Lee N. Abrams, W. Donald McSweeney, Earl E. Pollock, Peter Gruenberger, Conrad W. Oberdorfer, Earl A. Jinkinson, Edgar E. Barton, Leo Rosen, Roger Hunting*, and *Samuel Weisbard*.

Briefs of *amici curiae* urging affirmance were filed by *David T. Searls, Harry M. Reasoner, Ray D. Henson,* and *John C. Bartlett* for the American Bar Association et al.; by *Andrew P. Miller,* Attorney General, and *Anthony F. Troy* and *T. J. Markow,* Assistant Attorneys General, for the Commonwealth of Virginia; and by *Samuel W. Murphy, Jr.,* and *George S. Leisure, Jr.,* for the Association of the Bar of the City of New York et al. *Edward S. Irons* and *Mary Helen Sears, pro sese,* filed a brief as *amici curiae.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

BRUNO *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 205. Argued December 14, 1970—Decided January 12, 1971

435 Pa. 200, 255 A. 2d 519 and 257 A. 2d 47, certiorari dismissed as improvidently granted.

Daniel L. Quinlan, Jr., argued the cause and filed a brief for petitioner.

Milton O. Moss argued the cause and filed a brief for respondent.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

U. S. BULK CARRIERS, INC. *v.* ARGUELLES

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

No. 29. Argued November 12, 1970—Decided January 13, 1971

The enactment of § 301 of the Labor Management Relations Act, which provides for the enforcement of grievance and arbitration provisions of collective-bargaining agreements in industries affecting commerce, did not abrogate, but merely added an optional remedy to, the remedy of 46 U. S. C. § 596, which permits seamen to sue for wages in federal court. Pp. 352–358.

408 F. 2d 1065, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, and BLACKMUN, JJ., joined. BLACK, J., filed a concurring statement, *post,* p. 358. HARLAN, J., filed a concurring opinion, *post,* p. 358. WHITE, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post,* p. 366.

George W. Sullivan argued the cause and filed a brief for petitioner.

I. Duke Avnet argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit for seaman's wages accruing from services rendered in foreign commerce. Federal jurisdiction was claimed under 28 U. S. C. § 1333 which grants exclusive jurisdiction to the district courts in any "admiralty or maritime" case. A collective-bargaining agreement contained provisions concerning wages payable when seamen were dismissed or when their employment was terminated; and it provided a grievance procedure and for arbitration of disputed claims. Those procedures were not pursued by the seaman. He sued in the federal court instead.

The District Court granted the employer's motion for summary judgment, ruling that the principles we announced in a series of decisions starting with *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, and extending to *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650, governed this maritime case and that the federal court had no jurisdiction to adjudicate the maritime claim but only to enforce the grievance procedure or an arbitration award that might be given. The Court of Appeals reversed by a divided vote, 408 F. 2d 1065, and we granted certiorari, 398 U. S. 957.

The Labor Management Relations Act, 1947, 61 Stat. 136, provides a federal remedy to enforce grievance and arbitration provisions of collective-bargaining agreements in an industry "affecting commerce," § 301 (a), 29 U. S. C. § 185 (a); and it is clear that "commerce" includes foreign commerce. 29 U. S. C. § 152 (6). It is also clear that this employee's basic wage and the overtime rate of pay were fixed or determinable by the collective-bargaining agreement. And it is generally true, as stated in *Vaca* v. *Sipes,* 386 U. S. 171, 184, that when the employee's claim "is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced."

The question here is not the continuing validity of *Lincoln Mills* and its progeny. The question is a distinctly different one, and that is whether the earlier, express, and alternative method of collecting seamen's wages contained in 46 U. S. C. § 596 has been displaced by § 301 of the Labor Management Relations Act or whether so far as seamen and their wages are concerned § 301 is only an optional method of resolving the controversy.

Title 46 U. S. C. § 596, which derives from the Act of July 20, 1790, § 6, 1 Stat. 133, provides in relevant part:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, *which sum shall be recoverable as wages in any claim made before the court . . . .*" (Italics added.)

Moreover, 46 U. S. C. § 597, which also derives from the 1790 Act, provides:

> "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void:

> *Provided,* Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. . . ."

The statutory remedy speaks in terms of the amount of wages due and owing and the penalties for nonpayment, and it specifies the timetable within which the payments must be made. Section 596 speaks of a penalty for nonpayment recoverable "as wages in any claim made before the court." This implies a right to make the claim to the court and not a duty to make it before a grievance committee or before an arbiter. Hence § 596 does not wholly jibe with § 301. We often must legislate interstitially [1] to iron out inconsistencies within a statute or to fill gaps resulting from legislative oversight or to resolve ambiguities resulting from a legislative compromise. It is earnestly urged that the grievance procedure established in the collective-bargaining agreement can give effect to these payments and penalty provisions and that the agreement is therefore not in

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[1] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 221 (Holmes, J., dissenting).

Mr. Justice Cardozo, in speaking of the construction of laws to achieve justice and harmony, said:

"All departments of the law have been touched and elevated by this spirit. In some, however, the method of sociology works in harmony with the method of philosophy or of evolution or of tradition. Those, therefore, are the fields where logic and coherence and consistency must still be sought as ends. In others, it seems to displace the methods that compete with it. Those are the fields where the virtues of consistency must yield within those interstitial limits where judicial power moves." Selected Writings 136 (Hall ed. 1947).

derogation of the ancient statutory remedy which Congress has provided.

Seamen from the start were wards of admiralty. See *Robertson* v. *Baldwin,* 165 U. S. 275, 287. In 1872 it was provided that the federal courts might appoint shipping commissioners "to superintend the shipping and discharge of seamen" in our merchant fleet. Cong. Globe, 42d Cong., 2d Sess., 1836.[2] Commissioners indeed served, 46 U. S. C. § 541 (1940 ed.), as an administrative adjunct of the federal courts until July 16, 1946, when § 104 of Reorganization Plan No. 3 of 1946 abolished them. 60 Stat. 1098. No other administrative agency was substituted. The federal courts remained as the guardians of seamen, the agencies chosen by Congress, to enforce their rights—a guardian concept which, so far as wage claims are concerned, is not much different from what it was in the 18th century.

We reviewed the legislative history of § 301 in *Textile Workers* v. *Lincoln Mills,* 353 U. S., at 451–456. The matter of foremost concern in Congress was the enforceability of collective-bargaining agreements. The essence of § 301 was a new federal policy governed by federal law—"that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." *Id.,* at 455. Enforcement by or against labor unions was the main burden of § 301, though standing by individual employees to secure declarations of their legal rights under the collective agreement was recognized. *Id.,* at 456. Since the emphasis was on suits by unions and against unions, little attention was given to the assertion

[2] And see Cong. Globe, 42d Cong., 2d Sess., 1838, 1863, 2172, 2206, 3437, 3572, 3911.

of claims by individual employees and none whatsoever concerning the impact of § 301 on the special protective procedures governing the collection of wages of maritime workers. We can find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seamen since 1790.

It is earnestly urged that the literalness of the old statute should give way to the progressive philosophy of the new procedures.

It is said that arbitration would be most appropriate because "a familiarity with the customs and practices of shipping would be distinctly helpful in assessing the validity of the claims," and the "underlying wage claims [are] based on factual disputes." Resolving factual disputes is hardly uncommon in federal district courts. And while an arbitrator in the area may have expertise, for 180 years federal courts have been protecting the rights of seamen and are not without knowledge in the area.

It is also said that the informal, readily available grievance and arbitration procedures might defeat any overreaching and delay by the employer which § 596 was designed to reach. We do not hold that § 596 is the exclusive remedy of the seaman. He may, if he chooses, use the processes of grievance and arbitration. Yet, unlike Congress, we are not in a position to say that his interests usually will be best served through § 301 rather than through § 596.

The literal conflict between this ancient seaman's statute and the relatively new grievance procedure is one which we think Congress rather than this Court should resolve. We do not sit as a legislative committee of revision. We know that this employee has a justiciable

claim. We know it is the kind of claim that is grist for the judicial mill. We know that in § 596 Congress allowed it to be recoverable when made to a court. We know that this District Court has the case properly before it under the head of maritime jurisdiction. We hesitate to route this claimant through the relatively new administrative remedy of the collective agreement and shut the courthouse door on him when Congress, since 1790, has said that it is open to members of his class.

What we decide today has nothing whatsoever to do with grievance claims of the maritime unions against employers or the claims of employers against them, for neither is touched by § 596. We deal only with the seaman's personal wage claims.

Maritime unions, of course, like other unions, gain "prestige" by processing grievance claims. *Republic Steel Corp.* v. *Maddox, supra,* at 653. And employer interests are served "by limiting the choice of remedies available to aggrieved employees." *Ibid.* In *Maddox,* there was no express exception governing individual claims of employees from § 301 grievance procedures and we declined to carve one out under the circumstances there present. The circumstances here are quite different because of the express judicial remedy created by § 596. The reluctance in *Maddox* to redesign the statutory regime of § 301 makes us equally reluctant to redesign the statutory regime of § 596.

The chronology of the two statutes—§ 596 and § 301—makes clear that the judicial remedy was made explicit in § 596 and was not clearly taken away by § 301. What Congress has plainly granted we hesitate to deny. Since the history of § 301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them. We would require much more to hold that

§ 301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedy provided by 46 U. S. C. § 596.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court while still adhering to his dissent in *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650.

MR. JUSTICE HARLAN, concurring.

I join in the opinion and judgment of the Court, but deem it advisable to add some thoughts of my own.

I

I do not think that the mere provision by federal statute of a judicial forum for enforcement of the wage claims of a subclass of workers forecloses application of the arbitration principles of *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957), and *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650 (1965); nor do I understand the Court's opinion today to so hold. In *Smith* v. *Evening News Assn.,* 371 U. S. 195 (1962), we held that a suit in the state courts by an individual employee charging employer discrimination in violation of the collective-bargaining agreement was not foreclosed by the availability of an unfair labor practice proceeding before the National Labor Relations Board based on the same conduct. There we explicitly noted the absence of a grievance arbitration provision in the contract which had to be exhausted before recourse could be had to the courts. *Id.,* at 196 n. 1. Later, in *Republic Steel Corp.* v. *Maddox, supra,* at 652, we cited this portion of *Smith* as support for the broadly stated proposition that "[a]s a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must

attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." (Emphasis omitted.) *Maddox* held that an employee was compelled to exhaust contractual grievance machinery as a prelude to commencing a § 301 suit on the contract in the state court. Finally, in *Carey* v. *Westinghouse Corp.,* 375 U. S. 261 (1964), we held that a union could compel an employer to arbitrate a contractual grievance arising out of events which also might support proceedings before the NLRB for either an unfair labor practice under § 8 (a)(5) of the National Labor Relations Act, as amended, or a petition clarifying the union's representation certificate under § 9 (c)(1). See also *Old Dutch Farms* v. *Local 584, I. B. T.,* 243 F. Supp. 246 (EDNY 1965); *United States Steel Corp.* v. *Seafarers,* 237 F. Supp. 529 (ED Pa. 1965). See generally *Vaca* v. *Sipes,* 386 U. S. 171, 183–184 (1967).

Smith, Carey, and *Maddox* together evince the fundamental role arbitration plays in implementing national labor relations policy. They also evince the crucial role of the federal judiciary in forging the proper relationships among available arbitral, administrative, and judicial forums for vindicating contractual and statutory rights of employers, unions, and employees. In light of these cases, I cannot infer, from the mere provision by Congress of a federal judicial forum for enforcement of the wage claims of a subclass of workers' wages, that this Court is foreclosed from requiring arbitration under the collective-bargaining contract.

But in forging this relationship among potentially competing forums for the effectuation of contractual and statutory rights of individuals and organizations, we have always proceeded with close attention to the policies underpinning both the duty to arbitrate and the provision by Congress of rights and remedies in alternative forums. This Court has always recognized that the

choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum. In particular, where arbitration is concerned, the Court has been acutely sensitive to these differences. Thus, in *Wilko* v. *Swan,* 346 U. S. 427 (1953), the Court faced a conflict between congressional policy favoring arbitration, as manifested in § 3 of the United States Arbitration Act, 9 U. S. C. § 3, and congressional policy favoring protection of securities purchasers from fraud, as manifested in § 12 (2) of the Securities Act of 1933, 48 Stat. 84, 15 U. S. C. § 77*l* (2). The Court carefully analyzed the impact which remission to arbitration would have on the scope of the substantive federal right involved in that case and concluded that conflicting congressional goals would best be served by construing the nonwaiver provisions of the Securities Act [1] as applying to the choice of a judicial forum as well as the substance of the Act's protection. See *Wilko* v. *Swan, supra,* at 434–439. Central to the process of reconciliation in that case was the recognition that the effectiveness of any pro-arbitration policy is dependent, in the first instance, on a limited scope of judicial review of the arbitrator's determination.

And in *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198 (1956), in holding that state law controlled on the question of reference to arbitration in a diversity suit brought in a federal court, the Court offered the following considerations on the impact which reference to arbitration has on the scope of the substantive right:

> "The nature of the tribunal where suits are tried is an important part of the parcel of rights behind

[1] Section 14 of the Securities Act of 1933, 15 U. S. C. § 77n, provides:

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

> a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in *Wilko* v. *Swan* . . . ." 350 U. S., at 203.

Normally, the impact on the substantive right resulting from the decision to remit the individual to the arbitral forum is acceptable because the parties themselves have consented to that forum. Compare *Atkinson* v. *Sinclair Refining Co.,* 370 U. S. 238 (1962), with *Drake Bakeries* v. *Local 50, American Bakery Workers,* 370 U. S. 254 (1962). And, with respect to the individual employee seeking to bypass the arbitral forum in a suit brought "simply on the contract," see *Maddox, supra,* at 657, the fact that his substantive rights derive solely from the contract, and that he owes those rights to the actions of his union representative in the collective-bargaining process, warrants the extension of the boundaries of collective consent to his individual remedial preferences. A suit simply on the contract to enforce contractual grievances is the normal labor arbitration situation, and "it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." *Maddox, supra,* at 653. In *Maddox,* we laid out in full the strong policy concerns which support exclusivity in the arbitral forum, *supra,* at 653–656, and then expressly noted the absence of countervailing positive reasons where the suit was simply on the contract. *Supra,* at 657. It is this state of

affairs that supports the presumption of comprehensiveness underpinning this Court's § 301 labor arbitration doctrines. *Maddox, supra,* at 657.

II

Arguelles' suit, unlike Maddox's suit, is not "simply on the contract"; he invokes the court's jurisdiction seeking, in addition to the overtime wages allegedly due him under the collective-bargaining agreement, a statutory claim for refusal or neglect to pay his wages according to the timetable prescribed in 46 U. S. C. § 596 "without sufficient cause." In this circumstance, the presumption of comprehensiveness of the arbitral remedy is, in my view, rebutted.

But, of course, the policies underpinning *Maddox* are still relevant to the process of forging relationships among potentially competing forums in this case. Here, as in *Maddox,* the union's status as exclusive bargaining representative will most certainly be bolstered by requiring the employee to vindicate both his contractual and statutory rights in the arbitral forum. *Supra,* at 653. And, even more importantly, here as in *Maddox,* the availability of an alternative forum for vindicating both statutory and contractual rights allegedly abridged in the same transaction cuts significantly into the desirability of the arbitral forum from the employer's negotiating viewpoint. *Maddox, supra,* at 656–657. But, in the present context, it is crucial to recognize that these policy considerations underpinning arbitration argue, not merely for reference to the arbitrator as a matter of prior exhaustion of internal organizational remedies, but also for extremely limited judicial review of the arbitrator's decision. Indeed, this Court's decisions in the *Steelworkers Trilogy* make very clear that the scope of judicial review of the arbitrator's judgment where matters of contract

rights are concerned is limited to a threshold determination of the arbitrability of the dispute. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). The extreme limitation of judicial review, and the expansive reading of consent, are both important to the task of effectuating national labor policy; both are legitimized, in my view, by the derivation of the individual's substantive legal right from the collective-bargaining agreement.

Where, however, the § 301 dispute implicates federal statutory rights, it is incumbent upon this Court to fashion the relationships among forums according to an analysis of the policies underpinning both § 301 and the federal statute the employee invokes, rather than simply transposing *ipso facto* the Court's labor arbitration jurisprudence. Thus, in the analogous situation where the disputed transaction implicates both contractual rights and rights enforceable in NLRB proceedings, we do not simply assume that because the dispute involves a contract grievance, and the contract contains a typically broad arbitration provision, remission to arbitration on the presumption of consent—combined with virtually no judicial review—follows automatically. Rather, the Court takes account of the views of the NLRB, as the agency charged with enforcement of the substantive statutory right in question, on the difficult issue whether the interests of national labor policy, as manifested both in § 301 and the unfair labor practice provision, will best be served by remission to arbitration. See, *e. g.*, *Carey* v. *Westinghouse Corp.*, 375 U. S., at 271–272; *Smith* v. *Evening News Assn.*, 371 U. S., at 197–198.

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III

Here Seaman Arguelles seeks to vindicate a federal statutory right to prompt payment of wages due him. His original complaint stated a cause of action under 46 U. S. C. § 596, which provides as follows:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court . . . ."

These provisions of Title 46 derive from § 6 of the Act of July 20, 1790; see 1 Stat. 133. Also derived from § 6 of the original Act is 46 U. S. C. § 597, providing for part payment of wages earned during interim stops in port for the discharge of cargo.[2] Sections 596 and 597 go

[2] Arguelles attempted to amend his complaint prior to the summary judgment hearing to state a complaint under 46 U. S. C. § 597 as well as § 596. The court refused the proffered amendment pending its ruling on the summary judgment motion. Brief for Respondent 7 n. 4.

beyond the mere provision of a federal judicial forum for vindication of a worker's wage claims; they represent a congressional policy to secure to the individual seaman the prompt payment of his wages [3] as part of a broader protective and remedial scheme intended for the benefit of seamen. See *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 784–786 (1952). This legislation, though antedating the emergence of modern collective-bargaining institutions, must be taken to represent a continuing congressional policy to protect seamen as individual laborers.

In the instant case, remission to arbitration under the usual assumption concerning the scope of judicial review would mean that a denial of the grievance without any explanation on the arbitrator's part would have to stand. Given the assumption concerning scope of judicial review, the seaman's statutory right to double wages in the event of failure, "without sufficient cause" to pay promptly within the meaning of § 596 is, as a practical matter, subject to the unreviewable discretion of the arbitrator.

But the usual assumption concerning judicial review need not necessarily obtain in situations of this sort, any more than the usual assumptions concerning the boundaries of the individual's consent to the actions of his bargaining representative in agreeing to the broad arbitration provision need necessarily obtain. Two possibilities suggest themselves: the arbitrator's award might be reviewable to some unspecified extent, to ascertain whether the rights under §§ 596 and 597 have been adequately protected, or the claim may, in some fashion,

[3] In *Collie* v. *Fergusson,* 281 U. S. 52, 55 (1930), in discussing what constitutes sufficient cause for delay in payment under § 596, the Court noted that "the evident purpose of the section [is] to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed."

be split, either by declining jurisdiction at the outset over the contract portion of the litigation, or by utilizing the various devices of abstention. Cf., *e. g., United States Steel Corp.* v. *Seafarers,* 273 F. Supp. 529 (ED Pa. 1965). As an abstract proposition, both options have the undesirable consequence of cutting substantially into the very exclusivity of the contractual forum which we said in *Maddox* is important to effectuation of the national labor policy favoring arbitration. See *Maddox, supra,* at 653. And the difficulties of analyzing the respective boundaries of the contractual right and the statutory right forbode ill for the efficient resolution of disputes implicating both the contract right and the federal statutory right. But the matter is not one to be decided abstractly; it may well be that certain types of federal statutory benefits will lend themselves to arbitration or splitting without an unacceptable sacrifice in competing policy interests.

However, this is not such a statute, because the very essence of the legislative policy at stake here is ensuring promptness in the payment of wages. I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U. S. C. § 596 and § 301 of the Labor Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U. S. C. § 596.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

Respondent Arguelles is a seaman who signed onto the SS *U. S. Pecos,* a merchant ship owned by petitioner, on August 3, 1965, for six months' employment at a stated monthly wage. The employment relationship was

governed by the collective-bargaining agreement between petitioner and the National Maritime Union, AFL–CIO, of which respondent is a member.

On February 3, 1966, the day after respondent's shipping papers expired by their terms, the *Pecos* anchored off Cape St. Jacques, South Vietnam, awaiting authorization to proceed to Saigon harbor. Respondent concedes that congestion in the harbor was the cause of the extended wait offshore.[1] During this time, Saigon port officials refused to grant pratique, or quarantine clearance, to crew members. Nonetheless, respondent demanded discharge or shore leave, both of which were refused.[2] On February 13, the *Pecos* was authorized to, and did, proceed to the harbor and tie up at a designated location. Unloading of cargo began February 16, and the following day respondent and other crew members were discharged and given a voucher for their wages at the American Consulate in Saigon.[3] The voucher called for payment in American currency at petitioner's headquarters in Galveston, Texas. On February 18, respondent departed Saigon by air for Galveston, where he was paid in cash on February 22.

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[1] Brief of Respondent in Opposition to Certiorari 1–2.

[2] Id., at 2. Article III, § 2, of the bargaining agreement provides overtime pay for restriction to ship except when shore leave is prevented by order of foreign governments. In such cases, the bargaining agreement requires the company to "produce a copy of the government restriction order when the crew is paid off." Respondent now seems to concede that the government's failure to grant pratique prevented shore leave, but alleges that "the captain failed to conform to the procedures required to show the crew that pratique (clearance) was refused by the S. Vietnam Government [Art. III, § 2 of Agreement . . .]." Respondent seems to imply, though this is far from clear, that the alleged failure of the captain to exhibit the order restores respondent's right to overtime wages.

[3] Petitioner asserts that "local currency restrictions" prevented payment in American currency in South Vietnam, and that use of vouchers was a "customary and accepted" means of payment in foreign ports.

While in Galveston, respondent notified the union's local office that he was dissatisfied with the company's refusal to honor certain wage, penalty, and miscellaneous claims.[4] The respondent was advised to contact his union representative with details, but instead of doing so, he brought this suit in the District Court under its admiralty and maritime jurisdiction, 28 U. S. C. § 1333. Respondent sought recovery on three claims which survive here: (a) overtime for work allegedly performed prior to February 3, 1966; (b) overtime for wrongful restriction to the ship for 11 days between arrival at Cape St. Jacques on February 3 and tying up in the port of Saigon on February 13 despite requests for shore leave;[5] (c) a statutory penalty of $254.95 under 46 U. S. C. § 596,[6] based on two days' pay for each day be-

[4] In addition to the three claims listed below, respondent also sought recovery in the Federal District Court for the difference between coach air fare and first-class air fare to which he was entitled under the contract, $6.50 as his share of a limousine from Houston airport to Galveston, and $8.50 excess baggage charge. The air fare claim was settled directly with the airline, and respondent apparently abandoned the other two claims during the course of the proceedings.

[5] See n. 2, *supra*.

[6] "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made

tween February 3 and February 22, when respondent was paid at Galveston. Petitioner answered by alleging the failure of respondent to exhaust the grievance and arbitration procedures of the collective-bargaining agreement.[7] Petitioner contends that (a) the master did not

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before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

[7] "ARTICLE II

"GRIEVANCES

"Section 1. Department Spokesmen. The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall endeavor to have said grievance adjusted by his respective designated spokesman, in the following manner:

"*First*—Presentation of the complaint to his immediate superior.

"*Second*—Appeal to the head of the department in which the employee involved shall be employed.

"*Third*—Appeal directly to the Master.

"Section 2. Grievance Machinery. If the complaint cannot be settled to the mutual satisfaction of the employee and department head or the Master, the decision of the Master shall be supreme at sea and in foreign ports, and until the vessel arrives at the port where shipping articles are closed. Such complaint shall be settled through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent."

. . . . . .

"ARTICLE XII

"ARBITRATION

"Section 1. Settlement of Disputes Prior to Arbitration. In case a dispute arises over the interpretation of any of the provisions of this agreement, whether the said dispute originates on board ship or ashore, the Union agrees to take the matter up with the Company and make every effort to adjust the said dispute. In the event that no amicable and satisfactory adjustment can be made between the Union and the Company and the question in dispute is deemed to

authorize any overtime work before February 3; (b) the restriction to ship between February 3 and February 13 was due to the failure of Saigon port officials to lift quarantine restrictions, and (c) because respondent was paid promptly by voucher at the American Consulate on the day of discharge, no penalty obtains.

The collective-bargaining agreement provides in relevant part that (a) no overtime work shall be performed without the authorization of the master (Art. IV, § 2); (b) with exceptions not relevant here, no overtime will be paid for restriction to ship when such restriction is

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be sufficiently important to either party, the Union or the Company may present the question disputed to the Disputes Board for arbitration as provided herein.

. . . . . .

"Section 3. Notwithstanding any of the foregoing, should a dispute or grievance arise under this agreement which, in the opinion of the President of the American Merchant Marine Institute or his designee or the President of the National Maritime Union or his designee, requires expeditious determination, such party may waive the grievance and arbitration provisions referred to above and request that the dispute or grievance be referred to arbitration as follows:

"(a) The dispute or grievance shall be asserted by notice in writing to the other party and to Theodore W. Kheel, the arbitrator under this agreement. Such notice shall contain a summary of the dispute or grievance and the reasons for requesting a waiver of the contract grievance procedure. Following the receipt of such request the arbitrator or his designee shall, upon the basis of the information submitted and any further information he may have requested from either party, determine whether the matter should be submitted to arbitration or referred back for processing under the regular grievance machinery. In the latter case, the arbitrator shall notify both parties of his decision and the grievance shall be processed as provided in Sections 1 and 2 of this Article. If the arbitrator or his designee should decide that the request to waive the regular grievance machinery should be granted, he shall so notify both parties and schedule the matter for prompt arbitration."

. . . . . .

due to the regulation of government authorities (Art. III, § 2), and (c) a ship shall not be deemed to have arrived in port while it is awaiting quarantine clearance (Art. III, § 1 (c)).

The merits of respondent's nonstatutory claims depend entirely on interpretation and application of the bargaining agreement. Specifically, the threshold questions involved are (a) whether the respondent performed overtime work with the authorization of the master; (b) whether the crew was confined to ship because of the actions of government officials and if so whether respondent can base his claim on the alleged failure of the master to show the required documents to the crew, and (c) whether the ship had arrived "in port" on February 3, so that respondent was entitled to discharge and payment, or, in the alternative, whether the fact that respondent's shipping articles expired by their terms on February 2 entitled him to discharge against petitioner's claim that where the cargo is still aboard in such cases the articles are automatically extended. An additional question is whether respondent was "paid" on February 17 or February 22, since the penalty accrues only until the date of payment.

Most importantly, for purposes of this case, it is clear that the question of whether respondent was entitled to the statutory penalty depends entirely on a resolution of these questions. If it develops that petitioner has paid respondent all wages due him in a timely manner, the statutory penalty claim also disappears.

These questions are particularly within the competence of the contractually established grievance procedure of the collective-bargaining agreement. They are all questions of fact or interpretation of various provisions of the agreement. There is not the slightest indication or contention that the grievance machinery would be unable

to determine these questions, or that it would be inferior to a federal court in so doing. It is clear from the face of the claims that a familiarity with the customs and practices of shipping would be distinctly helpful in assessing the validity of the claims. This familiarity is, of course, one of the prime attributes of an arbitrator. As the Court said in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960):

> "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), it was held that federal courts have jurisdiction to specifically enforce the arbitration provisions of the collective-bargaining agreement. And it has been clear at least since *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), that absent extraordinary circumstances not

alleged here, contractual grievance procedures must be exhausted before suit can be brought.[8]

The collective agreement reveals that the parties intended all disputes and grievances, not merely those based on the contract, to be resolved if possible through the contractual procedure. Article II provides a three-step on-board grievance procedure for "[a]ny employee who feels that he has been unjustly treated or been subjected to an unfair consideration." If no satisfactory solution is reached on board, the parties are directed to proceed "through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an

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[8] The language of the Court in that decision is pertinent here:

"Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. . . . Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" (Citations omitted.) 379 U. S., at 653.

agent." Provisions are made for any party to a "dispute or grievance" to seek expeditious determination from the arbitrator. Art. XII, § 3. The parties made no provision whatever for excepting statutory penalty claims from the grievance machinery. Prior decisions unmistakably limit the role of the courts to determining whether a dispute is arguably covered under the arbitration clause. "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." *United Steelworkers* v. *Warrior & Gulf Navigation Co., supra,* at 584–585.

Nor until now has there been any principle that requires contract rights to be resolved internally but directs statutorily created remedies to be presented to the court, at least where, as here, the availability of the statutory remedy rests on disputed issues that are cognizable under the arbitration clause. In fact, this Court and lower federal courts have endorsed the suitability of arbitration to resolve federally created rights. In *Wilko* v. *Swan,* 346 U. S. 427 (1953), the Court expressed "hope for [arbitration's] usefulness . . . in controversies based on statutes . . . ." *Id.,* at 432. And courts of appeals both before and after passage of § 301 have required that Fair Labor Standards Act employees' claims for liquidated damages under 29 U. S. C. § 216 (b) for failure to pay overtime wages be referred to contractual grievance procedures before being presented to the court. *Donahue* v. *Susquehanna Collieries Co.,* 138 F. 2d 3 (CA3 1943); *Evans* v. *Hudson Coal Co.,* 165 F. 2d 970 (CA3 1948); *Beckley* v. *Teyssier,* 332 F. 2d 495 (CA9 1964). Cf. *Fallick* v. *Kehr,* 369 F. 2d 899 (CA2 1966); *Old Dutch Farms* v. *Local 584, I. B. T.,* 243 F. Supp. 246 (EDNY 1965);

United States Steel Corp. v. *Seafarers,* 237 F. Supp. 529 (ED Pa. 1965). That the question of penalties or liquidated damages should be referred in the first instance to applicable grievance procedures is especially proper where, as here, there are also underlying wage claims based on factual disputes, and whose resolution will determine whether, and to what extent, the penalty is due. Neither do I see any reason why the issue of the penalty would be unsuitable for arbitration even if the owner paid off all disputed underlying wage claims, leaving only the question of the statutory penalty. On the contrary, if respondent's claims are not reached by his promise to arbitrate, or if the promise to arbitrate is unenforceable, a master or owner could pay off wages in full, but grossly late, secure in the knowledge that the obligation to pay the penalty would not be susceptible of the quick and informal arbitration process, but must await the attention of a federal district court which may be thousands of miles away. Overreaching and delay were precisely the evils that § 596 was designed to reach. *Mavromatis* v. *United Greek Shipowners Corp.,* 179 F. 2d 310 (CA1 1950).

The Court tries to avoid this problem by holding that grievance procedures are available to the seaman to pursue if he chooses. The effect of this is to hold contractual remedies enforceable by the employee but not by the employer. This is not only a curious application of § 301 and contract principles but an unwise departure from past cases. In *Republic Steel Corp.* v. *Maddox, supra,* the Court foresaw that under such circumstances the employer, "to limit the modes of redress that could be used against him," would simply insist in future bargaining that suits for overtime pay [9] be eliminated from

[9] Though *Maddox* involved a claim for severance rather than overtime pay, "[g]rievances depending on severance claims are not critically unlike other types of grievances." 379 U. S., at 656.

the grievance procedure. The Court was entirely correct in surmising that "[t]he union would hardly favor the elimination, for it is in the union's interest to afford comprehensive protection to those it represents, to participate in interpretations of the contract, and to have an arbitrator rather than a court decide such questions . . . ." 379 U. S., at 656.

Nothing in the words of the statute warrants dispensing with contractual procedures. Section 596 provides that the penalty "shall be recoverable *as wages* in any claim made before the court." (Emphasis added.) The statute on its face makes the penalty a wage claim; it would in no way be in derogation of the statute to require this claim to be presented like any other wage claim. Under the principles of *Republic Steel Corp.* v. *Maddox, supra,* this means that the internal remedies must first be exhausted.

Even assuming, without conceding, that § 596 provides a direct route to federal courts on penalty claims, § 301 should at least require that the contractual bases for the penalty claim be settled by contractual methods before penalty claims may be adjudicated by the courts. The penalty statute is a direct descendant of 1 Stat. 133, passed in 1790. Section 596 has existed unchanged since 1915. Section 301, on the other hand, was enacted in 1947 as a farreaching measure designed to secure the enforcement of arbitration agreements in the federal courts in the belief that "industrial peace can be best obtained only in that way." *Textile Workers* v. *Lincoln Mills, supra,* at 455. Section 301 did away with common-law rules against enforcing executory promises to arbitrate, and there should be no reluctance to accommodate § 596 and the policy of § 301 by withholding judicial relief until contractual remedies are exhausted.

It should also be recalled that even though a dispute also involves an unfair labor practice or a representation

or jurisdictional dispute it is nevertheless not removed from the arbitral process. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962); *Carey* v. *Westinghouse Corp.*, 375 U. S. 261 (1964).[10] Both the National Labor Relations Board and this Court have shown a high regard for the informed opinion of the arbitrator in such cases. *International Harvester Co.*, 138 N. L. R. B. 923, 925–926 (1962); *Carey* v. *Westinghouse Corp., supra,* at 272.

Moreover, prior to the passage of § 301, nonmaritime employees, like seamen, could go to court to resolve disputes over the meaning of the collective-bargaining agreement. Given the basis for federal jurisdiction, they could go to federal court. In this respect they were no different from seamen. When § 301 provided for the enforcement of arbitration agreements and, as interpreted in *Maddox,* for exhaustion of internal remedies, there is not the slightest indication that Congress intended that seamen should be treated any differently from their nonmaritime counterparts.

Finally, it is pertinent to recall the words of the District Court in the instant case in granting summary judgment to the petitioner:

> "The policy established by the cases referred to, that matters of this sort should be left to procedures set up between the union and the employer, is, in the opinion of the Court, a most important policy lest this Court be inundated with small claims of the type which has been presented to the Court today." App. 55a.

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[10] In *Carey* v. *Westinghouse Corp., supra,* at 272, *Smith* v. *Evening News, supra,* was interpreted as approving "resort to a tribunal other than the Board" even though the tribunal in *Smith* was a state court. There was no internal grievance machinery established in the collective agreement in *Smith*.

In short, the Court today makes an unnecessary and ill-advised detour around the body of arbitration law developed by Congress and this Court. Its reasons for doing so, in my opinion, comport with neither the language of the statute nor considerations of sound labor and maritime policy.

Syllabus

PERKINS ET AL. *v.* MATTHEWS, MAYOR OF THE CITY OF CANTON, ET AL.

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

No. 46. Argued October 20, 1970—Decided January 14, 1971

Appellants, voters and candidates for city offices, sought to enjoin the 1969 election in Canton, Mississippi, alleging that the 1969 requirements differed from those in effect on November 1, 1964, and at the last city election in 1965, and that the city sought to enforce the changed requirements without following the approval procedure set forth in § 5 of the Voting Rights Act of 1965. Section 5 precludes a State or political subdivision covered by the Act from administering "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first submitting the change to the U. S. Attorney General or securing a declaratory judgment from the District Court for the District of Columbia that the change does not have a racially discriminatory purpose or effect. Canton, which is covered by the Act, sought to enforce changes (1) in location of polling places, (2) in municipal boundaries through annexations of adjacent areas, thus increasing the number of eligible voters, and (3) from ward to at-large election of aldermen. Though at-large election of aldermen was called for by a 1962 Mississippi statute, the 1965 Canton election was by wards. A single District Judge, relying on *Allen* v. *State Board of Elections*, 393 U. S. 544, temporarily restrained the election, but a three-judge court, after examining the challenged changes to determine whether they had "a discriminatory purpose or effect," dissolved the injunction and dismissed the complaint. *Held:*

1. The three-judge court should have considered only the issue of "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Allen, supra,* at 559. Pp. 383–387.

2. Each of the challenged changes falls within § 5 as a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," and requires prior submission. Pp. 387–395.

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(a) Changed locations of polling places come within § 5 since such changes may affect one's ability to vote and may have a racially discriminatory purpose or effect. Pp. 387–388.

(b) Changes in boundary lines through annexations, by determining who may vote in city elections through inclusion of certain voters and by diluting the weight of the votes of those who had the franchise prior to annexation, in view of the great potential for racial discrimination in voting, clearly come within the scope of § 5. Pp. 388–394.

(c) The change from ward to at-large election of aldermen comes within the purview of § 5 since the procedure *in fact* "in force or effect" on November 1, 1964, was the election of aldermen by wards. Pp. 394–395.

3. The appropriate remedy should be determined by the District Court after hearing the views of the parties. Pp. 395–397.

301 F. Supp. 565, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court in which DOUGLAS, STEWART, WHITE and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, *post,* p. 397. HARLAN, J., filed a concurring and dissenting opinion, *post,* p. 397. BLACK, J., filed a dissenting opinion, *post,* p. 401.

Armand Derfner argued the cause and filed a brief for appellants.

Robert L. Goza argued the cause for appellees. With him on the brief were *A. F. Summer,* Attorney General of Mississippi, and *William A. Allain,* Assistant Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. V),[1] provides that

[1] The full text of § 5, 42 U. S. C. § 1973c (1964 ed., Supp. V), provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title are in effect

whenever a State or political subdivision covered by the Act [2] shall enact or seek to administer "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure" if the State or subdivision has not first obtained a declaratory judgment in the United States District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race

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shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

[2] Mississippi and its subdivisions have been determined to be covered by the Act. 30 Fed. Reg. 9897 (Aug. 6, 1965).

or color," or unless the chief legal officer or other appropriate official of such State or subdivision has submitted the qualification, prerequisite, standard, practice, or procedure to the Attorney General of the United States "and the Attorney General has not interposed an objection within sixty days after such submission." The question in this case is whether the city of Canton, Mississippi, was precluded by § 5 from enforcing at the 1969 elections for mayor and aldermen certain changes with respect to voting not first submitted to the Attorney General or to the District Court for the District of Columbia.

Appellants, voters and candidates for mayor or alderman, sought to enjoin the 1969 elections in this action brought in the United States District Court for the Southern District of Mississippi.[3] They alleged that the requirements at the 1969 elections differed from those in effect on November 1, 1964, and at the last mayoral and aldermanic elections in 1965 because of (1) changes in locations of the polling places, (2) changes in the municipal boundaries through annexations of adjacent areas which enlarged the number of eligible voters,[4]

[3] "[A]n individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny." *Allen* v. *State Board of Elections*, 393 U. S. 544, 561 (1969). We construed the statute to require such a suit to be heard by a three-judge court. *Ibid.*

[4] Appellants alleged that prior to the Voting Rights Act of 1965, less than 200 black citizens of Canton were qualified electors. At the trial of this lawsuit, one of the appellants testified that there were approximately 3,050 registered black electors and 2,850 white electors, for the 1969 election. Based on an average index of two voters per residence, the District Court concluded that the 1969 figures included approximately 82 black voters and 176 white voters from the annexations in this case. The annexations in this case also increased the land area of the city by approximately 50% and required the boundaries of all four election wards to be changed to conform to the new city limits.

and (3) a change from ward to at-large election of aldermen. The city of Canton, they alleged, sought to enforce these changes without first submitting them to the Attorney General or obtaining a declaratory judgment under § 5. Pending the convening of the court of three judges required by § 5, a single judge temporarily restrained the elections, which were originally scheduled for the spring of 1969. The three-judge court, however, after hearing, dissolved the temporary injunction and dismissed the complaint. 301 F. Supp. 565 (1969). The elections were then held in October 1969 with the challenged changes in effect.[5] We noted probable jurisdiction. 397 U. S. 903 (1970). We reverse.

I

The three-judge court misconceived the permissible scope of its inquiry into appellants' allegations. Our decision in *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969), handed down two months before this action was instituted, settled that question. The inquiry should have been limited to the determination whether "a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny." *Id.,* at 561. *Allen* held explicitly "[t]he only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Id.,* at 558–559. For emphasis, we added:

> "It is important to distinguish the instant cases from those brought by a State seeking a declaratory judgment that its new voting laws do not have a discriminatory purpose or effect. . . . In the latter

[5] The municipal primary elections were originally scheduled for May 13 and 20, 1969, and the municipal general elections for June 3, 1969. The primary elections were actually held October 7 and 14, and the general election October 28, 1969, after the three-judge court dissolved the temporary injunction.

type of cases the substantive questions necessary for approval (*i. e.*, discriminatory purpose or effect) are litigated, while in the cases here decided *the only question is whether the new legislation must be submitted for approval.*" *Id.*, at 555–556, n. 19 (emphasis supplied).

The single judge who first acted in this case before the three-judge court was convened recognized that *Allen* so limited the inquiry. In his unreported oral opinion granting temporary relief, he correctly stated:

> "The only questions to be decided by . . . the three judge court to be designated, [are] whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964, and whether or not prior to doing so the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked for approval of the Attorney General of the United States . . . ."

He correctly observed further that, although there was no proof that the challenged annexations which changed the city's boundaries were made for the purpose of denying anyone any voting right or any right guaranteed by the Fourteenth or Fifteenth Amendments, "the case of Allen versus State Board of Elections held that it is not the function or prerogative of this Court, even if it were now sitting as a three judge court, to determine the motive of the City in extending its boundary." For *Allen* had explicitly held that, as between the United States District Court for the District of Columbia and other

district courts "Congress intended to treat 'coverage' questions differently from 'substantive discrimination' questions," 393 U. S., at 559, and therefore: "we do not consider whether this change has a discriminatory purpose or effect." 393 U. S., at 570. This is not to say that a district court limited to deciding a "coverage" question should close its eyes to the congressional purpose in enacting § 5—to prevent the institution of changes which might have the purpose or effect of denying or abridging the right to vote on account of race or color, for Congress meant to reach "the subtle, as well as the obvious, state regulations . . ." which may have that effect. 393 U. S., at 565. What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color."

The single judge made the limited examination of the claims concerning boundary extensions and selection of polling places permitted by *Allen* and, on the basis of preliminary findings that both were required to be submitted under § 5, granted the temporary injunction.[6] But the three-judge court (which included the single judge) did not adhere to *Allen*'s holding. As we read the opinion of the three-judge court, the challenged changes were examined on the merits to determine whether they had "a discriminatory purpose or effect." This emerges with particular clarity in the court's consideration of the annexations. Canton's failure to obtain prior approval of the annexations was held not to violate the Act on the express ground that "the black voters still had a majority of not less than 600

[6] The claim concerning the change from ward to at-large election of aldermen was added by amendment.

after the expansions were effected." 301 F. Supp., at 567. Similarly, in considering the change from ward to at-large election of aldermen, as provided by a 1962 Mississippi statute, Miss. Code Ann. § 3374–36 (Supp. 1968), the court remarked, "Since a majority of the voters in Canton are black it is equally true that under the 1962 Act the black voters have the power, if they wish to be influenced by race alone to elect an all black governing body." *Id.*, at 568.

It is true that the three-judge court disclaimed reliance on lack of discriminatory effect as the basis for its holding that the change from ward to at-large election of aldermen was not covered by § 5; the court stated that its decision rested on the fact that the 1962 law antedated the Voting Rights Act of 1965 and should be complied with "regardless of whether [the city] complied in 1965." *Ibid.* It is further true that in finding "no merit" in the challenge to the relocation of the polling places, the court based the holding on proofs that "[t]he changes were made necessary because one place did not have space for voting machines, two others had to be moved because they had been situated on private property (bank lobbies) and permission to use the space had been withdrawn, and another was moved out of the courthouse to a school building because facilities were more ample and the move eliminated any interference with sessions of the various courts sitting at the courthouse." *Ibid.* Nevertheless, these considerations, so far as relevant, are relevant only to the questions reserved by § 5 for consideration by the Attorney General of the United States or the District Court for the District of Columbia.

However, in the interest of judicial economy, we shall not remand to the District Court for the making of a properly limited inquiry. The record is adequate to enable us to decide whether the challenged changes should

have been submitted for approval, and we shall, therefore, decide that question.

II

We held in *Allen* that Congress intended that the Act be given "the broadest possible scope" to reach "any state enactment which altered the election law of a covered State in even a minor way." 393 U. S., at 566, 567. "It is significant that Congress chose not to include even . . . minor exceptions [*e. g.*, changing from paper ballots to voting machines] in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny." *Id.*, at 568. Tested by that standard, each of the three changes challenged in this case falls within § 5, if not as a "voting qualification or prerequisite to voting," at all events as a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."

Even without going beyond the plain words of the statute, we think it clear that the location of polling places constitutes a "standard, practice, or procedure with respect to voting." The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise. Given § 5's explicit concern with both the purpose and the effect of a voting "standard, practice, or procedure," the location of polling places comes within the section's coverage. Moreover, the legislative history provides ample support for the conclusion that Congress intended § 5 to cover a change in polling places. Before the Senate Judiciary Committee, the Attorney General explicitly testified that a change in "the place of registration" and a change "from a paper ballot to a ma-

chine" were changes of the kind that § 5 was designed to reach.[7] Plainly the relocation of the polling places is precisely the same kind of change. Moreover, there inheres in the determination of the location of polling places an obvious potential for "denying or abridging the right to vote on account of race or color." 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. V). Locations at distances remote from black communities or at places calculated to intimidate blacks from entering, or failure to publicize changes adequately might well have that effect. Consequently, we think it clear that § 5 requires prior submission of any changes in the location of polling places.

Changing boundary lines by annexations which enlarge the city's number of eligible voters also constitutes the change of a "standard, practice, or procedure with respect to voting." Clearly, revision of boundary lines has an effect on voting in two ways: (1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964). Moreover, § 5 was designed to cover

[7] "The CHAIRMAN: I say, is it not a fact that the keystone of this situation is that these changes in procedures that we are talking about, like changing from a paper ballot to a machine, may not likely have the effect of denying or abridging rights guaranteed by the 15th amendment?

"Mr. KATZENBACH: . . . Even in a sense a most innocent kind of law, as our experiences have indicated time and time again, can be used. You change the place of registration, for instance."

Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, p. 62 (1965).

changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation. *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), provides a clearcut illustration of the potential of boundary changes for "denying or abridging the right to vote on account of race or color." In addition, based on the findings of an 18-month study of the operation of the Voting Rights Act by the United States Civil Rights Commission, the Commission's director reported to Congress that gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters:

> "The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Acts and the increased black registration that followed has resulted in new methods to maintain white control of the political process.
>
> "For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength." Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 3, p. 17 (1969) (remarks of Mr. Glickstein).[8]

[8] One Congressman who had supported the 1965 Act observed, "When I voted for the Voting Rights Act of 1965, I hoped that 5 years would be ample time. But resistance to progress has been more subtle and more effective than I thought possible. A whole

In *Fairley* v. *Patterson,* 393 U. S. 544 (1969), a companion case to *Allen,* this Court held that § 5 applied to a change from district to at-large election of county supervisors on the ground that

> "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964)." 393 U. S., at 569.

Mr. Justice Harlan's separate opinion in that case accurately recognized that the Court's holding rested on its conclusion that "Congress intended to adopt the concept of voting articulated in *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and protect Negroes against a dilution of their voting power." *Fairley* v. *Patterson, supra,* at 588. In terms of dilution of voting power, there is no difference between a change from district to at-large election and an annexation that changes both the boundaries and ward lines of a city to include more voters. We follow *Fairley* and hold that § 5 applies to the annexations in this case.

Our conclusion that both the location of the polling places and municipal boundary changes come within § 5

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arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis, counties have been consolidated, elective offices have been abolished where blacks had a chance of winning, the appointment process has been substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed.

"Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement." Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 3, pp. 3–4 (1969) (remarks of Rep. McCulloch).

draws further support from the interpretation followed by the Attorney General in his administration of the statute. "[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965). The Attorney General's interpretation was recently reported by officials of the Department of Justice in testimony related to the extension of the 1965 Act.[9] They testified that the Department regarded relocating polling places and annexing territory [10] as fall-

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[9] Congress has extended the life of the 1965 Act, including § 5, from 1970 to 1975. Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314.

[10] In its *amicus* brief filed in this Court in *Fairley* v. *Patterson,* No. 25, O. T. 1968, the Government took the position that § 5 applied to "laws [that] substantially change the constituency of certain elected officials . . . . There is surely no doubt today that the right to vote can be curtailed as effectively by an impermissible demarcation of an elected official's constituency as by the destruction of ballots or the refusal to permit access to the voting booth." Memorandum for the United States as *Amicus Curiae* 13. While the Government was arguing there that § 5 reached a change from ward to at-large elections, its interpretation is equally germane to the boundary annexations in the present case. MR. JUSTICE HARLAN argues that the apparent clarity of the Department's position, taken before congressional committees and before this Court, is clouded by the Department's failure to challenge unsubmitted annexations in covered States. However, the Government, in its *amicus* brief in *Fairley,* specifically denied that any significance could be attributed to the Government's failure to bring suit. In arguing that § 5 applied to redistricting and reapportionment in States covered by the Act, the Government stated:

"Nor can the Attorney General's failure to [bring suit] in cases involving reapportionment and redistricting be properly viewed as undermining these Section 5 cases or refuting the clear congressional intent that that provision should be given broad scope. The most that can be assumed from past silence is that the Attorney General was not prepared to interpose an objection to the changes being

ing within the Act. Their testimony also indicated that this interpretation was accepted by at least some affected States and political subdivisions, which had submitted such changes for the Attorney General's approval. Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 248 (1969), *id.*, 2d Sess., 506 (1970).

In support of this testimony, the Justice Department submitted a formal table showing the 313 changes in laws with respect to voting which had been submitted to the Attorney General and acted upon by him between 1965 and 1969. The Department divided its responses to these

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effected . . . ." Memorandum for the United States as *Amicus Curiae, supra,* at 22.

Moreover, there is no indication that the Attorney General or other Justice Department officials were aware of the boundary changes referred to in the dissenting opinion; no mention of them appears in any of the extensive congressional materials on the Justice Department's enforcement activities under § 5, submitted to Congress in relation to the recent extension of the Act from 1970 to 1975. Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess. (1969, 1970); Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 3 (1969). Finally, attributing significance to any apparent failure of the Government to act is particularly hazardous in this case. Section 5 was enacted in large part because of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act. See n. 13, *infra.* For that reason, § 5 places the burden on the affected polities to submit all changes for prior approval. That the Department may have been unable to discover and investigate changes not reported to it should not, in these circumstances, be surprising, and does not cast any serious doubt on explicit official statements of the Department's interpretation of the statute.

submissions into three categories: (1) changes that the Department did not consider within the scope of § 5; (2) changes that the Department considered within the scope of § 5, but to which the Department did not object; and (3) changes within the scope of § 5 to which the Department objected as discriminatory. Every change in boundary or election district lines [11] as well as every

[11] The table reflects the fact that only South Carolina has complied rigorously with § 5. Through June 1969, it submitted 252 changes for approval, including all three annexations (and one consolidation) that were approved by the state legislature between 1965 and 1969. No political subdivisions of South Carolina, however, submitted any changes on their own initiative. Georgia and its subdivisions had submitted 60 changes for approval, including one annexation, one consolidation of election districts, and two changes in the lines of election districts. It is true that the Georgia Session Laws reflect numerous annexations that were not submitted to the Attorney General. It is also true that the Georgia Session Laws reflect at least an equal number of changes, obviously covered under any interpretation of § 5, that were also not submitted. For example, in 1965, the Georgia State Legislature enacted the following acts, each applicable to one municipality, which were not submitted to the Attorney General: four acts changing voter qualifications in municipal elections, three acts changing municipal elections from paper ballots to voting machines, four acts completely revising municipal election codes, and two acts requiring a majority vote, instead of a plurality, for election of city officials. In 1968, the Georgia State Legislature enacted the following acts, each applicable to one municipality, which were not submitted to the Attorney General: seven acts changing the dates of municipal elections and increasing the terms of municipal officials, one act creating a voter residency requirement and an oath to be taken by all voters, one act changing the number of aldermen and requiring a majority vote for election of aldermen, one act changing voter qualifications, and one act completely revising a municipal election code. Nor is this an exhaustive list even for those two years. The remaining four States covered by the Act—Mississippi, Alabama, Louisiana, and Virginia—have submitted a combined total of 33 changes. The only conclusion to be drawn from this unfortunate record is that only one State is regularly complying with § 5's requirement.

change in polling places shown in that table was considered by the Department to be within the scope of § 5. Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 3, pp. 308–313 (1969).

The change from ward to at-large elections of all aldermen was of course a change within the coverage of the Act. *Fairley* v. *Patterson, supra,* is dispositive of that question. However, the question arises in this case in a peculiar context. The change to at-large elections was mandated by a Mississippi statute enacted in 1962. But Canton ignored the mandate in the conduct of the 1965 municipal elections and, as in 1961, elected aldermen by wards.[12] Canton now argues that it had no choice but to comply with the 1962 statute in the 1969 elections.

We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under § 5. That section in express terms reaches any standard, practice, or procedure "different from that in force or effect on November 1, 1964." In our view, § 5's reference to the procedure "in force or effect on November 1, 1964," must be taken to mean the procedure that would have been followed if the election had been held on that date. That judgment is necessarily a matter of inference in this case since Canton did not hold a munipical election on November 1, 1964. But in drawing that inference, there is little reason to blind ourselves to relevant evidence in the record by restricting our gaze to events that occurred before that date. Ordinarily we presume that officials will act in accordance with law. See *First National Bank of Albuquerque* v. *Albright,* 208 U. S. 548, 553 (1908). If the only available facts showed that Canton conducted its 1961 election by wards but that the

[12] The reason for Canton's failure to conform its election to state law does not appear in the record. On oral argument, appellee's counsel stated that the lapse was due to his overlooking the 1962 law.

Mississippi Legislature had subsequently enacted a statute in 1962 requiring future municipal elections to be held at large, Canton officials would be entitled to the weight of that presumption.

With the benefit of hindsight, however, we know that Canton elected its aldermen by wards in its June 1965 municipal election. The record reflects no relevant change between November 1964 and June 1965 to suggest that a different procedure would have been in effect if the elections had been held seven months earlier. Consequently, we conclude that the procedure *in fact* "in force or effect" in Canton on November 1, 1964, was to elect aldermen by wards. That sufficed to bring the 1969 change within § 5. As was the case in *Allen,* "It is clear, however, that the new procedure with respect to voting is different from the procedure in effect when . . . [Canton] became subject to the Act . . . ." 393 U. S., at 570. The bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide.

III

The appellants have urged that, in addition to reversing the District Court judgment, the Court should set aside the elections held in October 1969, and order new elections held forthwith in which the changes challenged in this case may not be enforced. In *Allen* we declined a like invitation and gave that decision only prospective effect, primarily because the scope of § 5 coverage was then an issue of first impression and "subject to rational disagreement." 393 U. S., at 572. That reasoning is inapplicable in this case since *Allen* was decided two months before the originally scheduled dates of the Canton elections.

In arguing for new elections, appellants emphasize the desire of Congress to ensure that States and subdivisions

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covered by the Act not institute new laws with respect to voting that might have a racially discriminatory purpose or effect. On the basis of the legislative history, there is little question that Congress sought to achieve this goal by relying upon the voluntary submission by affected States and subdivisions of all changes in such laws before enforcing them. Failure of the affected governments to comply with the statutory requirement would nullify the entire scheme since the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act, see *Allen,* 393 U. S., at 556, and since private suits seem unlikely to sufficiently supplement federal supervision. Moreover, based upon ample proof of repeated evasion of court decrees and of extended litigation designed to delay the implementation of federal constitutional rights, Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation.[13]

At the same time, we recognize that, in determining the appropriate remedy, other factors may be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5. In certain circumstances, for example, it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal

[13] *E. g.,* Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, pp. 60, 72 (1965); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess, pt. 1, pp. 14–17 (1965); 111 Cong. Rec. 10727 (1965) (remarks of Sen. Tydings); *id.,* at 15645, 15648 (remarks of Rep. Celler); *id.,* at 16221 (remarks of Rep. Corman). Opponents of the Act also recognized the severity of § 5's requirements. *E. g., id.,* at 10725 (remarks of Sen. Talmadge); *id.,* at 15657 (remarks of Rep. Willis).

approval is not forthcoming. Since the District Court is more familiar with the nuances of the local situation than are we, and has heard the evidence in this case, we think the question of the appropriate remedy is for that court to determine, in the first instance, after hearing the views of both parties.[14]

The judgment of the District Court is reversed, and the case is remanded to that court with instructions to issue injunctions restraining the further enforcement of the changes until such time as the appellees adequately demonstrate compliance with § 5, and for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

Given the decision in *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969), a case not cited by the District Court, I join in the judgment of reversal and in the order of remand.

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

Our role in this case, as the Court correctly recognizes, is limited to determination whether § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c (1964 ed., Supp. V), required the city of Canton to obtain federal approval of the way it proposed to run its 1969 elections. For this reason, I am unable to join the dissenting opinion of MR. JUSTICE BLACK, *post,* p. 401, although, like him, I see little likelihood that the changes here involved had a discriminatory purpose or effect.

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[14] We add only one restriction: If the District Court decides that a new election is required, Canton should be permitted to enforce any changes at the new election for which it can obtain federal approval.

I agree with the Court, and for substantially the reasons it gives, that the city should have submitted the relocation of polling places for federal approval. But I cannot agree that it was obliged to follow that course with respect to the other two matters here at issue.

I

Whether or not Congress could constitutionally require a State to submit all changes in its laws for federal approval, cf. *South Carolina* v. *Katzenbach,* 383 U. S. 301, 358–362 (1966) (separate opinion of BLACK, J.), the Voting Rights Act does not purport to do so. Section 5 requires submission of changes "with respect to voting" only. The Court seems to interpret this restriction as including any change in state law which has an effect on voting, if changes of that type have "a potential for racial discrimination in voting." *Ante,* p. 389. The limitation implied by the latter clause will prove meaningless as a practical matter. Given a change with an effect on voting, a set of circumstances may be conceived with respect to almost any situation in which the change will bear more heavily on one race than on another. In effect, therefore, the Court requires submission of any change which has an effect on voting. I think it plain that the statutory phrase—"with respect to voting"—was intended to have more limited compass.

The legislative history of the Voting Rights Act was examined in the majority opinion and a separate opinion in *Allen* v. *State Board of Elections,* 393 U. S. 544, 564–571, 588–591 (1969). No useful purpose would be served by retraversing ground covered there. The Court concluded from its review of the history that § 5 was "intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Id.,* at 566. The Court's opinions in both *Allen* and this case are devoid of evidence of a legislative intent to go beyond

the State's election law and to reach matters such as annexations, which affect voting only incidentally and peripherally. *Fairley* v. *Patterson,* decided with *Allen,* and the remarks of the Solicitor General in his *amicus* brief in that case are plainly distinguishable on this basis. At least in the absence of a contrary administrative interpretation, I would not go beyond *Allen* to hold that annexations are within the scope of § 5. The Court's assertion that the Attorney General does in fact interpret the Act differently seems to me to give too much weight to the passing remark of an Assistant Attorney General. Cf. *Allen* v. *State Board of Elections,* 393 U. S., at 568–569.[1]

II

Fairley v. *Patterson* held that a change from election by districts to election at large was within the scope of § 5. The question for determination here is which of the two procedures was "in force or effect on November 1,

[1] The fact that the Attorney General has expressed his opinion on the merits of the handful of border changes which have been presented to him, rather than dismissing them as not within the scope of § 5, seems to me to be entitled to little weight in the face of the enormous number of annexations which have not been submitted to him and which he has done nothing about. In the fiscal year beginning July 1, 1967, there were over 40 municipal annexations in South Carolina. 1967–1968 Report of the Secretary of State of South Carolina 165–166. None of these were submitted for the approval of the Attorney General. Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 3, pp. 310–312 (1969). The Georgia Session Laws for the years 1965 to 1969 reveal over 100 boundary changes in Georgia cities. Only one was submitted to the Attorney General, and that one also involved redrawing of ward lines. So far as the face of the statute, Act of March 2, 1966, No. 235, Ga. Laws 1966, p. 2729, reveals, the redrawing of ward lines may have completely altered the political map of the city. In the case at hand, the old ward lines were simply extended to the new city limits.

1964." The Court interprets the quoted phrase to mean the procedure which probably would have been followed if an election had been held on the crucial date, regardless of the provisions of controlling state law. While this interpretation is not wholly unreasonable, I find it unlikely that it is the one Congress would have preferred if it had thought about the problem. Resolution of the hypothetical factual question required by the Court's test would be quite inconvenient, if not unmanageable, for the Attorney General or the District Court for the District of Columbia, far from the scene.[2] Moreover, under the Court's test, results may turn on the seeming fortuity that in the first election after November 1, 1964, local officials forgot about a controlling statute of statewide application and no private citizen brought suit to have the election set aside. Barring state attempts to resurrect long-ignored statutes, I would interpret "procedure . . . in force or effect on November 1, 1964," to mean the procedure required by state law. Under this interpretation I would hold that the change from election by wards to election at large occurred on the effective date of the 1962 state statute, and therefore that it did not require approval under § 5.

III

I must confess that I am somewhat mystified by the Court's discussion of the appropriate remedy in this case. For the reasons set out in my partial dissent in

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[2] Assuming that the statute requires determination of this hypothetical factual question, I would have thought that it should be passed on by the District Court in the first instance. The record is simply too sparse to reveal why the 1962 statute was not followed in 1965, or whether the same cause would have been operative a year earlier. If the defendants are not entitled to prevail on the theory that the plaintiffs failed to come forward with adequate proof of the procedure in force or effect in 1964, they are at least entitled to a hearing at which they may address themselves to the issue.

Allen, 393 U. S., at 593–594, I would direct the holding of new elections if, and only if, the city fails to obtain approval from the appropriate federal officials within a reasonable time. If such approval is forthcoming, I see no justification for requiring a rerun of the 1969 elections. See the opinion of MR. JUSTICE BLACK, *post,* this page. If the approval is not forthcoming, the fact of violation of the federal statute, as interpreted by this Court, and the possibility that the changes had a discriminatory purpose or effect seem to me to require new elections in the absence of exceptional circumstances which I cannot now foresee. In any event, the District Court is entitled to more guidance on this score than the Court provides.

MR. JUSTICE BLACK, dissenting.

In *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), this Court upheld the Voting Rights Act of 1965 as a legitimate exercise of congressional power to enforce the provisions of the Fifteenth Amendment. I agreed with the majority that Congress had broad power under § 2 of the Fifteenth Amendment to enforce the ban on racial discrimination in voting. However, I dissented vigorously from the majority's conclusion that every part of § 5 of the Voting Rights Act was constitutional. The fears which precipitated my dissent in *Katzenbach* have been fully realized in this case. The majority, relying on *Katzenbach,* now actually holds that the City of Canton, Mississippi, a little town of 10,000 persons, cannot change four polling places for its election of aldermen without first obtaining federal approval.

Section 5 of the Voting Rights Act provides that no political subdivision subject to the Act may adopt any voting law or election practice different from that in effect on November 1, 1964, without first going all the way to Washington to submit the proposed change to the United States Attorney General or to obtain a favor-

able declaratory judgment from the United States District Court for the District of Columbia.[1] I have stated my belief, in dissents in *Katzenbach* and *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969), that this section of the Voting Rights Act of 1965 violates the United States Constitution because it deprives a few States and their political subdivisions of the power to make their own laws and govern themselves without advance federal approval. Under our Constitution as the Founding Fathers drafted it and as the people have adopted and amended it, I believe the power of the States to initiate and enforce their own laws cannot be so easily taken away.

This case poignantly demonstrates the extent to which the Federal Government has usurped the function of local government from the local people to place it in the hands of the United States District Court for the District of Columbia and the United States Attorney General, both being over a thousand miles away from Canton, Mississippi. The last election for aldermen in the City of Canton before the one here in issue was held in 1965. If the procedures used in the 1965 election had been used in the 1969 election, four of the five aldermen would have been elected from wards. In two of these wards white voters were in a majority and in the other two black voters were in a majority. One alderman would have been elected at large. The city adopted three changes for the 1969 elections. Detailed consideration of these changes shows that they pertained solely to local concerns in which the National Government has no proper interest and did not involve racial discrimination.

Polling Places.—The city altered four of the local polling places. Two were moved because the old polling places had been located on private property and the

[1] Voting Rights Act of 1965, § 5, 42 U. S. C. § 1973c (1964 ed., Supp. V).

owners would no longer consent to the use of their property for voting. I find it incredible to believe that Congress intended that the people of Canton would have to travel to Washington to get the Attorney General's consent to rent new polling places. Another polling place was moved because the old one did not have sufficient space to accommodate voting machines. Finally, the fourth place was moved from a courthouse to a public school to eliminate interference with courtroom proceedings. It is difficult for me to imagine a matter more peculiarly and exclusively fit for local determination than the location of polling places for the election of town aldermen. Nor is there the slightest indication that any of these changes were motivated by or resulted in racial discrimination. The United States District Court unanimously agreed on undisputed evidence that the appellants' attack on the changes in polling places had "no merit." [2] Yet, the majority of this Court has now decided that the City of Canton cannot move its polling places without first submitting the proposed change to the politically appointed Attorney General or a District Court over a thousand miles away. Presumably, the majority is ready to hold, if necessary, that the City of Canton could not change from ballots to voting machines without obtaining similar federal approval. I dissent from any such utter degradation of the power of the States to govern their own affairs.

Boundary Extensions.—The majority also finds that Canton violated the Act by making three separate extensions of the City's boundaries between 1965 and 1969. The 1965 extension of the city limits added 46 Negro voters to the voter registration rolls. *That annexation added no white voters.* The 1966 annexation added 28 black voters and 187 white voters. The 1968 annexation added eight black voters and 144 white voters. In sum,

[2] 301 F. Supp., at 568.

the three extensions added 82 black voters and 331 white voters. These figures must be viewed in relation to the voting population of the city on January 12, 1969, when there were 2,052 white voters and 2,794 Negro voters.[3] It is apparent that even if these 1969 figures included no voters from the annexed areas, the additions would not alter the racial balance of voters in Canton. Moreover, it is undisputed that at the time of the election in question an absolute majority of the voters in Canton was black. Finally, the District Court found that the annexations were not part of "a stratagem deliberately designed to overturn a black majority at the municipal polls." [4]

In my view, the Constitution prohibits the Federal Government from requiring federal approval of state laws before they can become effective. Proposals for such congressional veto power over state laws were made at the Constitutional Convention and overwhelmingly rejected.[5] The Fourteenth Amendment did not alter the basic structure of our federal system of government. The Fourteenth Amendment did bar discrimination on account of race and did give the Federal Government power to enforce the ban on racial discrimination. In this case the Congress has attempted to enforce the ban on racial discrimination by requiring the States to submit their laws or practices to federal approval even before they are initiated. In my view that requirement attempts to accomplish the constitutional end of banning racial discrimination by a means—requiring submission of proposed state laws to the Attorney General—that violates the letter and the spirit of the Constitution. But here the Court goes even further: it permits the

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[3] *Id.*, at 566–567.

[4] *Id.*, at 567.

[5] See Debates in the Federal Convention of 1787 as reported by James Madison in Documents Illustrative of the Formation of the Union of American States 605, 789, 856 (1927).

use of an unconstitutional means in a case where the *parties have not shown racial discrimination.*

At-large Elections.—In 1962, before Congress enacted the Voting Rights Act of 1965, Mississippi passed a state statute requiring cities to conduct all elections for aldermen by having all candidates run at large.[6] For some reason not revealed in the record, the City of Canton failed to comply with that law in the 1965 elections for aldermen. The majority now holds that because Canton violated Mississippi law in the 1965 elections, the city must violate the same law again in future elections unless the officials of Canton secure federal permission to abide by the admittedly valid law of their State.

In my view Congress did not intend and the Constitution does not permit such a perversion of our federal system of government. Nor can the majority support its unprecedented decision on the grounds of racial discrimination. It is beyond my comprehension how the change from wards to an at-large election can discriminate against Negroes on account of their race in a city that has an absolute majority of Negro voters.

One vice of § 5 is that it attempts to shortcut the Federal Government's job in policing racial discrimination in voting by radically curtailing the power of certain States to conduct their own elections while leaving other States wholly free of any such restraint. Moreover, § 5

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[6] Chapter 537 of the Laws of Mississippi of 1962, provides:

"All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one alderman from each of the four (4) wards shall select one from the candidates for alderman from each particular ward who shall be a resident of said ward by majority vote of the entire electorate of the municipality."

A strong argument can be made that this statute was "procedure with respect to voting . . . in force or effect on November 1, 1964," in which case the officials of Canton were prohibited by the Voting Rights Act from *not enforcing* it absent federal approval.

is unnecessary to the enforcement of the Voting Rights Act and can only serve to cause irritation and pernicious divisiveness in those States to which it applies. When Mississippi or any other State abridges the rights of citizens on account of race, the proper course for the United States is to institute suit in a federal court to have the discriminatory practice halted. Of course, in such proceedings, the state statute or practice is presumed valid, and it is up to the Attorney General to prove that the challenged act or practice is discriminatory. *Only after discrimination has been established* does the Federal Government have the power under the Fourteenth Amendment and the Supremacy Clause to interfere with the State's conduct of its own affairs.

This Act attempts to reverse the proper order of things. Now the Congress presumes—a presumption which the Court upholds—that state statutes regulating voting are discriminatory and enjoins their enforcement until the State can convince distant federal judges or politically appointed officials that the statute is not discriminatory. This permits the Federal Government to suspend the effectiveness or enforcement of a state act *before* discrimination is proved. But I think the Federal Government is without power to suspend a state statute before discrimination is proved. The inevitable effect of such a reversal of roles is what has happened in this case—a nondiscriminatory state practice or statute is voided wholly without constitutional authority.

Except as applied to a few Southern States in a renewed spirit of Reconstruction, the people of this country would never stand for such a perversion of the separation of authority between state and federal governments. Never would New York or California be required to come begging to the City of Washington before it could enforce the valid enactments of its own legislature. Never would this law have emerged from

congressional committee had it applied to the entire United States. Our people are more jealous of their own local governments than to permit such a bold seizure of their authority.[7]

Finally, I dissent from the remedy adopted by the Court. The majority adds insult to injury by remanding this case to the District Court with instructions to determine whether Canton should be required to hold a new election. This Court has always heretofore been rightly hesitant in interfering with elections even for the grossest abuses. The majority now departs from our many precedents for restraint in election cases and suggests to the District Court that it may be appropriate to invalidate the 1969 election and require the village to undergo the great expense and tremendous disruption of a new election. Such a remand of this case is inappropriate for at least two reasons. First, the majority's decision is not predicated upon any actual discrimination against voters by the city of Canton, but merely upon a failure to seek federal approval for *de minimis* changes in its election machinery. The majority does not pretend that any actual discrimination has been proved in this case. Ci-

[7] Section 5 of this Act and its enforcement by the Court is reminiscent of treatment accorded the Colonies by the British King. Some of the Colonies' complaints of July 4, 1776, were:

"He has refused his Assent to Laws, the most wholesome and necessary for the public good.—He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.—He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.—He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures. . . ." Declaration of Independence (July 4, 1776).

tations to the finding of the United States Civil Rights Commission about past instances of racial discrimination and to statements made by Congressmen who supported the 1965 Voting Rights Act do not prove discrimination in this case. In the absence of affirmative proof of racial discrimination, I believe it would be an abuse of any remedial discretion that may be vested in the federal judiciary to compel Canton to hold a new election. Second, I believe that in remanding this case, my Brethren are neglecting their constitutional duty to decide an issue necessary to the full disposition of this case. This case has been in litigation since May 1969 and the election has already been postponed once. By the time the majority's mandate is acted upon by the District Court and we have disposed of the jurisdictional statement which will inevitably follow, Canton's 1973 elections will be just around the corner. In this posture, to require a new election would not be a remedy for a constitutional or statutory wrong but a harsh and oppressive punishment wholly unwarranted by the facts of this case. Moreover, an order directing a new election would be a "shotgun" sanction, damaging all of the candidates and all of the people in Canton. Useless campaign expenses would have to be borne by both white and black candidates. And the town, through property or sales taxes imposed on all citizens, black or white, rich or poor, would have to collect tax money to pay the expenses of a new election. I need not remind the District Judges below that elections are expensive and that all southern towns are not rich. I am convinced that if the majority were to confront the issue of an appropriate remedy now, the Court would not void the election or compel the city to hold a new election. To the contrary, the 1969 election would be upheld because the alleged violations of the Act are so very minor and so clearly technical. We should not forget that while it is easy for judges to order

new elections, it will be neither easy nor inexpensive for the little city of Canton to comply with such an order.

For the reasons set out above and in my dissents in *South Carolina* v. *Katzenbach, supra,* and *Allen* v. *State Board of Elections, supra,* I would affirm the judgment of the United States District Court.[8]

[8] My Brothers THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN have stated that "[g]iven the decision in *Allen* v. *State Board of Elections* . . . [they] join in the judgment" of the Court in this case. I have to admit that I do not precisely understand what they mean by "given *Allen.*" Neither THE CHIEF JUSTICE nor MR. JUSTICE BLACKMUN was a member of the Court when *Allen* was decided. They are certainly not bound by the Court's past mistakes if they think, as I do, that *Allen* was a mistake. Yet, I do not understand that "given *Allen,*" necessarily means that they now agree to what was decided in that case. I believe that *Allen* was wrongly decided and would overrule it now. Moreover, I do not believe that acceptance of the Court's decision in *Allen* necessitates compelling the city of Canton to seek the Attorney General's consent to either the changes in local polling places or the other changes at issue in this case.

BLOUNT, POSTMASTER GENERAL, ET AL. *v.* RIZZI, DBA THE MAIL BOX

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

No. 55. Argued November 10, 1970—Decided January 14, 1971*

Title 39 U. S. C. § 4006 permits the Postmaster General to stamp as "Unlawful" and return to the sender letters addressed to any person and to prohibit the payment of postal money orders to that person if he finds, on "evidence satisfactory to [him]," that the person is obtaining or seeking money through the mails for "an obscene . . . matter" or is using the mails to distribute information about how such items may be obtained. Under departmental regulations, following complaint and notice of hearing, a Judicial Officer holds a hearing and renders his opinion "with all due speed," from which there is an administrative appeal. Section 4007 permits district courts to order the defendant's incoming mail detained pending completion of the § 4006 proceedings, upon a showing of "probable cause" to believe that § 4006 is being violated, under the standards fixed by Fed. Rule Civ. Proc. 65. In No. 55, appellee, a retail magazine distributor against whom the Postmaster General had instituted a § 4006 proceeding, brought an action in the District Court seeking declaratory and injunctive relief. A three-judge court held the statute unconstitutional for failure to meet the requirements of *Freedman* v. *Maryland,* 380 U. S. 51, which held with respect to a scheme of administrative censorship that (1) the censor must initiate judicial review and prove that the material is unprotected expression; (2) "prompt judicial review" is mandatory; and (3) any restraint before a final judicial determination must be limited to the shortest, fixed period compatible with sound judicial resolution. In No. 58, where the Postmaster General applied for a § 4007 order, the District Court, on appellee distributor's counterclaim, held § 4006 unconstitutional under *Freedman* v. *Maryland, supra,* and that § 4007's "probable cause" standard was constitutionally insufficient to support a temporary mail detention order. *Held:* The administrative censorship scheme created by 39 U. S. C. §§ 4006, 4007

*Together with No. 58, *United States et al.* v. *The Book Bin,* on appeal from the United States District Court for the Northern District of Georgia.

violates the First Amendment since it lacks adequate safeguards against undue inhibition of protected expression. *Freedman* v. *Maryland, supra.* Pp. 416–422.

(a) The statutory scheme does not require governmentally initiated judicial participation in the procedure barring the magazines from the mails or assuring prompt judicial review. Pp. 417–418.

(b) The authority given the Postmaster General under § 4007 to apply for a court order for temporary mail detention does not cure the defects in § 4006 since the procedure is only discretionary and the requirement for prompt judicial review is not satisfied by a "probable cause" finding. Pp. 419–420.

(c) Section 4007 fails to provide that any restraint preceding a final judicial determination "be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." 380 U. S., at 59. Pp. 421–422.

No. 55, 305 F. Supp. 634; No. 58, 306 F. Supp. 1023, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, HARLAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACK, J., concurred in the result.

Peter L. Strauss argued the cause for appellants in both cases. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener, Donald L. Horowitz, David Nelson,* and *Charles D. Hawley.*

Stanley Fleishman argued the cause for appellee in No. 55. With him on the brief was *Sam Rosenwein. Robert Eugene Smith* argued the cause for appellee in No. 58. With him on the brief was *Hugh W. Gibert.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

No. 55 (hereafter *Mail Box*) draws into question the constitutionality of 39 U. S. C. § 4006 (now 39 U. S. C. § 3006, Postal Reorganization Act,† 84 Stat. 747), under

†The codification of the Act will appear in the 1970 edition of the United States Code. This opinion treats the old Code sections as current.

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which the Postmaster General, following administrative hearings, may halt use of the mails and of postal money orders for commerce in allegedly obscene materials. No. 58 (hereafter *Book Bin*) also draws into question the constitutionality of § 4006, and, in addition, the constitutionality of 39 U. S. C. § 4007 (now 39 U. S. C. § 3007), 84 Stat. 748, under which the Postmaster General may obtain a court order permitting him to detain the defendant's incoming mail pending the outcome of § 4006 proceedings against him.

39 U. S. C. § 4006 provides in pertinent part:

> "Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene . . . matter . . . , or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—
>
> "(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked 'Unlawful'; and
>
> "(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes."

Proceedings under § 4006 are conducted according to departmental regulations. A proceeding is begun by the General Counsel of the Post Office Department by written complaint and notice of hearing. 39 CFR §§ 952.5, 952.7, 952.8. The Judicial Officer of the Department holds a trial-type hearing at which a full record is transcribed. He renders an opinion which includes findings

of fact and a statement of reasons. 39 CFR §§ 952.9–952.25. The decision is to "be rendered with all due speed," 39 CFR § 952.24 (a), and there is an administrative appeal. 39 CFR § 952.25. No § 4006 order may issue against the defendant until completion of the administrative proceeding. If, however, the Postmaster General wishes to detain the defendant's incoming mail before the termination of the § 4006 proceedings, he may apply to the United States District Court for the district in which the defendant resides, under 39 U. S. C. § 4007, which in pertinent part provides: [1]

> "In preparation for or during the pendency of proceedings under [§ 4006] of this title, the United

[1] Section 4006 was enacted in 1950. 64 Stat. 451. In 1956 the Postmaster General sought and obtained the power himself to enter an order, pending administrative proceedings under § 4006, that all mail addressed to the defendant in the § 4006 proceeding be impounded. The order was to expire at the end of 20 days unless the Postmaster General sought in a federal district court, an order continuing the impounding. 70 Stat. 699. In 1959, extensive hearings were held in the House on the Post Office's request that the 20-day period be extended to 45 days, and that the standard of necessity be changed to "public interest." Hearings on Obscene Matter Sent Through the Mail before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., pts. 1, 2, and 3 (1959); Hearings on Detention of Mail for Temporary Periods before the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess. (1959). Instead, Congress enacted § 4007 which stripped the Postmaster General of his power to issue an interim order for any period, and directed him to seek such an order in a federal district court. One Senate Report expressed misgivings when the Postmaster General had originally sought the impounding power: "The committee recognizes that even in its present form the bill gives the Postmaster General extraordinary and summary powers to impose a substantial penalty by impounding a person's mail for up to 20 days in advance of any hearing or any review by the courts. Such power is directly contrary to the letter and spirit of normal due process, as exemplified by the Administrative Procedure Act, which requires a hearing before any penalty may be imposed. The Post Office Department has made

States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings." [2]

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its case for this legislation on the grounds that a temporary and summary procedure is required to deal with fly-by-night operators using the mails to defraud or to peddle pornography, who may go out of business—or change the name of their business or their business address—before normal legal procedures can be brought into operation. The Post Office Department has not recommended, nor does this committee approve, the use of the temporary impounding procedure under this bill as a substitute for the normal practice of an advance hearing or the bringing of an indictment for violation of the criminal code in all cases involving legitimate and well-established business operations. The committee would not approve the use of the extraordinary summary procedure under the bill against legitimate publishers of newspapers, magazines, or books in cases in which a Postmaster General might take objection to an article, an issue, or a volume." S. Rep. No. 2234, 84th Cong., 2d Sess., 2–3 (1956).

[2] Section 4007 also authorizes the Postmaster General to apply for an impounding order during the pendency of proceedings under 39 U. S. C. § 4005 (1964 ed., Supp. V), now § 3005. Section 4005, as amended (82 Stat. 1153), permits the return to the sender of any mail sent to the perpetrator of what the Postmaster General finds to be a scheme for obtaining money by means of false representations. That section has been upheld against First Amendment attack. *Donaldson* v. *Read Magazine,* 333 U. S. 178 (1948). The Govern-

In *Mail Box,* the Postmaster General began administrative proceedings under § 4006 on November 1, 1968. The administrative hearing was concluded December 5, 1968. The Judicial Officer filed his decision December 31, 1968, finding that the specified magazines were obscene and, therefore, entered a § 4006 order—61 days after the complaint was filed. Mail Box filed a complaint in the United States District Court for the Central District of California seeking a declaratory judgment that § 4006 was unconstitutional and an injunction against enforcement of the administrative order. A three-judge court was convened and held that 39 U. S. C. § 4006 "is unconstitutional on its face, because it fails to meet the requirements of Freedman v. Maryland (1965) 380 U. S. 51 . . . ." 305 F. Supp. 634, 635 (1969). The court, therefore, vacated the administrative order, directed the delivery "forthwith" of all mail addressed to Mail Box, and enjoined any proceedings to enforce § 4006.

In *Book Bin,* the Postmaster General applied to the District Court for the Northern District of Georgia for a § 4007 order pending the completion of § 4006 proceedings against Book Bin.[3] Book Bin counterclaimed, asserting that both §§ 4006 and 4007 were unconstitutional and that their enforcement should be enjoined. A three-judge court was convened and held both sections unconstitutional. It agreed with the three-judge court in *Mail Box* that the procedures of § 4006 were fatally deficient under *Freedman* v. *Maryland,* 380 U. S. 51

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ment does not argue in its brief that *Donaldson* compels the conclusion that § 4006 also is constitutional but only that "Section 4006, like the fraud statute upheld in *Donaldson* . . . meets all necessary constitutional standards." Brief for Appellants 20. On oral argument, the Government suggested that an affirmance in this case might jeopardize the validity of § 4005 and the continued vitality of *Donaldson.* But no argument was offered to support the suggestion.

[3] The order was sought with respect to a single issue of one magazine.

(1965), and also held that the finding under § 4007 merely of "probable cause" to believe material was obscene was not a constitutionally sufficient standard to support a temporary mail detention order. 306 F. Supp. 1023 (1969).

We noted probable jurisdiction of the Government's appeals. 397 U. S. 959, 960 (1970). We affirm the judgment in each case.

Our discussion appropriately begins with Mr. Justice Holmes' frequently quoted admonition that, "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ." *Milwaukee Social Democratic Pub. Co.* v. *Burleson,* 255 U. S. 407, 437 (1921) (dissenting opinion); see also *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965). Since § 4006 on its face, and § 4007 as applied, are procedures designed to deny use of the mails to commercial distributors of obscene literature, those procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant,* 367 U. S. 717, 731 (1961). Rather, the First Amendment requires that procedures be incorporated that "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. . . . Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. . . ." *Bantam Books,*

Inc. v. *Sullivan,* 372 U. S. 58, 66 (1963). Since we have recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser* v. *Randall,* 357 U. S. 513, 525 (1958).

The procedure established by § 4006 and the implementing regulations omit those "sensitive tools" essential to satisfy the requirements of the First Amendment. The three-judge courts correctly held in these cases that our decision in *Freedman* v. *Maryland,* 380 U. S. 51 (1965) compels this conclusion. We there considered the constitutionality of a motion picture censorship procedure administered by a State Board of Censors. We held that to avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require "prompt judicial review"—a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination. 380 U. S., at 58–60.

These safeguards are lacking in the administrative censorship scheme created by §§ 4006, 4007, and the regulations.[4]

The scheme has no statutory provision requiring governmentally initiated judicial participation in the pro-

[4] We therefore have no occasion to consider the argument of appellees that *Stanley* v. *Georgia,* 394 U. S. 557 (1969), presupposes that an individual has a constitutional right to obtain possession of the challenged materials by delivery through the mail.

cedure which bars the magazines from the mails, or even any provision assuring prompt judicial review. The scheme does differ from the Maryland scheme involved in *Freedman* in that under the Maryland scheme the motion picture could not be exhibited pending conclusion of the administrative hearing, whereas under § 4006 the order to return mail or to refuse to pay money orders is not imposed until there has been an administrative determination that the magazines are obscene. This, however, does not redress the fatal flaw of the procedure in failing to require that the Postmaster General seek to obtain a prompt judicial determination of the obscenity of the material; rather, once the administrative proceedings disapprove the magazines the distributor "must assume the burden of instituting judicial proceedings and of persuading the courts that the . . . [magazines are] protected expression." 380 U. S., at 59–60. The First Amendment demands that the Government must assume this burden. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U. S., at 58.[5]

Moreover, once a § 4006 administrative order has been entered against the distributor, there being no provision for judicial review, the Postmaster may stamp as "Unlawful" and immediately return to the sender orders for

[5] In 1962, three Justices of the Court stated: "[We have] . . . no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts." *Manual Enterprises* v. *Day*, 370 U. S. 478, 518–519 (1962) (opinion of BRENNAN, J.).

purchase of the magazines addressed to the distributor, and prohibit the payment of postal money orders to him. Such a scheme "presents peculiar dangers to constitutionally protected speech. . . . Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." 380 U. S., at 57–58.[6] Appellants suggest that we avoid the constitutional question raised by the failure of § 4006 to provide that the Government seek a prompt judicial determination by construing that section to deny the administrative order any effect whatever, if judicial review is sought by the distributor, until the completion of that review. Apart from the fact that this suggestion neither requires that the appellants initiate judicial proceedings, nor provides for a prompt judicial determination, it is for Congress, not this Court, to rewrite the statute.

The authority of the Postmaster General under § 4007 to apply to a district court for an order directing the detention of the distributor's incoming mail pending the conclusion of the § 4006 administrative proceedings and any appeal therefrom plainly does not remedy the defects in § 4006. That section does not provide a prompt proceeding for a judicial adjudication of the challenged ob-

[6] The Judicial Officer is appointed by the Postmaster General to "perform such quasi-judicial duties as the Postmaster General may designate." 39 U. S. C. § 308a. He functions as hearing examiner in many proceedings in addition to those under § 4006. The appellants argue that the Judicial Officer enjoys "many of the insulations that judges enjoy." What the Constitution requires, however, is that a noncriminal censoring process require governmentally initiated full judicial participation. Clearly, § 4006 does not so provide.

scenity of the magazine.[7] First, it is entirely discretionary with the Attorney General whether to institute a § 4007 action and, therefore, the section does not satisfy the requirement that the appellants assume the burden of seeking a judicial determination of the alleged obscenity of the magazines. Second, the district court is required to grant the relief sought by the Postmaster General upon a showing merely of "probable cause" to believe § 4006 is being violated. We agree with the three-judge court in *Book Bin* that to satisfy the demand of the First Amendment "it is vital that prompt judicial review on the issue of obscenity—rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §§ 4006, 4007, are invoked." 306 F. Supp., at 1028. Indeed, the statute expressly provides that, "An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings." [8]

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[7] The Court said in *Freedman* v. *Maryland* that the procedure considered in *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957), provides "a model . . . [of an] . . . injunctive procedure designed to prevent the sale of obscene books." 380 U. S., at 60.

[8] This provision was added at the request of Postmaster General Summerfield who desired it expressly to forestall judicial review pending completion of the administrative proceeding. "This would guarantee that counsel for a mailer will not be able to raise successfully a bar to all further administrative proceedings in a case in which the Government failed to prevail on its motion for a preliminary injunction." Letter from Arthur E. Summerfield, Postmaster General, to Senator Olin D. Johnston, Chairman, Senate Committee on Post Office and Civil Service, U. S. Code Cong. & Admin. News, 86th Cong., 2d Sess., 3249 (1960). In 1959, Postmaster General Summerfield had testified:

"In spite of the frustrations and the legal complications, and even the court decisions [which the Postmaster General had described as handing down 'the very broad definition of obscenity'], I feel a responsibility to the public to attempt to prevent the use of the mails for indecent material, and to seek indictments and prosecutions for

Moreover, § 4007 does not in any event itself meet the requisites of the First Amendment. Any order issued by the district court remains in effect "pending the conclusion of the statutory proceedings and any appeal therefrom." [9] Thus, the statute not only fails to provide that the district court should make a final judicial determination of the question of obscenity, expressly giving that authority to the Judicial Officer, but it fails to provide that "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." 380 U. S., at 59.

The appellees here not only were not afforded "prompt judicial review" but they "can only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by [their] own initiative. During the interim, the prolonged threat of an adverse

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such offenses, even though it may be argued that it falls in the category of material concerning which there have been previous rulings favorable to the promoters." Hearing on Obscene Matter Sent Through the Mail before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., pt. 1, p. 6 (1959).

[9] Appellants point out that orders under §§ 4006 and 4007 generally allow the addressee to open his mail at the post office and receive any first class mail demonstrated clearly not to be connected with the allegedly unlawful use. This provision is provided in light of 39 U. S. C. § 4057 which provides that "[o]nly an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department." See also 39 CFR § 117.1. But, query whether such provision of the order requires an "official act," *viz.*, examining the mail, which constitutes an unconstitutional limitation on the addressee's First Amendment rights. *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965).

administrat[ive] decision in § 4006 or the reality of a sweeping § 4007 order, will have a severe restriction on the exercise of [appellees'] First Amendment rights—all without a *final* judicial determination of obscenity." 306 F. Supp., at 1028.

The judgments of the three-judge courts in Nos. 55 and 58 are

Affirmed.

MR. JUSTICE BLACK concurs in the result.

Per Curiam

KENNERLY ET AL. *v.* DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF MONTANA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 5370. Decided January 18, 1971

Petitioners unsuccessfully moved to dismiss an action for a 1964 debt brought against them, on the ground that the Montana courts lacked jurisdiction because they were Blackfeet Indians and the transactions took place on the Indian reservation. Section 7 of the Act of August 15, 1953, provided in part that a State not having civil jurisdiction over Indians could "assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." Montana took no affirmative legislative action with respect to the Blackfeet Reservation. In 1967 the Blackfeet Tribal Council adopted an act providing for concurrent jurisdiction in the Tribal Court and the state courts of any suit where the defendant is a member of the Tribe. Title IV of the Civil Rights Act of 1968 repealed § 7 of the 1953 Act and provided for the assumption of state jurisdiction "only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose." *Held:* The Tribal Council's unilateral action was insufficient to vest jurisdiction in the Montana courts under either the 1953 Act, which required affirmative state legislative action, or under the 1968 Act, which calls for a majority vote of all enrolled Indians.

Certiorari granted; 154 Mont. 488, 466 P. 2d 85, vacated and remanded.

PER CURIAM.

This case arises on petition for certiorari from a judgment of the Supreme Court of Montana. The petition for certiorari and the motion to proceed *in forma pauperis* are granted. For reasons appearing below, we vacate the judgment of the Supreme Court of Montana and

remand the case for further proceedings not inconsistent with this opinion.

Petitioners are members of the Blackfeet Indian Tribe and reside on the Blackfeet Indian Reservation in Montana. The tribe is duly organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.* In July and August of 1964, petitioners purchased some food on credit from a grocery store located within the town limits of Browning, a town incorporated under the laws of Montana but located within the exterior boundaries of the Blackfeet Reservation.

A suit was commenced in the Montana state courts against petitioners on the debt arising from these transactions. Petitioners moved to dismiss the suit on the ground that the state courts lacked jurisdiction because the defendants were members of the Blackfeet Tribe and the transactions took place on the Indian reservation. The lower state court overruled the motion and petitioners, pursuant to Montana rules of procedure, petitioned the Supreme Court of Montana for a "writ of supervisory control" to review this lower court ruling. The State Supreme Court took jurisdiction and affirmed.

Prior to the passage of Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U. S. C. §§ 1321–1326 (1964 ed., Supp. V), discussed *infra,* state assumption of civil jurisdiction—in situations where Congress had not explicitly extended jurisdiction [1]—was governed by § 7 of

[1] For example, § 4 of the Act of August 15, 1953, 67 Stat. 589, 28 U. S. C. § 1360 (a), extended jurisdiction over civil causes of action arising in Indian country to which Indians are parties to five States. The statute is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country. See also § 2 of the Act, 67 Stat. 588, 18 U. S. C. § 1162, extending criminal jurisdiction to the

the Act of August 15, 1953, 67 Stat. 590. Section 7 of that statute provided:

> "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act [referring to §§ 2 and 4, see n. 1, *supra*], to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

Pursuant to this statute, the Montana Legislature enacted Chapter 81, Laws of 1963 (§§ 83–801, 83–806, Montana Rev. Codes Ann. (1966)), extending criminal, but not civil, jurisdiction over Indians of the Flathead Indian Reservation. But Montana never took "affirmative legislative action"—concerning either civil or criminal jurisdiction—with respect to the Blackfeet Reservation.

However, on November 20, 1967, the Blackfeet Tribal Council adopted Chapter 2, Civil Action, § 1, as part of the Blackfeet Tribal Law and Order Code, which provides, in relevant part:

> "The Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts. . . ."

The Montana Supreme Court relied on this pre-1968 Tribal Council action as an alternative basis for the assertion of state civil jurisdiction over the instant liti-

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same States over offenses involving Indians committed in Indian country. Montana was not one of the five States accorded civil and criminal jurisdiction under these sections of the statute.

gation.[2] In *Williams* v. *Lee,* 358 U. S. 217 (1959), a non-Indian brought suit against a Navajo Indian for a debt arising out of a transaction which took place on the Navajo Reservation. The Arizona State Supreme Court upheld the exercise of jurisdiction and we reversed. In the instant case, the Montana Supreme Court attempted to reconcile its result with *Williams* on the theory that the transfer of jurisdiction by unilateral tribal action is consistent with the exercise of tribal powers of self-government. 154 Mont. 488, 466 P. 2d 85.[3]

The Court in *Williams,* in the process of discussing the general question of state action impinging on the affairs of reservation Indians, noted that "[e]ssentially, absent governing Acts of Congress, the question has always been

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[2] As discussed *infra,* § 403 (b) of the Civil Rights Act of 1968, 82 Stat. 79, 25 U. S. C. § 1323 (b) (1964 ed., Supp. V), repealed § 7 of the Act of 1953. But § 403 (b) provides: "such repeal shall not affect any cession of jurisdiction made pursuant to [§ 7] prior to its repeal." Further, §§ 402 and 406 of the 1968 Act, which govern the assumption of civil jurisdiction by States, appear to cover only States not presently having such jurisdiction.

The instant litigation commenced after the passage of the 1968 Act. However, since the Tribal Council action preceded the 1968 Act—and under the state court's reasoning vested the State with jurisdiction at that point in time—we must consider the validity of the State's assertion of jurisdiction under the 1953 Act as well as the 1968 Act.

[3] The Montana Supreme Court also sought to distinguish *Williams* outright on the ground that the plaintiff in that case had, at one point, secured a writ of attachment on Indian-owned livestock on the Navajo Reservation, bringing into play special federal protective policies with regard to Indian livestock. However, the Arizona Supreme Court judgment under review in *Williams* had set aside the writ of attachment on the very basis relied upon by the Montana Supreme Court in its opinion in this case as a distinguishing ground. *Williams* v. *Lee,* 83 Ariz. 241, 247–248, 319 P. 2d 998, 1002–1003 (1958). Respondent in *Williams* did not seek review of that portion of the judgment, and, of course, the Court's opinion in *Williams* makes no reference to the attachment.

whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 220. With regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country, there was, at the time of the Tribal Council resolution, a "governing Act of Congress," *i. e.*, the Act of 1953. Section 7 of that statute conditioned the assumption of state jurisdiction on "affirmative legislative action" by the State; the Act made no provision whatsoever for tribal consent, either as a necessary or sufficient condition to the assumption of state jurisdiction. Nor was the requirement of affirmative legislative action an idle choice of words; the legislative history of the 1953 statute shows that the requirement was intended to assure that state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities. See H. R. Rep. No. 848, 83d Cong., 1st Sess., 6, 7 (1953); *Williams, supra,* at 220–221. Our conclusion as to the intended governing force of § 7 of the 1953 Act is reinforced by the comprehensive and detailed congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country. See n. 1, *supra.*

In *Williams,* the Court went on to note the absence of affirmative congressional action, or affirmative legislative action by the people of Arizona within the meaning of the 1953 Act. 358 U. S., at 222–223. Here it is conceded that Montana took no affirmative legislative action with respect to the Blackfeet Reservation. The unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction over Indian country under the 1953 Act.

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The remaining question is whether the pre-1968 manifestation of tribal consent by tribal council action can operate to vest Montana with jurisdiction under the provision of the Civil Rights Act of 1968. Title IV of the 1968 statute repealed § 7 of the 1953 Act [4] and substituted a new regulatory scheme for the extension of state civil and criminal jurisdiction to litigation involving Indians arising in Indian country. See 25 U. S. C. §§ 1321–1326 (1964 ed., Supp. V). Section 402 (a) of the Act, 25 U. S. C. § 1322 (a) (1964 ed., Supp. V), dealing with civil jurisdiction, provides:

> "The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

Section 406 of the Act, 25 U. S. C. § 1326 (1964 ed., Supp. V), then provides:

> "State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled

[4] But see n. 2, *supra*.

> Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults."

We think the meaning of these provisions is clear: the tribal consent that is prerequisite to the assumption of state jurisdiction under the provisions of Title IV of the Act must be manifested by majority vote of the enrolled Indians within the affected area of Indian country.[5] Legislative action by the Tribal Council does not comport with the explicit requirements of the Act.

Finally, with regard to the 1968 enactment, this case presents no question concerning the power of the Indian tribes to place time, geographical, or other conditions on the "tribal consent" to state exercise of jurisdiction. Rather, we are presented solely with a question of the *procedures* by which "tribal consent" must be manifested under the new Act. Thus the suggestion made

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[5] The plain meaning of the statute is reinforced by the legislative history. Title IV of the 1968 Act was offered and principally sponsored by Senator Ervin of North Carolina as part of an amendment by way of a substitute to H. R. 2516, which eventually became part of the Civil Rights Act of 1968. See 114 Cong. Rec. 393–395. In discussing Title IV, Senator Ervin stated, *id.*, at 394:

"This title repeals section 7 [of the 1953 Act] and authorizes States to assert civil and criminal jurisdiction in Indian country only after acquiring the consent of the tribes in the States by referendum of all reservated Indians."

See also S. Rep. No. 721, 90th Cong., 1st Sess., 32 (1967) (additional views of Sen. Ervin). Senator Ervin's proposals were eventually adopted as an amendment to the Dirksen amendment to the 1968 Act. See 114 Cong. Rec. 5836–5838.

in dissent that, under today's disposition, "[t]he reservation Indians must now choose between exclusive tribal court jurisdiction on the one hand and permanent, irrevocable state jurisdiction on the other," is incorrect.[6]

The judgment of the Supreme Court of Montana is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

This case does not involve state action infringing "the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee,* 358 U. S. 217, 220. To the contrary, the exercise of state jurisdiction complained of here was expressly authorized by tribal law. Blackfeet Tribal Law and Order Code, c. 2, § 1. The Court holds that this tribal law is invalid because Congress has restricted the right of Indian self-government by specifying the exclusive procedure by which reservation Indians may confer on a state court jurisdiction over them.

I think that Congress did not intend in enacting either § 7 of the Act of August 15, 1953, 67 Stat. 590, or the successor to that section, Title IV of the Civil Rights Act of 1968, §§ 402 (a), 406, 25 U. S. C. §§ 1322, 1326 (1964 ed., Supp. V), to invalidate tribal legislation that author-

[6] The dissent's rebutting footnote infers from the express allowance for selective state exercise of jurisdiction a congressional intent to exclude selective tribal consent to state exercise of jurisdiction. That inference is so obviously not compelled by either the language or structure of 25 U. S. C. § 1322 (a) (1964 ed., Supp. V), the full text of which is quoted above, that we think no further response is needed. We reiterate, however, that with respect to the 1968 enactment, today's decision is concerned solely with procedural mechanisms by which tribal consent must be registered.

izes state courts to take jurisdiction over actions brought against a member of the tribe. It is plain to me that these statutes reflect only a congressional determination that there is a need for protective limitations when state jurisdiction over reservation Indians is to be *permanently* authorized. But I can find in these statutes no suggestion that Congress determined that such limitations are necessary when reservation Indians pass a law that authorizes state court jurisdiction over them. Nor can I see any reason to suppose that to invalidate such a law will effectuate the purpose of Congress. When state court jurisdiction over reservation Indians rests on tribal legislation, as distinct from a permanent federal authorization, the interests of the reservation Indians are fully protected by their ability to repeal the grant of jurisdiction to the state courts and thereby to return exclusive jurisdiction to their own courts.

The decision reached by the Court today substantially frustrates productive self-government by reservation Indians because it unjustifiably reduces the options available to them with respect to state court jurisdiction. The reservation Indians must now choose between exclusive tribal court jurisdiction on the one hand and permanent, irrevocable state jurisdiction on the other.* This means that because of a temporary inability to maintain a tribal court, reservation Indians may find it necessary to cede jurisdiction to a State for all time.

*The Court suggests that this dilemma is imaginary because the tribe may attach conditions to its consent. I fail to understand how the problem can be avoided in this way. When state jurisdiction is assumed pursuant to 25 U. S. C. § 1322 (a) (1964 ed., Supp. V), it is the State and not the tribe that determines the scope of the jurisdiction to which the tribe may consent. That section authorizes a State to assume "such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof *as may be determined by such State* . . . ." (Emphasis added.)

It also means that reservation Indians do not have the option of a trial period of state jurisdiction under the authority of their own laws. I cannot believe that Congress intended to withdraw these options.

Finally, it seems to me quite wrong to invalidate an enactment of the Blackfeet Tribal Council, which is not a party to this litigation, without first giving the Council an opportunity at least to submit a brief in support of its legislation. Before deciding this case the Court requested the Solicitor General to submit the views of the United States, whose law the Court now interprets as controlling. I should have thought the most basic principles of fair play would dictate a like request to the Blackfeet Tribal Council before the Court strikes down its law as invalid.

Syllabus

WISCONSIN *v.* CONSTANTINEAU

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

No. 95. Argued December 10, 1970—Decided January 19, 1971

The police chief of Hartford, Wisconsin, pursuant to a state statute, caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquor to appellee, a resident of that city, were forbidden for one year. The statute provides for such "posting," without notice or hearing, with respect to any person who "by excessive drinking" produces certain conditions or exhibits specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community. On appellee's suit seeking, *inter alia,* injunctive relief, a three-judge federal court held the statute unconstitutional as violative of procedural due process. *Held:*

1. The label or characterization given an individual by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. Pp. 436–437.

2. Since here the state statute is unambiguous and there is no uncertain issue of state law, the federal court properly proceeded to determine the federal constitutional claim. *Zwickler* v. *Koota,* 389 U. S. 241, 250–251. Pp. 437–439.

302 F. Supp. 861, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which HARLAN, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post,* p. 439. BLACK, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post,* p. 443.

Benjamin Southwick, Assistant Attorney General of Wisconsin, argued the cause for appellant. With him on the brief were *Robert W. Warren,* Attorney General, and *Robert D. Martinson,* Assistant Attorney General.

S. A. Schapiro argued the cause and filed a brief for appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellee is an adult resident of Hartford, Wis. She brought suit in a federal district court in Wisconsin to have a Wisconsin statute declared unconstitutional.[1] A three-judge court was convened, 28 U. S. C. § 2281. That court, by a divided vote, held the Act unconstitutional, 302 F. Supp. 861, and we noted probable jurisdiction. 397 U. S. 985.

The Act, Wis. Stat. § 176.26 (1967), provides that designated persons may in writing forbid the sale or gift of intoxicating liquors to one who "by excessive drinking" produces described conditions or exhibits specified traits, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community.[2]

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[1] 28 U. S. C. § 1343 provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[2] Section 176.26 reads as follows:

"(1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages misspend, waste or lessen his estate so as to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as thereby to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, the wife of such person, the supervisors of such town, the mayor, chief of police or aldermen of such city, the trustees of such village, the county superintendent of the poor of such county, the chairman of the county board of supervisors of such county, the

The chief of police of Hartford, without notice or hearing to appellee, caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquors to appellee were forbidden for one year. Thereupon this suit was brought against the chief of police claiming damages and asking for injunctive relief. The State of Wisconsin intervened as a defendant on the injunctive phase of the case and that was the only issue tried and decided, the three-judge court holding the Act unconstitutional on its face and enjoining its enforcement. The court said:

> "In 'posting' an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within

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district attorney of such county or any of them, may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same. A copy of said writing so signed shall be personally served upon the person so intended to be prohibited from obtaining any such liquor or beverage.

"(2) And the wife of such person, the supervisors of any town, the aldermen of any city, the trustees of any village, the county superintendent of the poor of such county, the mayor of any city, the chairman of the county board of supervisors of such county, the district attorney or sheriff of such county, may, by a notice made and signed as aforesaid, in like manner forbid all persons in such town, city or village, to sell or give away intoxicating liquors or drinks or fermented malt beverages to any person given to the excessive use of such liquors, drinks or beverages, specifying such person, and such notice shall have the same force and effect when such specified person is a nonresident as is herein provided when such specified person is a resident of said town, city or village."

Section 176.28 makes the sale or gift of liquor to such a person a misdemeanor.

> the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such 'posting' or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter." 302 F. Supp., at 864.

We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment. *Crane* v. *Campbell,* 245 U. S. 304. The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.

We reviewed in *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895, the nature of the various "private interest[s]" that have fallen on one side or the other of the line. See also *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 339–342. Generalizations are hazardous as some state and federal administrative procedures are sum-

mary by reason of necessity or history. Yet certainly where the State attaches "a badge of infamy" to the citizen, due process comes into play. *Wieman* v. *Updegraff,* 344 U. S. 183, 191. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 168 (Frankfurter, J., concurring).

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

It is suggested that the three-judge court should have stayed its hand while the aggrieved person repaired to the state courts to obtain a construction of the Act or relief from it. The fact that Wisconsin does not raise the point does not, of course, mean that it lacks merit. Yet the suggestion is not in keeping with the precedents.

Congress could, of course, have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it came to review of the state court judgments. But our First Congress [3] resolved differently and created the federal court system and in time granted the federal courts various heads of

[3] The first Judiciary Act is in 1 Stat. 73.

jurisdiction,[4] which today involve most federal constitutional rights. Once that jurisdiction was granted, the federal courts resolved those questions even when they were enmeshed with state law questions. In 1941 we gave vigor to the so-called abstention doctrine in *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496. In that case an authoritative resolution of a knotty state law question might end the litigation and not give rise to any federal constitutional claim. *Id.*, at 501. We, therefore, directed the District Court to retain the suit pending a determination by a state court of the underlying state law question. We applied the abstention doctrine most recently in *Fornaris* v. *Ridge Tool Co.*, *ante*, p. 41, where a relatively new Puerto Rican statute, which had not been authoritatively construed by the Commonwealth's courts, "might be judicially confined to a more narrow ambit which would avoid all constitutional questions." We ordered the federal courts to stay their hands until the Puerto Rican courts had spoken. Speaking of *Reetz* v. *Bozanich*, 397 U. S. 82, we noted that the "three-judge federal court should not have proceeded to strike down an Alaska law which, if construed by the Alaska Supreme Court, might be so confined as not to have any constitutional infirmity." *Ante*, at 43. But the abstention rule only applies where "the issue of state law is uncertain." *Harman* v. *Forssenius*, 380 U. S. 528, 534. Thus our abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe. *Reetz* v. *Bozanich, supra; City*

[4] 28 U. S. C. § 1343 (3) involved in the present case came into the statutes in 1871. 17 Stat. 13. In 1875 Congress enlarged federal jurisdiction by authorizing the "federal question" jurisdiction presently contained in 28 U. S. C. § 1331. See 18 Stat. 470. We recently reviewed this history in *Zwickler* v. *Koota*, 389 U. S. 241, 245–248.

of Meridian v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639.

In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some construction but not under others. The Act on its face gives the chief of police the power to do what he did to the appellee. Hence the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional. As we said in *Zwickler* v. *Koota*, 389 U. S. 241, 251, abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. *Id.*, at 250–251. We would negate the history of the enlargement of the jurisdiction of the federal district courts,[5] if we held the federal court should stay its hand and not decide the question before the state courts decided it.

Affirmed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court today strikes down, as unconstitutional, a Wisconsin statute that has never been challenged or tested in the Wisconsin state courts. The judges of Wisconsin probably will be taken by surprise by our summary action since few, if any, have ever heard of this case.

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[5] See n. 4, *supra*.

Very likely we reach a correct result since the Wisconsin statute appears, on its face and in its application, to be in conflict with accepted concepts of due process.

The reason for my dissent is that it seems to me a very odd business to strike down a state statute, on the books for almost 40 years, without any opportunity for the state courts to dispose of the problem either under the Wisconsin Constitution or the U. S. Constitution. For all we know, the state courts would find this statute invalid under the State Constitution,[1] but no one on either side of the case thought to discuss this or exhibit any interest in the subject. Since no one could reasonably think that the judges of Wisconsin have less fidelity to due process requirements of the Federal Constitution than we do, this case is, for me, a classic illustration of one in which we should decline to act until resort to state courts has been exhausted. At oral argument counsel for Mrs. Constantineau was candid in saying that he had deliberately avoided resort to the state courts because he could secure, and indeed did secure, a three-judge federal district court to decide the issue and, in that posture, appeal would lie directly to this Court.

Only recently in the 1969 Term we held unanimously that a challenge, under the Equal Protection Clause of the Fourteenth Amendment and under certain provisions of the Alaska Constitution, to the constitutionality of a state statute restricting commercial salmon fishing licenses should not have been decided by the federal district court until the courts of Alaska had acted. There,

[1] Although Wisconsin has no due process clause as such, Art. I, § 1, of the Wisconsin Constitution has been held by the Wisconsin Supreme Court to be substantially equivalent to the limitation on state action contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Pauly* v. *Keebler,* 175 Wis. 428, 185 N. W. 554 (1921).

as here, the statute's challenger wanted to use the "short cut" Congress has authorized. As here, the "short cut" was to convene a three-judge federal district court which held the Alaska statute invalid. Notwithstanding that the license applicants presented a sound claim, MR. JUSTICE DOUGLAS, speaking for a unanimous Court, said:

> "We are advised that the provisions of the Alaska Constitution at issue have never been interpreted by an Alaska court. The District Court, feeling sure of its grounds on the merits, held, however, that this was not a proper case for abstention, saying that 'if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable.' 297 F. Supp., at 304. The three-judge panel was a distinguished one, two being former Alaska lawyers. And they felt that prompt decision was necessary to avoid the 'grave and irreparable' injury to the 'economic livelihood' of the appellees which would result, if they could not engage in their occupation 'during this year's forthcoming fishing season.' *Ibid.*
>
> "It is, of course, true that abstention is not necessary whenever a federal court is faced with a question of local law, the classic case being *Meredith* v. *Winter Haven,* 320 U. S. 228, where federal jurisdiction was based on diversity only. Abstention certainly involves duplication of effort and expense and an attendant delay. See *England* v. *Louisiana State Board,* 375 U. S. 411. That is why we have said that this judicially created rule which stems from *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, should be applied only where 'the issue of state law is uncertain.' *Harman* v. *Forssenius,* 380 U. S. 528, 534." *Reetz* v. *Bozanich,* 397 U. S. 82, 86 (1970).

This very wise doctrine is an essential one of policy and is a keystone of federalism. Previously this Court had underscored this concept, saying:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. . . . In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639, 640–641 (1959).

See also *Fornaris* v. *Ridge Tool Co., ante,* p. 41.

It is no answer to contend that there is no ambiguity in the Wisconsin statute and hence no need to abstain; in *Reetz* the Alaska statute could not have been more plain, or less susceptible of a limiting construction. Yet, in furtherance of this Court's firm policy to steer around head-on collisions with the States by avoiding unnecessary constitutional decisions, we reversed the District Court and remanded with instructions to stay its hand while the litigants exhausted state court remedies for resolution of their challenge to the statute. See also *Fornaris* v. *Ridge Tool Co., supra.* *Reetz* cannot be distinguished and I see no reason to depart from the principles it reaffirmed.[2]

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[2] Here there is not the urgency presented by *Reetz* where our action in remanding for state court consideration effectively precluded appellees from securing a commercial fishing license for at least one more season. No such urgency is presented by the instant case.

I quite agree that there is no absolute duty to abstain—to stay our hand—until the state courts have at least been asked to construe their own statute, but for me it is the negation of sound judicial administration—and an unwarranted use of a limited judicial resource—to impose this kind of case on a three-judge federal district court, and then, by direct appeal, on this Court. Indeed, in my view, a three-judge district court would be well advised in cases such as this, involving no urgency or question of large import, to decline to act.

This Court has an abundance of important work to do, which, if it is to be done well, should not be subject to the added pressures of non-urgent state cases which the state courts have never been called on to resolve. Neither the historic role of this Court nor any reasonable duty placed on us, calls for our direct intervention when no reason for expedited review is shown. Here we have an example of an unwise statute making direct review *prima facie* available, and an unwillingness by the Court to follow its own precedents by declining to pass on the Wisconsin statute before Wisconsin courts do so. We should remand this case with directions to the three-judge court to refrain from acting until the Wisconsin courts have acted.

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

I agree substantially with the dissent of THE CHIEF JUSTICE. I would vacate the District Court's judgment and remand with directions to withhold its proceedings to enable appellee to file a declaratory judgment or other state court action challenging the police chief's posting of notices in all Hartford retail liquor outlets forbidding sales or gifts of liquors to appellee for one year. As the

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Court's opinion, the cases there cited, and THE CHIEF JUSTICE's dissent point out, such a course of action is justified "where the issue of state law is uncertain" and where the state court might confine the state law's meaning so "as not to have any constitutional infirmity." The Wisconsin Act appears on its face to grant authority to a man's wife, a mayor, a town's supervisors, the county superintendent of the poor, a sheriff, or a district attorney to post notices forbidding liquor establishments from giving or selling any alcoholic beverages to the person so posted. The effect of such sweeping powers, if there is nothing else in the State's law to limit them, is practically the same as that of an old common-law bill of attainder, against which our forebears had such an abhorrence that they forbade it in Art. I, § 9, of the Constitution. See, *e. g., United States* v. *Lovett,* 328 U. S. 303 (1946). And here the Wisconsin law purports on its face to place such arbitrary and tyrannical power in the hands of minor officers and others that these modern bills of attainder can be issued *ex parte,* without notice or hearing of any kind or character. It is impossible for me to believe that the Supreme Court of Wisconsin would uphold any such boundless power over the lives and liberties of its citizens. It seems to me therefore wholly uncertain that the state law has the meaning it purports to have, and I believe it is unfair to Wisconsin to permit its courts to be denied the opportunity of confining this law within its proper limits if it could be shown that there are other state law provisions that could provide such boundaries. For example, notice and hearing might be provided by principles of state administrative procedure law similar to the federal Administrative Procedure Act.

I realize that there are many cases where federal courts should not stay their hands to permit state courts to

interpret state law. Compare *Clay* v. *Sun Insurance Office,* 363 U. S. 207, 213–227 (1960) (BLACK, J., dissenting), with *Burford* v. *Sun Oil Co.,* 319 U. S. 315 (1943). Here, however, no state court appears to have passed on this Act at all, and a state decision might well apply the body of other state law to require notice, hearing, and other necessary provisions to render the challenged Act constitutional.

PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* ATCHLEY

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

No. 44. Argued November 18, 1970—Decided January 19, 1971

Respondent was convicted in 1959 of murdering his wife. A recorded statement, made in jail to an insurance agent in connection with discussion of a policy on the life of respondent's wife, was admitted into evidence at the trial. The California Supreme Court affirmed the conviction, finding the statement voluntary. Respondent later sought federal habeas corpus relief, contending that the statement was involuntary. The District Court granted relief on the ground that the trial court had excluded relevant evidence on the issue of voluntariness and thus "did not reliably determine whether [the] confession was voluntary or involuntary." The Court of Appeals affirmed. *Held:* An applicant for federal habeas corpus relief is not entitled to a new hearing on the voluntariness of a statement introduced at his trial merely because he can point to shortcomings in the state court procedure used to decide the voluntariness issue, as he must also show (which respondent did not do in this case) that his version of the events, if true, would require the conclusion that the statement was involuntary. Pp. 451–454.

412 F. 2d 230, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACK, J., filed a concurring statement, *post,* p. 454.

Robert R. Granucci, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *William D. Stein,* Deputy Attorney General.

Charles A. Legge argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1959 a jury in a California trial court found the respondent guilty of murdering his wife by firing six bullets into her body at close range. A key prosecution witness at the trial was Ray Travers, an insurance agent. Two days after the respondent's wife was killed, Travers visited the respondent in jail at the latter's request, and the two conversed regarding an insurance policy on the life of the decedent. During the course of this conversation the respondent told Travers his version of how his wife had been killed, admitting that he had lain in wait for her with a gun, but insisting that her shooting had been accidental. As he was leaving the jail, Travers told the sheriff's officers about the respondent's statement. They asked him if he would be willing to have his next conversation with the respondent electronically recorded, and, since he planned to return to get additional information for the insurance company, he agreed. Later the same day Travers returned to the jail and had another conversation with the respondent, in the course of which the respondent again gave Travers substantially the same account of the circumstances of his wife's death. This conversation was recorded.[1] Over the objection of defense counsel, the recording of the second conversation was admitted in evidence at the trial. Travers in detailed testimony verified the authenticity of the recording, and orally recounted the two conversations he had had with the respondent. The accuracy of the recording and of Travers' testimony was not questioned; indeed, when the respondent took the stand he gave substantially the same account of how his wife had been killed that he had given to Travers.

[1] No charges had been filed against the respondent at the time of these conversations. Cf. *Massiah* v. *United States*, 377 U. S. 201.

On appeal to the Supreme Court of California, the respondent contended that the second conversation with Travers was an involuntary confession, and that the record of the conversation and Travers' supporting testimony had, therefore, been wrongly admitted in evidence at the trial. The state appellate court unanimously rejected this contention and affirmed the conviction. *People* v. *Atchley,* 53 Cal. 2d 160, 346 P. 2d 764. Proceeding upon the proposition that "any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily," Justice Traynor's opinion for the Supreme Court of California reasoned as follows:

> "Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.
>
> "Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra* v. *Denno,* 347 U. S. 556. . . . Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements

> inadmissible, for it was not of a type reasonably likely to procure an untrue statement. . . .
>
> "While cross-examining Travers as to the voluntariness of defendant's recorded statements, defense counsel attempted to ask whether defendant had complained to Travers of not being permitted by the police, despite numerous requests, to talk to a lawyer. The trial court sustained an objection to this question and explained to the jury that the answer would have no bearing on the question of voluntariness. Defendant correctly contends that this ruling was erroneous, but fails to show that it was prejudicial. Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred." 53 Cal. 2d, at 170–171, 346 P. 2d, at 769–770.

This Court granted certiorari.[2] After hearing argument, we disposed of the case as follows:

> "After hearing oral argument and fully examining the record, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed." [3]

In 1967 the respondent initiated the present habeas corpus proceeding in the United States District Court for the Northern District of California. He contended that decisions of this Court rendered subsequent to his direct appeal had established that the recording of his conversation with Travers had been unconstitutionally

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[2] 362 U. S. 987.

[3] 366 U. S. 207.

introduced into evidence, and that he was accordingly entitled to a new trial. It was asserted that his statements were involuntary under the criteria stated in *Johnson* v. *New Jersey,* 384 U. S. 719, because he had been denied access to a lawyer and because he had not been advised of his right to remain silent; and that in any event the procedures used to determine the voluntariness of these statements were constitutionally inadequate under the criteria stated in *Jackson* v. *Denno,* 378 U. S. 368.

The District Court, although making clear that it was not "presently able to say that the confession was involuntary," nonetheless concluded that the respondent was entitled to relief because the state trial court had "excluded relevant and perhaps crucial evidence on the issue of whether the confession was voluntary" and thus "did not reliably determine whether Atchley's confession was voluntary or involuntary." 300 F. Supp. 68, 71, 72. The excluded evidence that the District Court thought "relevant and perhaps crucial" had to do with what the police had said to Travers before the recorded interview, whether the respondent had been trying to obtain a lawyer, whether Travers had deceived the respondent about his motives and feigned sympathy, whether the respondent knew that the conversation was being recorded, and, finally, with the respondent's intellectual and educational qualifications. Because inquiry into these matters had been restricted, the federal court held that the wrong standard of voluntariness had been applied in the state trial proceeding. Accordingly, the District Court ruled that the respondent was entitled to a new hearing in the state courts on the issue of voluntariness and, in the event that the statements should be found involuntary, to a new trial. The Court of Appeals[4] affirmed on the

[4] 412 F. 2d 230.

opinion of the District Court, Judge Barnes dissenting, and we granted certiorari.[5]

In *Jackson,* the Court held that to commit the determination of the voluntariness of a confession solely to the same jury that decided guilt was inconsistent with the constitutional requirement that the procedures used to determine voluntariness be reliable. Concern for the reliability of the procedures utilized to decide the voluntariness issue was also reflected in *Townsend* v. *Sain,* 372 U. S. 293, where it was held that a state trial court's resolution of a disputed issue of historical fact could not be dispositive in a later federal habeas corpus proceeding unless the petitioner had had a "full and fair hearing" on that issue in the trial court.[6]

But those decisions did not establish that an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events, if true, would require the conclusion that his confession was involuntary. Thus in *Townsend* v. *Sain, supra,* we did not reach the question whether a hearing was required until we had determined, as a threshold matter, that the application for habeas corpus alleged facts which, if true, would establish that the petitioner had been deprived of constitutional rights by the use of an involuntary confession. 372 U. S., at 309. We said that "the Federal District Court could not conclude that the state trial judge admitted the confession because he disbelieved the evidence which would show that it was involuntary." *Id.,*

[5] 397 U. S. 905.

[6] Congress in 1966 amended 28 U. S. C. § 2254 (see 1964 ed., Supp. V), so as substantially to codify most of the habeas corpus criteria set out in *Townsend* v. *Sain.*

at 321. And in *Jackson* v. *Denno, supra,* we did not jump from the premise that the procedures used to determine voluntariness were inadequate, to the conclusion that the petitioner was entitled to a new hearing. Instead, we pointed out:

> "This is not a case where the facts concerning the circumstances surrounding the confession are undisputed and the task is only to judge the voluntariness of the confession based upon the clearly established facts and in accordance with proper constitutional standards. Here there are substantial facts in dispute . . . . Whether Jackson is entitled to relief depends upon how these facts are resolved, for if the State is to be believed we cannot say that Jackson's confession was involuntary, whereas if Jackson's version of the facts is accepted the confession was involuntary and inadmissible." 378 U. S., at 391–392.

The reason for this approach is obvious. Unless the result of the habeas corpus proceeding turns on disputed issues of historical fact, a rehearing on the issue of the involuntariness of a defendant's incriminating statement would be an exercise in futility, since the applicant for federal habeas would not be entitled to relief even if his allegations of historical fact should be found to be true. Yet the District Court in this case quite evidently failed to make the threshold determination that the respondent would be entitled to relief if his allegations were believed. Rather the court, disavowing any present ability to say whether the respondent's statement was involuntary, said only that "the trial court could have more competently determined whether [the respondent's] will was overborne" had the circumstances surrounding the statement been more fully explored. 300 F. Supp., at 72.

The respondent's trial took place several years before the decisions of the Court in *Escobedo* v. *Illinois,* 378

U. S. 478, and *Miranda* v. *Arizona,* 384 U. S. 436, and those decisions have not been given retroactive effect. *Johnson* v. *New Jersey,* 384 U. S. 719. The admissibility of the respondent's statement as a constitutional matter was governed, therefore, by the contemporary case law elaborating the due process standard of voluntariness. The question was whether the will of the defendant had been overborne so that the statement was not his free and voluntary act, and that question was to be resolved in light of the totality of the circumstances. See, *e. g., Davis* v. *North Carolina,* 384 U. S. 737; *Haynes* v. *Washington,* 373 U. S. 503, 513–516; *Spano* v. *New York,* 360 U. S. 315, 323; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 147–148.

There is no reason to infer that the Supreme Court of California did not apply the correct constitutional criteria in reviewing the issue, and the court quite clearly assumed the truth of the respondent's version of the historical facts still in dispute, in holding that his statement was not involuntary.

The respondent contended that his confession was involuntary because he had been denied a lawyer, because he had not been advised of his right to remain silent, because he had thought he was giving Travers information that Travers needed to obtain the insurance money, because he had thought that what he told Travers would be held in confidence, because he had not known that his conversation with Travers was being recorded, and because he was lower than average in intelligence and educational attainments. Of these six assertedly coercive factors, three went only to the weight to be given other evidence of actual coercion. Low intelligence, denial of the right to counsel, and failure to advise of the right to remain silent were not in themselves coercive. Rather they were relevant only in establishing a setting in which actual coercion might have been exerted to over-

come the will of the suspect. See *Darwin* v. *Connecticut*, 391 U. S. 346; *Greenwald* v. *Wisconsin*, 390 U. S. 519; *Davis* v. *North Carolina*, *supra*. The circumstance that the conversation was recorded without the respondent's knowledge did not tend to show either actual coercion or a potentially coercive setting. The factual issue whether the respondent thought his statements to Travers would be held in confidence was resolved in the trial court. Travers testified that he advised the respondent that what he said would have to be reported to the insurance company and that the respondent knew it would be a matter of record. This testimony was not contradicted, and there was no reason for the California Supreme Court to disturb the finding, implicit in the trial record, that the respondent had had no reason to believe that Travers would not repeat what he had been told. See *Townsend* v. *Sain*, 372 U. S. 293, 314. The remaining contention was that the respondent's statement was improperly induced by the suggestion that Travers needed the information in order to obtain insurance money for Atchley's children and stepchildren. The California Supreme Court properly found that "the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers."

It is clear that the California courts gave full consideration to the issue of the voluntariness of the respondent's statement, and that they applied correct standards of constitutional law in upholding its admission in evidence. Accordingly, the District Court was in error in requiring a new trial of claims that were long ago fully, fairly, and correctly determined in the courts of California.

The judgment is reversed.

Mr. Justice Black concurs in the judgment and substantially all of the opinion.

MAYBERRY *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 121. Argued December 17, 1970—Decided January 20, 1971

Under the facts of this case, a defendant in a state criminal contempt proceeding who vilified the judge during the course of the defendant's trial in the state court and was sentenced by that judge to 11 to 22 years for the contempt, was entitled under the Due Process Clause of the Fourteenth Amendment to a public trial before another judge. Pp. 462–466.

434 Pa. 478, 255 A. 2d 131, vacated and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., *post*, p. 466, and HARLAN, J., *post*, p. 469, filed concurring opinions. BLACK, J., filed a separate statement, *post*, p. 466.

Curtis R. Reitz, by appointment of the Court, 398 U. S. 902, argued the cause and filed a brief for petitioner.

Carol Mary Los argued the cause for respondent, *pro hac vice.* With her on the brief was *Robert W. Duggan.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner and two codefendants were tried in a state court for prison breach and holding hostages in a penal institution. While they had appointed counsel as advisers, they represented themselves. The trial ended with a jury verdict of guilty of both charges on the 21st day, which was a Friday. The defendants were brought in for sentencing on the following Monday. Before imposing sentence on the verdicts the judge pronounced them guilty of criminal contempt. He found that petitioner had committed one or more contempts on 11 of the 21 days of trial and sentenced him to not less than one nor more than two years for each of the 11 contempts or a total of 11 to 22 years.

The Supreme Court of Pennsylvania affirmed by a divided vote. 434 Pa. 478, 255 A. 2d 131. The case is here on a petition for writ of certiorari. 397 U. S. 1020.

Petitioner's conduct at the trial comes as a shock to those raised in the Western tradition that considers a courtroom a hallowed place of quiet dignity as far removed as possible from the emotions of the street.

(1) On the first day of the trial petitioner came to the side bar to make suggestions and obtain rulings on trial procedures. Petitioner said: "It seems like the court has the intentions of railroading us" and moved to disqualify the judge. The motion was denied. Petitioner's other motions, including his request that the deputy sheriffs in the courtroom be dressed as civilians, were also denied. Then came the following colloquy:

> "Mr. Mayberry: I would like to have a fair trial of this case and like to be granted a fair trial under the Sixth Amendment.
>
> "The Court: You will get a fair trial.
>
> "Mr. Mayberry: It doesn't appear that I am going to get one the way you are overruling all our motions and that, and being like a hatchet man for the State.
>
> "The Court: This side bar is over.
>
> "Mr. Mayberry: Wait a minute, Your Honor.
>
> "The Court: It is over.
>
> "Mr. Mayberry: You dirty sonofabitch."

(2) The second episode took place on the eighth day of the trial. A codefendant was cross-examining a prison guard and the court sustained objections to certain questions:

> "Mr. Codispoti: Are you trying to protect the prison authorities, Your Honor? Is that your reason?
>
> "The Court: You are out of order, Mr. Codispoti. I don't want any outbursts like that again. This

is a court of justice. You don't know how to ask questions.

"Mr. Mayberry: Possibly Your Honor doesn't know how to rule on them.

"The Court: You keep quiet.

"Mr. Mayberry: You ought to be Gilbert and Sullivan the way you sustain the district attorney every time he objects to the questions.

"The Court: Are you through? When your time comes you can ask questions and not make speeches."

(3) The next charge stemmed from the examination of an inmate about a riot in prison in which petitioner apparently was implicated. There were many questions asked and many objections sustained. At one point the following outburst occurred:

"Mr. Mayberry: Now, I'm going to produce my defense in this case and not be railroaded into any life sentence by any dirty, tyrannical old dog like yourself.

"The Court: You may proceed with your questioning, Mr. Mayberry."

(4) The fourth charge grew out of an examination of another defense witness:

"By Mr. Mayberry:

"Q. I ask you, Mr. Nardi, is that area, the handball court, is it open to any prisoner who wants to play handball, who cares to go to that area to play handball?

"A. Yes.

"Q. Did you understand the prior question when I asked you if it was freely open and accessible area?

"The Court: He answered your question. Let's go on.

"Mr. Mayberry: I am asking him now if he understands——

"The Court: He answered it. Now, let's go on.

"Mr. Mayberry: I ask Your Honor to keep your mouth shut while I'm questioning my own witness. Will you do that for me?

"The Court: I wish you would do the same. Proceed with your questioning."

(5) The fifth charge relates to a protest which the defendants made that at the end of each trial day they were denied access to their legal documents—a condition which the trial judge shortly remedied. The following ensued:

"Mr. Mayberry: You're a judge first. What are you working for? The prison authorities, you bum?

"Mr. Livingston: I have a motion pending before Your Honor.

"The Court: I would suggest——

"Mr. Mayberry: Go to hell. I don't give a good God damn what you suggest, you stumbling dog."

Meanwhile one defendant told the judge if he did not get access to his papers at night he'd "blow your head off." Another defendant said he would not sit still and be "kowtowed and be railroaded into a life imprisonment." Then the following transpired:

"Mr. Mayberry: You started all this bullshit in the beginning.

"The Court: You keep quiet.

"Mr. Mayberry: Wait a minute.

"The Court: You keep quiet.

"Mr. Mayberry: I am my own counsel.

"The Court: You keep quiet.

"Mr. Mayberry. Are you going to gag me?

"The Court: Take these prisoners out of here. We will take a ten minute recess, members of the jury."

(6) The sixth episode happened when two of the defendants wanted to have some time to talk to a witness whom they had called. The two of them had had a heated exchange with the judge when the following happened:

"Mr. Mayberry: Just one moment, Your Honor.

"The Court: This is not your witness, Mr. Mayberry. Keep quiet.

"Mr. Mayberry: Oh, yes, he is my witness, too. He is my witness, also. Now, we are at the penitentiary and in seclusion. We can't talk to any of our witnesses prior to putting them on the stand like the District Attorney obviously has the opportunity, and as he obviously made use of the opportunity to talk to his witnesses. Now——

"The Court: Now, I have ruled, Mr. Mayberry.

"Mr. Mayberry: I don't care what you ruled. That is unimportant. The fact is——

"The Court: You will remain quiet, sir, and finish the examination of this witness.

"Mr. Mayberry: No, I won't be quiet while you try to deny me the right to a fair trial. The only way I will be quiet is if you have me gagged. Now, if you want to do that, that is up to you; but in the meantime I am going to say what I have to say. Now, we have the right to speak to our witnesses prior to putting them on the stand. This is an accepted fact of law. It is nothing new or unusual. Now, you are going to try to force us to have our witness testify to facts that he has only a hazy recollection of that happened back in 1965. Now, I believe we have the right to confer with our witness prior to putting him on the stand.

"The Court: Are you finished?

"Mr. Mayberry: I am finished.

"The Court: Proceed with your examination."

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(7) The seventh charge grew out of an examination of a codefendant by petitioner. The following outburst took place:

> "By Mr. Mayberry:
>
> "Q. No. Don't state a conclusion because Gilbert is going to object and Sullivan will sustain. Give me facts. What leads you to say that?"

Later petitioner said:

> "Mr. Mayberry: My witness isn't being in an inquisition, you know. This isn't the Spanish Inquisition."

Following other exchanges with the court, petitioner said:

> "Mr. Mayberry: Now, just what do you call proper? I have asked questions, numerous questions and everyone you said is improper. I have asked questions that my adviser has given me, and I have repeated these questions verbatim as they came out of my adviser's mouth, and you said they are improper. Now just what do you consider proper?
>
> "The Court: I am not here to educate you, Mr. Mayberry.
>
> "Mr. Mayberry: No. I know you are not. But you're not here to railroad me into no life bit, either.
>
> "Mr. Codispoti: To protect the record——
>
> "The Court: Do you have any other questions to ask this witness?
>
> "Mr. Mayberry: You need to have some kind of psychiatric treatment, I think. You're some kind of a nut. I know you're trying to do a good job for that Warden Maroney back there, but let's keep it looking decent anyway, you know. Don't make it so obvious, Your Honor."

(8) A codefendant was removed from the courtroom and when he returned petitioner asked for a severance.

> "Mr. Mayberry: I have to ask for a severance.
>
> "The Court: I have heard that before. It is denied again. Let's go on."

(Exception noted.)

> "Mr. Mayberry: This is the craziest trial I have ever seen.
>
> "The Court: You may call your next witness, Mr. Mayberry."

Petitioner wanted to call witnesses from the penitentiary whose names had not been submitted earlier and for whom no subpoenas were issued. The court restricted the witnesses to the list of those subpoenaed:

> "Mr. Mayberry: Before I get to that I wish to have a ruling, and I don't care if it is contempt or whatever you want to call it, but I want a ruling for the record that I am being denied these witnesses that I asked for months before this trial ever began."

(9) The ninth charge arose out of a ruling by the court on a question concerning the availability of tools to prisoners in their cells.

> "The Court: I have ruled on that, Mr. Mayberry. Now proceed with your questioning, and don't argue.
>
> "Mr. Mayberry: You're arguing. I'm not arguing, not arguing with fools."

(10) The court near the end of the trial had petitioner ejected from the courtroom several times. The contempt charge was phrased as follows by the court:

> "On December 7, 1966, you have created a despicable scene in refusing to continue calling your witnesses and in creating such consternation and uproar as to cause a termination of the trial."

(11) As the court prepared to charge the jury, petitioner said:

> "Before Your Honor begins the charge to the jury defendant Mayberry wishes to place his objection on the record to the charge and to the whole proceedings from now on, and he wishes to make it known to the Court now that he has no intention of remaining silent while the Court charges the jury, and that he is going to continually object to the charge of the Court to the jury throughout the entire charge, and he is not going to remain silent. He is going to disrupt the proceedings verbally throughout the entire charge of the Court, and also he is going to be objecting to being forced to terminate his defense before he was finished."

The court thereupon had petitioner removed from the courtroom and later returned gagged. But petitioner caused such a commotion under gag that the court had him removed to an adjacent room where a loudspeaker system made the courtroom proceedings audible. The court phrased this contempt charge as follows:

> "On December 9, 1966, you have constantly, boisterously, and insolently interrupted the Court during its attempts to charge the jury, thereby creating an atmosphere of utter confusion and chaos."

These brazen efforts to denounce, insult, and slander the court and to paralyze the trial are at war with the concept of justice under law. Laymen, foolishly trying to defend themselves, may understandably create awkward and embarrassing scenes. Yet that is not the character of the record revealed here. We have here downright insults of a trial judge, and tactics taken from street brawls and transported to the courtroom. This is conduct not "befitting an American courtroom," as we

said in *Illinois* v. *Allen*,* 397 U. S. 337, 346; and criminal contempt is one appropriate remedy. *Id.*, at 344–345.

As these separate acts or outbursts took place, the arsenal of authority described in *Allen* was available to the trial judge to keep order in the courtroom. He could, with propriety, have instantly acted, holding petitioner in contempt, or excluding him from the courtroom, or otherwise insulating his vulgarity from the courtroom. The Court noted in *Sacher* v. *United States,* 343 U. S. 1, 10, that, while instant action may be taken against a lawyer who is guilty of contempt, to pronounce him guilty of contempt is "not unlikely to prejudice his client." Those considerations are not pertinent here where petitioner undertook to represent himself. In *Sacher* the trial judge waited until the end of the trial to impose punishment for contempt, the Court saying:

> "If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted." *Id.*, at 11.

Generalizations are difficult. Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt is committed, but waits until the end of the

*Petitioner was sentenced for contempt December 12, 1966. The Pennsylvania Supreme Court affirmed on April 23, 1969. We decided *Illinois* v. *Allen* on March 31, 1970.

trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place. What Chief Justice Taft said in *Cooke* v. *United States*, 267 U. S. 517, 539, is relevant here:

> "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

We conclude that that course should have been followed here, as marked personal feelings were present on both sides.

Whether the trial be federal or state, the concern of due process is with the fair administration of justice. At times a judge has not been the image of "the impersonal authority of law" (*Offutt* v. *United States,* 348 U. S. 11, 17) but has become so "personally embroiled" with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.

"The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." *Id.,* at 14.

Offutt does not fit this case, for the state judge in the instant controversy was not an activist seeking combat. Rather, he was the target of petitioner's insolence. Yet a judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication. *In re Murchison,* 349 U. S. 133, was a case where a judge acted under state law as a one-man grand jury and later tried witnesses for contempt who refused to answer questions propounded by the "judge-grand jury." We held that since the judge who sat as a one-man grand jury was part of the accusatory process he "cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.,* at 137. "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Ibid.*

It is, of course, not every attack on a judge that disqualifies him from sitting. In *Ungar* v. *Sarafite,* 376 U. S. 575, we ruled that a lawyer's challenge, though "disruptive, recalcitrant and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge

carrying such potential for bias as to require disqualification." *Id.*, at 584. Many of the words leveled at the judge in the instant case were highly personal aspersions, even "fighting words"—"dirty sonofabitch," "dirty tyrannical old dog," "stumbling dog," and "fool." He was charged with running a Spanish Inquisition and told to "Go to hell" and "Keep your mouth shut." Insults of that kind are apt to strike "at the most vulnerable and human qualities of a judge's temperament." *Bloom* v. *Illinois,* 391 U. S. 194, 202.

Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor. See *In re Oliver,* 333 U. S. 257. In the present case that requirement can be satisfied only if the judgment of contempt is vacated so that on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of petitioner as shown by the record.

Vacated and remanded.

MR. JUSTICE BLACK concurs in the judgment and with all the opinion except that part which indicates that the judge without a jury could have convicted Mayberry of contempt instantaneously with the outburst.

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the Court's opinion and add these additional observations chiefly for emphasis. Certain aspects of the problem of maintaining in courtrooms the indispensable atmosphere of quiet orderliness are crucial. Without order and quiet, the adversary process must fail. Three factors should be noted: (1) as MR. JUSTICE DOUGLAS has said, the trial was conducted without the guidance af-

forded by MR. JUSTICE BLACK'S opinion for the Court in *Illinois* v. *Allen,* 397 U. S. 337; (2) although the accused was afforded counsel at his trial he asserted a right to act as his own counsel and the court permitted him to do so; (3) we are not informed whether Pennsylvania has a statute covering obstruction of justice that would reach the conduct of the accused shown by this record.

(1)

As the Court's opinion suggests, the standards of *Illinois* v. *Allen, supra,* would have enabled the trial judge to remove the accused from the courtroom after his first outrageous actions and words, and to summarily punish him for contempt. The contempt power, however, is of limited utility in dealing with an incorrigible, a cunning psychopath, or an accused bent on frustrating the particular trial or undermining the processes of justice. For such as these, summary removal from the courtroom is the really effective remedy. Indeed it is one, as this case shows, where removal could well be a benefit to the accused in the sense that one episode of contemptuous conduct would be less likely to turn a jury against him than 11 episodes. As noted by MR. JUSTICE BLACK in *Illinois* v. *Allen,* and MR. JUSTICE DOUGLAS here, a fixed rule to fit every situation is not feasible; plainly summary removal is the most salutary remedy in cases such as this.

(2)

Here the accused was acting as his own counsel but had a court-appointed lawyer as well. This suggests the wisdom of the trial judge in having counsel remain in the case even in the limited role of a consultant. When a defendant refuses counsel, as he did here, or seeks to discharge him, a trial judge is well advised—as so many do—to have such "standby counsel" to perform all the serv-

ices a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument. No circumstance that comes to mind allows an accused to interfere with the absolute right of a trial judge to have such "standby counsel" to protect the rights of accused persons "foolishly trying to defend themselves," as MR. JUSTICE DOUGLAS so aptly described it. In every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge's exercising his discretion to have counsel participate in the defense even when rejected. A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself. The value of the precaution of having independent counsel, even if unwanted, is underscored by situations where the accused is removed from the courtroom under *Illinois* v. *Allen*. The presence of counsel familiar with the case would at the very least blunt Sixth Amendment claims, assuming they would have merit, when the accused has refused legal assistance and then brought about his own removal from the proceedings.

(3)

There are other means to cope with grave misconduct in the courtroom, whether that of the accused, his counsel, spectators, or others. Statutes defining obstruction of justice have long been in force in many States, with penalties measured in years of confinement. Such statutes, where available, are an obvious response to those who seek to frustrate a particular trial or undermine the processes of justice generally.

A review of this record warrants a closing comment on the exemplary patience of the trial judge under provo-

cation few human beings could accept with equanimity. Our holding that contempt cases with penalties of the magnitude imposed here should be heard by another judge does not reflect on his performance; it relates rather to a question of procedure.

MR. JUSTICE HARLAN, concurring.

I concur in the judgment of reversal solely on the ground that these contempt convictions must be regarded as infected by the fact that the unprecedented long sentence of 22 years which they carried was imposed by a judge who himself had been the victim of petitioner's shockingly abusive conduct. That circumstance seems to me to deprive the contempt proceeding of the appearance of evenhanded justice which is at the core of due process. For this reason I think the contempt convictions must be set aside, leaving the State free to try the contempt specifications before another judge or to proceed otherwise against this petitioner.

It is unfortunate that this Court's decision in *Illinois* v. *Allen,* 397 U. S. 337 (1970), was not on the books at the time the criminal case against this petitioner was on trial. The courses which that decision lays open to trial judges for coping with outrageous courtroom tactics of the sort engaged in by this petitioner would doubtless have enabled Judge Fiok to deal with the petitioner in a manner that would have obviated the regrettable necessity for setting aside this contempt conviction.

UNITED STATES *v.* JORN

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

No. 19. Argued January 12, 1970—Reargued October 22, 1970—Decided January 25, 1971

Appellee was tried in Federal District Court on an information charging him with willfully assisting in the preparation of fraudulent income tax returns. Following the impaneling of the jury, the prosecutor called to the stand a taxpayer whom appellee allegedly had aided in preparing his return. At defense counsel's suggestion, the judge warned the witness of his constitutional rights. The witness expressed his willingness to testify, stating that he had been warned of his rights when first contacted by the Internal Revenue Service (IRS). The judge refused to permit him to testify until he had consulted an attorney, indicating that he did not believe the witness had been warned by the IRS. Although the prosecutor advised the judge that the remaining witnesses had been warned of their rights by the IRS upon initial contact, the judge stated that the warnings were probably inadequate. Thereupon he discharged the jury and aborted the trial so that the witnesses could consult with attorneys. The case was set for retrial before another jury, but on appellee's pretrial motion the judge dismissed the information on the ground of former jeopardy. The Government filed a direct appeal to this Court. *Held:* The judgment is affirmed. Pp. 473–488.

Affirmed.

MR. JUSTICE HARLAN, joined by THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL, concluded that:

1. The sustainment of a motion in bar based on a plea of former jeopardy is appealable by the Government, as long as the motion was sustained, as here, prior to the impaneling of the jury in the subsequent proceeding at which the motion was made. Cf. *United States* v. *Sisson,* 397 U. S. 267. Pp. 473–478.

2. The Fifth Amendment's Double Jeopardy Clause represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. Pp. 479–486.

(a) Although it is recognized that a defendant can be reprosecuted after a successful appeal, double jeopardy policies are not

confined to the prevention of prosecutorial or judicial overreaching. Pp. 483–484.

(b) The defendant has the option to have his case considered by the first jury, and where the judge, acting without defendant's consent, aborts the trial, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." P. 484.

(c) In the absence of defendant's motion for a mistrial, the doctrine of "manifest necessity," *United States* v. *Perez*, 9 Wheat. 579, 580, commands trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion warrants the conclusion that justice would not be served by a continuation of the trial. Pp. 485–486.

(d) A judge must temper the decision whether or not to abort the trial by considering the importance to the defendant of being able finally to conclude his confrontation with society through the verdict of a tribunal that he might believe is favorable to him. P. 486.

3. The trial judge here abused his discretion, and accordingly appellee's reprosecution would violate the Double Jeopardy Clause. Pp. 486–487.

MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concluded that the Court lacks jurisdiction of the appeal under 18 U. S. C. § 3731 because the trial judge's action amounted to an acquittal, but they join the Court's judgment in view of the decision of a majority of the Court to reach the merits. Pp. 487–488.

STEWART, J., joined by WHITE and BLACKMUN, JJ., agree only that the Court has jurisdiction of the appeal, as concluded by HARLAN, J. See point 1 of syllabus, *supra*.

HARLAN, J., announced the judgment of the Court in an opinion in which BURGER, C. J., and DOUGLAS and MARSHALL, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 487. BLACK and BRENNAN, JJ., filed a statement concurring in the judgment, *post*, p. 488. STEWART, J., filed a dissenting opinion in which WHITE and BLACKMUN, JJ., joined, *post*, p. 488.

Richard B. Stone argued the cause for the United States on the reargument. *Louis F. Claiborne* argued the cause for the United States on the original argument. With *Mr. Stone* on the brief on the reargument were

Solicitor General Griswold and *Assistant Attorney General Walters.* On the brief on the original argument were *Solicitor General Griswold, Assistant Attorney General Walters, Peter L. Strauss,* and *Joseph M. Howard.*

Denis R. Morrill, by appointment of the Court, 396 U. S. 899, reargued the cause and filed briefs for appellee.

MR. JUSTICE HARLAN announced the judgment of the Court in an opinion joined by THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL.

The Government directly appeals the order of the United States District Court for the District of Utah dismissing, on the ground of former jeopardy, an information charging the defendant-appellee with willfully assisting in the preparation of fraudulent income tax returns, in violation of 26 U. S. C. § 7206 (2).

Appellee was originally charged in February 1968 with 25 counts of violating § 7206 (2). He was brought to trial before Chief Judge Ritter on August 27, 1968. After the jury was chosen and sworn, 14 of the counts were dismissed on the Government's motion. The trial then commenced, the Government calling as its first witness an Internal Revenue Service agent in order to put in evidence the remaining 11 allegedly fraudulent income tax returns the defendant was charged with helping to prepare. At the trial judge's suggestion, these exhibits were stipulated to and introduced in evidence without objection. The Government's five remaining witnesses were taxpayers whom the defendant allegedly had aided in preparation of these returns.

After the first of these witnesses was called, but prior to the commencement of direct examination, defense counsel suggested that these witnesses be warned of their constitutional rights. The trial court agreed, and proceeded, in careful detail, to spell out the witness' right

not to say anything that might be used in a subsequent criminal prosecution against him and his right, in the event of such a prosecution, to be represented by an attorney. The first witness expressed a willingness to testify and stated that he had been warned of his constitutional rights when the Internal Revenue Service first contacted him. The trial judge indicated, however, that he did not believe the witness had been given any warning at the time he was first contacted by the IRS, and refused to permit him to testify until he had consulted an attorney.

The trial judge then asked the prosecuting attorney if his remaining four witnesses were similarly situated. The prosecutor responded that they had been warned of their rights by the IRS upon initial contact. The judge, expressing the view that any warnings that might have been given were probably inadequate, proceeded to discharge the jury; he then called all the taxpayers into court, and informed them of their constitutional rights and of the considerable dangers of unwittingly making damaging admissions in these factual circumstances. Finally, he aborted the trial so the witnesses could consult with attorneys.

The case was set for retrial before another jury, but on pretrial motion by the defendant, Judge Ritter dismissed the information on the ground of former jeopardy. The Government filed a direct appeal to this Court, and we noted probable jurisdiction. 396 U. S. 810 (1969). The case was argued at the 1969 Term and thereafter set for reargument at the present Term. 397 U. S. 1060 (1970).

I

Appellee contends, at the threshold, that our decision in *United States* v. *Sisson,* 399 U. S. 267, 302–307 (1970), which followed our noting of probable jurisdiction in this case, forecloses appeal by the Government under

the motion-in-bar provisions of 18 U. S. C. § 3731 prior to its recent amendment.[1] The question was fully briefed and argued on reargument.

The statute provided, in relevant part, for an appeal by the Government direct to the Supreme Court "[f]rom the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." Appellee concedes, as indeed he must under the prior rulings of this Court, that his plea of former jeopardy constituted a "motion in bar" within the meaning of the statute.[2] The issue is whether appellee had been "put in jeopardy" by virtue of the impaneling of the jury in the first proceeding before the declaration of mistrial. In *Sisson, supra,* the opinion of the Court[3]—in discussing the applicability of the motion-in-bar provision to the Government's direct appeal of the trial judge's actions there—concluded, *inter alia,* that the "put in jeopardy" language applied whenever the jury had

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[1] These provisions of the Criminal Appeals Act have recently been amended. See n. 6, *infra.* However, the new amendment does not apply to cases begun in the District Court before the effective date of enactment. *Ibid.* Our jurisdiction over the present appeal is therefore controlled by the terms of the Criminal Appeals Act as codified at 18 U. S. C. § 3731.

[2] The common-law equivalent of the motion in bar was used to raise the defenses of prior acquittal, prior conviction, and pardon. See *United States* v. *Murdock,* 284 U. S. 141, 151 (1931). Whether the motion-in-bar provision is construed broadly to reach any plea having the effect of preventing further prosecutions, see *United States* v. *Mersky,* 361 U. S. 431, 441–443 (1960) (BRENNAN, J., concurring), or narrowly to reach only pleas in the nature of confession and avoidance, see *id.,* at 455–458 (STEWART, J., dissenting), appellee's plea of former jeopardy based on the prior declaration of mistrial would be included. Cf. *United States* v. *Blue,* 384 U. S. 251, 254 (1966). See generally *United States* v. *Sisson,* 399 U. S. 267, 300 n. 53 (1970).

[3] The portion of the Court's opinion in *Sisson* under discussion here was joined in by only four members of the Court.

been impaneled, even if the defendant might constitutionally have been retried under the double jeopardy provisions of the Fifth Amendment. 399 U. S., at 302–307.[4]

Here the jury in the first proceeding had been impaneled before the mistrial ruling, but appellee's motion to dismiss on grounds of former jeopardy was made prior to the impaneling of the second jury. The Government contends that the impaneling of the jury must be understood to apply to the jury in the proceeding to which the plea of former jeopardy is offered as a bar, rather than the jury whose impaneling was, in the first instance, essential to sustain the plea on the merits. Appellee contends that the construction put on the statute in the *Sisson* opinion requires the conclusion that the Government may not appeal when a jury in the prior proceeding for the offense in question has been impaneled.

We think the Government has the better of the argument.[5] The Court's opinion in *Sisson* dealt with the problem presented by the trial judge's order purporting to arrest the entry of judgment on the guilty verdict

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[4] MR. JUSTICE WHITE's dissenting opinion contended that the jeopardy language applies to preclude governmental appeal only where the defendant's reprosecution would be barred by the Constitution.

[5] The Government relies in part on *United States* v. *Tateo,* 377 U. S. 463 (1964), and *United States* v. *Oppenheimer,* 242 U. S. 85 (1916), as sustaining jurisdiction under 18 U. S. C. § 3731 to review the trial court's action in granting a pretrial motion to dismiss on double jeopardy grounds after the prior proceeding ended in a mistrial. In *Tateo,* however, jurisdiction was neither raised by the parties nor considered by the Court; therefore, it is of little significance on the jurisdiction point. In *Oppenheimer,* the motion in bar in the second proceeding rested on an earlier pretrial motion based on the statute of limitations; the theory of the second plea was *res judicata.*

returned by the very jury whose impaneling was claimed to constitute "jeopardy" within the meaning of the motion-in-bar provision. The conclusion that jeopardy had attached by the impaneling of the jury in that proceeding rested on the view that the Congress was concerned, in granting the Government appeal rights in certain classes of cases, to avoid subjecting the defendant to a second trial where the first trial had terminated in a manner favorable to the defendant either because of a jury verdict or because of judicial action. See *Sisson, supra,* at 293–300. The "compromise origins" of the Criminal Appeals Act, see *id.,* at 307, reflected this concern, and that concern is an important consideration supporting the canon of strict construction traditionally applied to this statute. See *id.,* at 296–300; *Will* v. *United States,* 389 U. S. 90, 96–98 (1967).

In the mistrial situation, the judicial ruling that is chronologically analogous to the *Sisson* facts would be the declaration of a mistrial after the first jury has been impaneled. Obviously, the Government could not have appealed Judge Ritter's original declaration of mistrial. Since a mistrial ruling explicitly contemplates reprosecution of the defendant, the nonappealability of this judicial action fits with congressional action in excluding pleas in abatement from the class of cases warranting appellate review. The nonappealable status of rulings of this sort is fully explainable in terms of a policy disfavoring appeals from interlocutory rulings. See the discussion in *Will* v. *United States, supra,* at 96–98.

But it does not follow from the nonappealability of rulings which are essentially interlocutory insofar as they expressly contemplate resumption of the prosecution, that Congress intended to foreclose governmental appeal from the sustaining of a later motion in bar on the trial judge's conclusion that constitutional double

jeopardy policies require that the earlier mistrial ruling now be accorded the effect of barring reprosecution. Indeed, when we recall that pleas of former jeopardy were the paradigm illustrations of motions in bar at common law, see n. 2, *supra,* it seems much more likely that the congressional decision to allow governmental appeals from the judge's decision sustaining a motion in bar was intended to permit review of later judicial action possibly premised on erroneous theories concerning constitutional effects attaching to the earlier interlocutory ruling.

Consistently with the Court's opinion in *Sisson,* the sustaining of a motion in bar based on a plea of former jeopardy would be appealable as long as the motion in bar was sustained prior to the impaneling of the jury in the subsequent proceeding.[6] Since Judge Ritter in

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[6] Appellee points out that Rule 12 (b)(1) of the Federal Rules of Criminal Procedure permits the defendant to raise the defense of former jeopardy on motion before or after the impaneling of the jury. See Notes of the Advisory Committee, 8 J. Moore, Federal Practice ¶ 12.01[2] (2d ed. 1970). Thus, it is suggested that the defendant may deprive the Government of its appeal simply by delaying his motion to dismiss until the jury has been impaneled. This problem, of course, is inherent in the structure of the Criminal Appeals Act prior to amendment; for example, the defendant under Rule 12 (b)(1) may also delay his statute of limitations plea until after the impaneling of the jury, see *ibid.*, thereby depriving the Government of its § 3731 appeal to this Court. Soon after the passage of the original Act, the Attorney General recognized the problem and proposed that the Act be amended to require counsel for the defendant to raise and argue such questions before jeopardy attaches. See *Sisson, supra,* at 305–306. A recently enacted amendment to the Criminal Appeals Act undertakes to deal with the problem by allowing the Government to appeal "to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." Omnibus Crime Control Act of 1970, § 14 (a)(1), 84 Stat. 1890 (January 2, 1971). However, the amend-

this case dismissed the information on appellee's plea of former jeopardy prior to the impaneling of the second jury, we conclude that the decision is directly appealable by the Government as a motion in bar before the defendant was "put in jeopardy" within the meaning of the applicable statute. Hence we proceed to the merits of appellee's claim that reprosecution after the declaration of mistrial in the earlier proceeding would violate his Fifth Amendment rights.[7]

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ment is not applicable to any criminal case begun in any district court before the effective date of the amendment. *Id.*, § 14 (b). See also S. Rep. No. 91–1296, pp. 6–7.

[7] It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an "acquittal" for purposes of this Court's jurisdiction over the appeal under 18 U. S. C. § 3731. First, Judge Ritter's action at the original trial clearly contemplated reprosecution of the defendant after the witnesses had consulted with attorneys. See App. 46 and MR. JUSTICE STEWART's dissent, *post,* at 488–489, n. 1. Judge Ritter's subsequent action dismissing the information was simply put on the ground of defendant's plea of former jeopardy, without further explanation. App. 60. But the parties below put the question of former jeopardy to Judge Ritter exclusively in terms of the Court's line of cases concerning reprosecutability after mistrial declarations without the defendant's consent. See App. 55–59, which contain the entire post-mistrial proceedings before Judge Ritter.

Of course, as we noted in *Sisson, supra,* at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an "acquittal" for purposes of assessing our jurisdiction to review: the trial judge's disposition is an "acquittal" if it is "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . . ." *Sisson, supra,* at 290 n. 19. The record in this case is utterly devoid of any indication of reliance by Judge Ritter on facts relating to the general issue of the case, thereby surely distinguishing this case from *Sisson,* and, one would think, under the very reasoning of *Sisson,* compelling the conclusion that whatever else Judge Ritter may have done, he did not "acquit" the defendant in the relevant sense.

II

The Fifth Amendment's prohibition against placing a defendant "twice in jeopardy" represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings.[8] A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both of these considerations are expressed in *Green* v. *United States,* 355 U. S. 184, 187–188 (1957), where the Court noted that the policy underlying this provision "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. See *Green* v. *United States, supra,* at 188; *Wade* v. *Hunter,* 336 U. S. 684, 688 (1949).

But it is also true that a criminal trial is, even in the best of circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on

[8] Two Terms ago the double jeopardy provision of the Fifth Amendment was made directly applicable to the States. See *Benton* v. *Maryland,* 395 U. S. 784 (1969).

the most elementary sort of considerations, *e. g.*, the health of the various witnesses, parties, attorneys, jurors, etc., all of whom must be prepared to arrive at the courthouse at set times. And when one adds the scheduling problems arising from case overloads, and the Sixth Amendment's requirement that the single trial to which the double jeopardy provision restricts the Government be conducted speedily, it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide. As the Court noted in *Wade* v. *Hunter, supra,* at 689, "a defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to the public's interest in fair trials designed to end in just judgments."

Thus the conclusion that "jeopardy attaches" when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings. The question remains, however, in what circumstances retrial is to be precluded when the initial proceedings are aborted prior to verdict without the defendant's consent.

In dealing with that question, this Court has, for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial. Thus, in *United States* v. *Perez,* 9 Wheat. 579 (1824), this Court held that a defendant in a capital case might be retried after the trial judge had, without the defendant's consent, discharged a jury that reported itself unable to agree. Mr. Justice Story's opinion for the Court in

Perez expressed the following thoughts on the problem of reprosecution after a mistrial had been declared without the consent of the defendant:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." *Id.*, at 580.

The *Perez* case has since been applied by this Court as a standard of appellate review for testing the trial judge's exercise of his discretion in declaring a mistrial without the defendant's consent. *E. g., Simmons* v. *United States,* 142 U. S. 148 (1891) (reprosecution not barred where mistrial declared because letter published in newspaper rendered juror's impartiality doubtful); *Logan* v. *United States,* 144 U. S. 263 (1892) (reprosecution not barred where jury discharged after 40 hours of deliberation for inability to reach a verdict); *Thompson* v. *United States,* 155 U. S. 271 (1894) (reprosecution

not barred where jury discharged because one juror had served on grand jury indicting defendant); *Wade* v. *Hunter,* 336 U. S. 684 (1949) (retrial not barred where military court-martial discharged due to tactical necessity in the field).[9]

But a more recent case—*Gori* v. *United States,* 367 U. S. 364 (1961)—while adhering in the main to the *Perez* theme of a "manifest necessity" standard of appellate review—does suggest the possibility of a variation on that theme according to a determination by the appellate court as to which party to the case was the beneficiary of the mistrial ruling. In *Gori,* the Court was called upon to review the action of a trial judge in discharging the jury when it appeared to the judge that the prosecution's questioning of a witness might lead to the introduction of evidence of prior crimes. We upheld reprosecution after the mistrial in an opinion which, while applying the principle of *Perez,* appears to tie the judgment that there was no abuse of discretion in these circumstances to the fact that the judge was acting "in the sole interest of the defendant." 367 U. S., at 369; see also the dissenting opinion of MR. JUSTICE DOUGLAS, *id.,* at 370.[10]

In the instant case, the Government, relying principally on *Gori,* contends that even if we conclude the trial judge here abused his discretion, reprosecution should be permitted because the judge's ruling "benefited" the defendant and also clearly was not compelled by bad-faith prosecutorial conduct aimed at triggering a mistrial in order to get another day in court. If the judgment as to who was "benefited" by the mistrial ruling turns on the appellate court's conclusion concern-

[9] See also Annotation: Double Jeopardy—Mistrial, 6 L. Ed. 2d 1509; J. Sigler, Double Jeopardy 39–47 (1969).

[10] And see Annotation, *supra,* n. 9, at 1511; Sigler, *supra,* n. 9, at 44–45.

ing which party the trial judge was, in point of personal motivation, trying to protect from prejudice, it seems reasonably clear from the trial record here that the judge's insistence on stopping the trial until the witnesses were properly warned was motivated by the desire to protect the witnesses rather than the defendant. But the Government appears to view the question of "benefit" as turning on an appellate court's *post hoc* assessment as to which party would in fact have been aided in the hypothetical event that the witnesses had been called to the stand after consulting with their own attorneys on the course of conduct that would best serve to insulate them personally from criminal and civil liability for the fraudulent tax returns. That conception of benefit, however, involves nothing more than an exercise in pure speculation. In sum, we are unable to conclude on this record that this is a case of a mistrial made "in the sole interest of the defendant." See *Gori* v. *United States, supra.*

Further, we think that a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision. Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action. The Government contends, however, that the policies evinced by the double jeopardy provision do not reach this sort of injury; rather the unnecessarily inflicted second trial must, in the Government's view, appear to be the result of a mistrial declaration which "unfairly aids the prosecution or harasses the defense." Govt. Brief 8.

Certainly it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to

vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. Thus, for example, reprosecution for the same offense is permitted where the defendant wins a reversal on appeal of a conviction. *United States* v. *Ball,* 163 U. S. 662 (1896); see *Green* v. *United States,* 355 U. S. 184, 189 (1957). The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error. But it is also clear that recognition that the defendant can be reprosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching. For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal." [11] See *Wade* v. *Hunter,* 336 U. S., at 689.

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[11] We think that nothing said in *United States* v. *Tateo,* 377 U. S. 463, 467 (1964), can properly be taken as indicating a contrary view. For there, even though defendant's guilty plea which aborted the trial was subsequently held to have been coerced by judicial action, the defendant nonetheless was not foreclosed of his option to go to the jury if he chose to do so, and thereafter rely on post-convic-

If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.[12] In the absence of such a motion, the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See *United States* v. *Perez,* 9 Wheat., at 580.

The conscious refusal of this Court to channel the exercise of that discretion according to rules based on categories of circumstances, see *Wade* v. *Hunter,* 336 U. S., at 691, reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury. But that discretion must still be exercised; unquestionably an important

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tion proceedings to redress the wrong done to him by the judge. In other words, the question of "voluntariness" for purposes of assessing the validity of a plea of guilty—whether offered before or at trial—must be distinguished from the question of "voluntariness" for purposes of assessing reprosecutability under the Double Jeopardy Clause.

[12] Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. Cf. *United States* v. *Tateo, supra,* at 468 n. 3; n. 11, *supra.*

factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process. Yet we cannot evolve rules based on the source of the particular problem giving rise to a question whether a mistrial should or should not be declared, because, even in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal.

In sum, counsel for both sides perform in an imperfect world; in this area, bright-line rules based on either the source of the problem or the intended beneficiary of the ruling would only disserve the vital competing interests of the Government and the defendant. The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee. Cf. *Downum* v. *United States*, 372 U. S. 734 (1963). Alternatively, the judge must bear in mind the potential risks of abuse by the defendant of society's unwillingness to unnecessarily subject him to repeated prosecutions. Yet, in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.

III

Applying these considerations to the record in this case, we must conclude that the trial judge here abused his discretion in discharging the jury. Despite assurances by both the first witness and the prosecuting at-

torney that the five taxpayers involved in the litigation had all been warned of their constitutional rights, the judge refused to permit them to testify, first expressing his disbelief that they were warned at all, and then expressing his views that any warnings that might have been given would be inadequate. App. 41–42. In probing the assumed inadequacy of the warnings that might have been given, the prosecutor was asked if he really intended to try a case for willfully aiding in the preparation of fraudulent returns on a theory that would not incriminate the taxpayers. When the prosecutor started to answer that he intended to do just that, the judge cut him off in midstream and immediately discharged the jury. App. 42–43. It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial. *United States* v. *Perez,* 9 Wheat., at 580. Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment.

Affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I join in the plurality opinion and in the judgment of the Court not without some reluctance, however, since the case represents a plain frustration of the right to

have this case tried, attributable solely to the conduct of the trial judge. If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take appellee's claims outside the classic mold of being twice placed in jeopardy for the same offense.

MR. JUSTICE BLACK and MR. JUSTICE BRENNAN believe that the Court lacks jurisdiction over this appeal under 18 U. S. C. § 3731 because the action of the trial judge amounted to an acquittal of appellee and therefore there was no discretion left to the trial judge to put appellee again in jeopardy. However, in view of a decision by a majority of the Court to reach the merits, they join the judgment of the Court.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN join, dissenting.

The plurality opinion today says that whenever a trial judge in a criminal case has "abused his discretion" in declaring a mistrial on his own motion, the constitutional guarantee against double jeopardy categorically operates to forestall a trial of the case on the merits. I cannot agree.

The District Judge's decision to declare a mistrial in this case was based on his belief that the prosecution witnesses, who were to testify that they had submitted false income tax returns prepared by the defendant, had not been adequately warned that they might themselves incur criminal liability by their testimony. The judge apparently intended simply to postpone the case so that the witnesses could be fully apprised of their constitutional rights,[1] and a second trial was scheduled before

[1] The trial judge stated:

"So this case is vacated, setting is vacated this afternoon, and it will be calendared again; and, before it is calendared again, I am

a new jury. However, before the new trial date defendant filed a motion to dismiss the information on the ground of former jeopardy, and the judge granted the motion. The Government appealed directly to this Court.[2]

It is, of course, common ground that there are many circumstances under which a trial judge may discharge a jury and order a new trial, without encountering any double jeopardy problems. One example is where the judge acts at the instance of the defendant himself. See *United States* v. *Tateo,* 377 U. S. 463, 467. Another is where the jury cannot reach a verdict, and there the trial judge may proceed on his own initiative, even over the active objection of the defendant, to declare a mistrial. *United States* v. *Perez,* 9 Wheat. 579. Cf. *Simmons* v. *United States,* 142 U. S. 148; *Wade* v. *Hunter,* 336 U. S. 684. On the other hand, there are situations where the circumstances under which the mistrial was declared may be such as to bar a future prosecution. One example is where a "judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori* v. *United States,* 367 U. S. 364, 369. I should suppose that whether misconduct of this kind occurs at the instance of the prosecutor or on the trial judge's sole initiative, there is no question but that the guarantee against double jeopardy would make another trial impermissible.

The present case does not fall neatly into any of these conventional categories. There was no request for a mistrial from defense counsel (although his suggestion that the witnesses be warned of their constitutional rights

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going to have these witnesses in and talk to them again before I will permit them to testify." App. 46.

[2] I agree that the Court has jurisdiction of this appeal, for the reasons set out in Part I of the plurality opinion.

may have triggered the course of events that followed), and the case certainly cannot be analogized to that of a hung jury. Conversely, the mistrial was not requested by the prosecutor, and there is not the slightest indication that he desired it to occur. Nor is there any suggestion that this was a situation involving "harassment," or an attempt by judge or prosecutor to enhance the possibility of conviction in a second trial.

The plurality opinion purports to resolve the matter by adopting a rule of "abuse of discretion" by the trial judge. This standard is said to derive from the statement of the Court in the leading case of *United States* v. *Perez, supra,* at 580:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . . But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."

The plurality opinion appears to construe this passage to mean that an appellate court, in determining the applicability of the double jeopardy guarantee, must measure the trial judge's action in declaring the mistrial against a

standard of good trial practice. If the trial judge has conspicuously failed to meet such a standard, then, regardless of the nature or the consequences of the error, the Constitution bars another trial. In my view, this reasoning is both overbroad and flatly inconsistent with this Court's decision in *Gori* v. *United States, supra.*

In that case, the trial judge had discharged the jury during the first day of trial, taking such action apparently to forestall prejudicial error after inferring that the prosecuting attorney's line of questioning presaged inquiry calculated to inform the jury of other crimes by the accused. The Court of Appeals held that the declaration of a mistrial under these circumstances did not prevent a new trial on the merits:

> "Here the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subject to two trials for essentially the same offense. On the other hand, for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future." 282 F. 2d 43, 48 (CA2 1960).

This Court declined to pass on the Court of Appeals' judgment that there had been no abuse of discretion, noted that the case involved neither harassment nor an

attempt to augment the chances of conviction, and concluded:

> "Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused." 367 U. S., at 369–370.

Gori established, I think correctly, that the simple phrase "abuse of discretion" is not enough in itself to resolve double jeopardy questions in cases of this kind. Whether or not there has been an "abuse of discretion" sufficient to bar retrial cannot be determined without reference to the purpose and effect of the mistrial ruling. The real question is whether there has been an "abuse" of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishment of crime. It is in this context, rather than simply in terms of good trial practice, that the trial judge's "abuse of discretion" must be assessed in deciding the question of double jeopardy.[3]

[3] *Downum* v. *United States*, 372 U. S. 734, is not to the contrary. As the plurality opinion today points out, that case recognized that "lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee," *ante*, at 486. Failure of the prosecution to go forward with its case in an expeditious and orderly manner is quite different from even a serious error in trial procedure by the presiding judge. It is, of course, well settled that when a jury

Applying these considerations to the record in this case, it seems clear to me that a trial on the merits would not violate the constitutional guarantee. It is quite true, as the plurality opinion insists, that the mistrial was declared for the benefit of the witnesses rather than in the "sole interest of the defendant." But except for the inconvenience of delay always caused by a mistrial, the judge's ruling could not possibly have injured the defendant. Had the witnesses heeded the trial judge's advice, it is at least possible that the defendant's position might have been very substantially improved by their refusal to testify upon the grounds of the guarantee against compulsory self-incrimination. The line of questioning that resulted in the mistrial may have been initiated by defense counsel with just such a result in mind. There is, of course, no showing of an intent on the part of either the prosecutor or the judge to harass the defendant or to enhance the chances of conviction in a second trial. And as in *Gori,* the defense was given a complete preview of the Government's case. Even assuming that the trial judge's action was plainly improper by any standard of good trial practice, the circumstances under which the mistrial was declared did not involve "abuse" of a kind to invoke the constitutional guarantee against double jeopardy.

I respectfully dissent from the judgment of the Court.

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verdict is reversed on appeal because of an error by the trial judge, a new trial is permitted, *e. g., Forman* v. *United States,* 361 U. S. 416; *Bryan* v. *United States,* 338 U. S. 552. And in *United States* v. *Tateo,* 377 U. S. 463, the Court held retrial not barred by the Double Jeopardy Clause where the first trial was terminated on a plea of guilty coerced by clearly improper statements by the trial judge during the proceedings.

USNER *v.* LUCKENBACH OVERSEAS CORP. ET AL.

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

No. 47. Argued November 18, 1970—
Decided January 25, 1971

Isolated, personal act of negligence by a fellow longshoreman resulting in injury to petitioner did not make shipowner liable on ground of unseaworthiness of vessel, as injury was not caused by ship's condition, appurtenances, cargo, or crew. There is a "complete divorcement of unseaworthiness liability from concepts of negligence." *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550. Pp. 496–500.

413 F. 2d 984, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion in which BLACK and BRENNAN, JJ., joined, *post*, p. 501. HARLAN, J., filed a dissenting opinion, *post*, p. 503.

H. Alva Brumfield argued the cause for petitioner. With him on the brief were *Evangeline M. Vavrick* and *H. Alva Brumfield III*.

Charles Kohlmeyer, Jr., argued the cause for respondents. With him on the brief were *Thomas W. Thorne, Jr.*, and *Benjamin W. Yancey*.

Arthur J. Mandell filed a brief for the American Trial Lawyers Association as *amicus curiae* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, a longshoreman employed by an independent stevedoring contractor, was injured while engaged with his fellow employees in loading cargo aboard

the S. S. *Edgar F. Luckenbach.* He brought this action for damages against the respondents, the owner and the charterer of the ship, in a federal district court, alleging that his injuries had been caused by the ship's unseaworthiness.

In the course of pretrial proceedings the circumstances under which the petitioner had been injured were fully disclosed, and they are not in dispute. On the day in question the ship lay moored to a dock in New Orleans, Louisiana, receiving cargo from a barge positioned alongside. The loading operations were being performed by the petitioner and his fellow longshoremen under the direction of their employer. Some of the men were on the ship, operating the port winch and boom at the No. 2 hatch. The petitioner and others were on the barge, where their job was to "break out" the bundles of cargo by securing them to a sling attached to the fall each time it was lowered from the ship's boom by the winch operator. The loading operations had been proceeding in this manner for some time, until upon one occasion the winch operator did not lower the fall far enough. Finding the sling beyond his reach, the petitioner motioned to the flagman standing on the deck of the ship to direct the winch operator to lower the fall farther. The winch operator then lowered the fall, but he lowered it too far and too fast. The sling struck the petitioner, knocking him to the deck of the barge and causing his injuries. Neither before nor after this occurrence was any difficulty experienced with the winch, boom, fall, sling, or any other equipment or appurtenance of the ship or her cargo.

The respondents moved for summary judgment in the District Court, upon the ground that a single negligent act by a fellow longshoreman could not render the ship unseaworthy. The District Court denied the motion, but granted the respondents leave to take an interlocutory

appeal under 28 U. S. C. § 1292 (b).[1] The United States Court of Appeals for the Fifth Circuit allowed the appeal and, reversing the District Court, directed that the respondents' motion for summary judgment be granted. 413 F. 2d 984. It was the appellate court's view that "'[i]nstant unseaworthiness' resulting from 'operational negligence' of the stevedoring contractor is not a basis for recovery by an injured longshoreman." 413 F. 2d, at 985–986. We granted certiorari, 397 U. S. 933, because of a conflict among the circuits on the basic issue presented.[2]

The development in admiralty law of the doctrine of unseaworthiness as a predicate for a shipowner's liability for personal injuries or death has been fully chronicled elsewhere, and it would serve no useful purpose to repeat the details of that development here.[3] Suffice it to recall

[1] 28 U. S. C. § 1292 (b) provides as follows:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[2] Compare *Candiano* v. *Moore-McCormack Lines,* 382 F. 2d 961 (CA2); *Alexander* v. *Bethlehem Steel Corp.,* 382 F. 2d 963 (CA2); *Cleary* v. *United States Lines Co.,* 411 F. 2d 1009 (CA2); and *Venable* v. *A/S Det Forenede Dampskibsselskab,* 399 F. 2d 347 (CA4), with *Grigsby* v. *Coastal Marine Service,* 412 F. 2d 1011 (CA5), and *Tim* v. *American President Lines,* 409 F. 2d 385 (CA9).

[3] See *Mitchell* v. *Trawler Racer,* 362 U. S. 539; *id.,* at 550 (Frankfurter, J., dissenting); see also, G. Gilmore & C. Black, The Law of Admiralty 315–332 (1957); Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381.

that from its humble origin as a dictum in an obscure case in 1922,[4] the doctrine of liability based upon unseaworthiness has experienced a most extraordinary expansion in a series of cases decided by this Court over the last 25 years.[5] The Court's decisions in some of those cases have been severely questioned, by dissenting Justices and by others, on the basis of history, reason, and logic.[6] The present case, however, offers no occasion to re-examine any of our previous decisions. We may accept it as fully settled that a shipowner's liability for an unseaworthy vessel extends beyond the members of the crew and in-

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[4] *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255. There it was said, "[W]e think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock . . . and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages." 259 U. S., at 259.

[5] *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96; *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406; *Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396; *Rogers* v. *United States Lines,* 347 U. S. 984; *Boudoin* v. *Lykes Bros. S. S. Co.,* 348 U. S. 336; *Crumady* v. *The J. H. Fisser,* 358 U. S. 423; *Mitchell* v. *Trawler Racer,* 362 U. S. 539; *A. & G. Stevedores* v. *Ellerman Lines,* 369 U. S. 355; *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206; *Waldron* v. *Moore-McCormack Lines,* 386 U. S. 724.

[6] See, *e. g., Mahnich* v. *Southern S. S. Co., supra,* at 105 (Roberts, J., joined by Frankfurter, J., dissenting), *Seas Shipping Co.* v. *Sieracki, supra,* at 103 (Stone, C. J., joined by Frankfurter and Burton, JJ., dissenting); *Pope & Talbot, Inc.* v. *Hawn, supra,* at 419 (Jackson, J., joined by Reed and Burton, JJ., dissenting); *Alaska Steamship Co.* v. *Petterson, supra* (Burton, J., joined by Frankfurter and Jackson, JJ., dissenting); *Mitchell* v. *Trawler Racer, supra,* at 550 (Frankfurter, J., joined by HARLAN and Whittaker, JJ., dissenting); *Gutierrez* v. *Waterman S. S. Corp, supra,* at 216 (HARLAN, J., dissenting); *Waldron* v. *Moore-McCormack Lines, supra,* at 729 (WHITE, J., joined by HARLAN, BRENNAN, and STEWART, JJ., dissenting).

See also G. Gilmore & C. Black, The Law of Admiralty 315–332 (1957); Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381.

cludes a longshoreman like the petitioner.[7] We may accept it as settled, too, that the shipowner is liable though the unseaworthiness be transitory,[8] and though the injury be suffered elsewhere than aboard the ship.[9] But these propositions do not dispose of the case before us. For the question here goes to the very definition of what unseaworthiness is and what it is not.

A major burden of the Court's decisions spelling out the nature and scope of the cause of action for unseaworthiness has been insistence upon the point that it is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute[10] or under general maritime law.[11] More specifically, the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence.[12] The reason, of course, is that unseaworthiness is a *condition,* and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.

We had occasion to emphasize this basic distinction again in *Mitchell* v. *Trawler Racer,* 362 U. S. 539. There the unseaworthy condition causing the plaintiff's injury

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[7] *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85.

[8] *Crumady* v. *The J. H. Fisser,* 358 U. S. 423; *Mitchell* v. *Trawler Racer,* 362 U. S. 539.

[9] *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206.

[10] *E. g.,* the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688. The petitioner in the present case was fully covered, of course, by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*

[11] *E. g.,* maintenance and cure. See *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525; *Waterman S. S. Corp.* v. *Jones,* 318 U. S. 724; *Farrell* v. *United States,* 336 U. S. 511; *Warren* v. *United States,* 340 U. S. 523.

[12] *E. g., Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 94: "[T]he liability is neither limited by conceptions of negligence nor contractual in character."

was a ship's rail made slippery by the presence of fish gurry and slime. The trial judge had instructed the jury that the shipowner could be held liable for this unseaworthy condition only upon a finding that the slime and gurry had been on the ship's rail for a time long enough for the respondent to have learned about it and to have removed it. The Court of Appeals affirmed the judgment for the defendant shipowner, holding that at least with respect to "an unseaworthy condition which arises only during the progress of the voyage," the shipowner's obligation "is merely to see that reasonable care is used under the circumstances . . . incident to the correction of the newly arisen defect." 265 F. 2d 426, 432. We reversed the judgment, holding that the trial and appellate courts had been wrong in confusing liability for negligence with liability for unseaworthiness. What has evolved in our case law, we said, is the "complete divorcement of unseaworthiness liability from concepts of negligence." 362 U. S., at 550.

Trawler Racer involved the defective condition of a physical part of the ship itself. But our cases have held that the scope of unseaworthiness is by no means so limited. A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective,[13] her appurtenances in disrepair,[14] her crew unfit.[15] The number of men assigned to perform a shipboard task might be insufficient.[16] The method of loading her cargo, or the manner of its stowage, might be improper.[17] For any of these reasons, or others, a vessel might not be reasonably fit for her intended service.

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[13] *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96.

[14] *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

[15] *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336.

[16] *Waldron* v. *Moore-McCormack Lines*, 386 U. S. 724.

[17] *A. & G. Stevedores* v. *Ellerman Lines*, 369 U. S. 355; *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206.

What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo, or her crew,[18] but the isolated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions.[19] In *Trawler Racer, supra,* there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence. The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[18] No member of the ship's crew was in any way involved in this case.

[19] The petitioner's reliance upon our summary *per curiam* reversal of a judgment for the shipowner in *Mascuilli* v. *United States,* 387 U. S. 237, is misplaced. There a longshoreman had been killed during a loading operation aboard a Government vessel when, under the strain of the opposing pull of two winches, a heavy shackle parted, recoiled, and struck him. The petition for certiorari posed three questions: (1) Did a prior unseaworthy condition come into play by the tightline condition? (2) Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy? (3) Was the vessel unseaworthy because the longshoremen were not "equal in disposition and seamanship to the ordinary men in the calling," as was found in *Boudoin* v. *Lykes Bros. S. S. Co.,* 348 U. S. 336?

Our *per curiam* reversal cited two cases: *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, and *Crumady* v. *The J. H. Fisser,* 358 U. S. 423. *Mahnich* involved a defective rope, *Crumady* a defective winch. It seems evident, therefore, that it was the first question posed by the petition for certiorari to which the Court gave an affirmative answer.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur, dissenting.

While petitioner was working on a barge loading cargo into a hatch of the ship, he was injured as a result of the negligent operation of a winch. The winch was part of the ship and the winch operator was a member of the crew of the stevedores. The injury was caused by a lowering of a sling, which carried the cargo, too quickly and too far.

Prior to the 1970 Term the judgment denying recovery would have been reversed, probably out of hand. We held in *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, that the obligation of an owner to furnish a seaworthy ship extends to seaworthy appliances. We also held that the owner was not insulated from liability by the "negligent failure" of his officers or members of the crew to furnish seaworthy appliances. *Id.,* at 101. In *Mahnich,* the staging from which the seaman fell was an unseaworthy appliance because of the defective rope with which it was rigged. There was sound rope on board but defective rope was used. The fact that the mate and boatswain were negligent in selecting defective rope was held to be no defense.

In *Crumady* v. *The J. H. Fisser,* 358 U. S. 423, a winch was not inherently defective as was the rope in *Mahnich.* But it was used in a way which made it unsafe and dangerous for the work at hand. While the rigging would take only three tons of stress, the cutoff of the winch, "its safety device," was set at twice that limit. *Id.,* at 427. And so the rope sling broke and injured the seaman. The vessel which paid the damages was allowed to recover over from the stevedores whose negligence with the winch made the vessel *pro tanto* unseaworthy.

In *Mascuilli* v. *United States,* 387 U. S. 237, negligent use of a winch in a loading operation so obviously made

the vessel *pro tanto* unseaworthy that we reversed out of hand a judgment of no liability, citing *Mahnich* and *Crumady*.

What we said in *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550, about the "complete divorcement of unseaworthiness liability from concepts of negligence" related to a condition which made the vessel not "reasonably suitable for her intended service." Yet alongside that conventional type of unseaworthiness there developed the concept of unseaworthiness resulting from operational negligence.

Indeed, the doctrine of operational negligence which causes unseaworthiness has had a sturdy growth. Chief Justice Stone, writing for the Court in *Mahnich*, showed that this doctrine goes at least as far back as *The Osceola*, 189 U. S. 158, decided in 1903. See 321 U. S., at 101–104. The intervening decision of *Plamals* v. *Pinar del Rio*, 277 U. S. 151, which looked the other way, was decided in 1928. It was around that case that Justices Roberts and Frankfurter turned their dissent, saying that unless the Court followed precedent "the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them." 321 U. S., at 112. They added:

> "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." *Id.*, at 113.

Justices Roberts and Frankfurter bitterly expressed that view in *Mahnich* when *Pinar del Rio* was overruled—a freak decision not in keeping with the mainstream of the law that had come before.

Changes in membership do change decisions; and those changes are expected at the level of constitutional law. But when private rights not rooted in the Constitution

are at issue, it is surprising to find law made by new judges taking the place of law made by prior judges.

Up to today operational negligence has been one sturdy type of unseaworthiness.* I would let it continue as the prevailing rule unless Congress in its wisdom changes it.

MR. JUSTICE HARLAN, dissenting.

Past decisions of this Court have expanded the doctrine of unseaworthiness almost to the point of absolute liability. I have often protested against this development. See, *e. g.*, the cases cited by the Court, *ante*, at 497 n. 6. But I must in good conscience regard the particular issue in this case as having been decided by *Crumady* v. *The J. H. Fisser*, 358 U. S. 423 (1959), even if prior de-

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*The Second Circuit adopted the view that while one act of operational negligence would not make a vessel unseaworthy, unseaworthiness did result if the negligent act was incident to a continuous course of operation as where a wrong hatch cover was used, *Grillea* v. *United States*, 232 F. 2d 919, but not by an isolated act as where a boom was carrying a dangerous stress due to a negligent act. *Puddu* v. *Royal Netherlands S. S. Co.*, 303 F. 2d 752. The difference in the two cases was stated as follows:

"A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness." *Id.*, at 757.

The Second Circuit, however, refused to follow *Grillea* after our *Mascuilli* decision. *Candiano* v. *Moore-McCormack Lines*, 382 F. 2d 961; *Alexander* v. *Bethlehem Steel Corp.*, 382 F. 2d 963; *Cleary* v. *United States Lines Co.*, 411 F. 2d 1009; *Tarabocchia* v. *Zim Israel Navigation Co.*, 417 F. 2d 476. The Fourth Circuit followed suit. *Venable* v. *A/S Det Forenede Dampskibsselskab*, 399 F. 2d 347; *Lundy* v. *Isthmian Lines*, 423 F. 2d 913.

Only the Fifth Circuit in the instant case and in *Grigsby* v. *Coastal Marine Service*, 412 F. 2d 1011, and the Ninth in *Tim* v. *American President Lines*, 409 F. 2d 385, stood against the rule of *Mascuilli*.

cisions did not inexorably point to that result. As my Brother DOUGLAS states, *Crumady* cannot justly be distinguished from the case before us. Much as I would welcome a thoroughgoing re-examination of the past course of developments in the unseaworthiness doctrine, I fear that the Court's action today can only result in compounding the current difficulties of the lower courts with this area of the law.

GROPPI *v.* WISCONSIN

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 26. Argued December 7, 1970—
Decided January 25, 1971

State law that categorically prevents a change of venue for a jury trial in a criminal case, regardless of the extent of local prejudice against the defendant, solely on the ground that the crime with which he is charged is a misdemeanor *held* violative of the right to trial by an impartial jury guaranteed by the Fourteenth Amendment. Pp. 507–512.

41 Wis. 2d 312, 164 N. W. 2d 266, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, HARLAN, BRENNAN, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined, *post,* p. 512. BLACK, J., filed a dissenting opinion, *post,* p. 515.

Elizabeth B. Dubois argued the cause for appellant. With her on the briefs were *Jack Greenberg, Michael Meltsner, Anthony G. Amsterdam, Thomas M. Jacobson,* and *Robert E. Sutton.*

Sverre O. Tinglum, Assistant Attorney General of Wisconsin, argued the cause for appellee. With him on the brief were *Robert W. Warren,* Attorney General, and *Roy G. Mita,* Assistant Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

On August 31, 1967, during a period of civil disturbances in Milwaukee, Wisconsin, the appellant, a Roman Catholic priest, was arrested in that city on a charge of resisting arrest. Under Wisconsin law that offense is a misdemeanor, punishable by a fine of not more than $500 or imprisonment in the county jail for not more than

one year, or both.[1] After a series of continuances, the appellant was brought to trial before a jury in a Milwaukee County court on February 8, 1968. The first morning of the trial was occupied with qualifying the jurors, during the course of which the appellant exhausted all of his peremptory challenges.[2] The trial then proceeded, and at its conclusion the jury convicted the appellant as charged.

Prior to the trial, counsel for the appellant filed a motion for a change of venue from Milwaukee County "to a county where community prejudice against this defendant does not exist and where an impartial jury trial can be had." The motion asked the court to take judicial notice of "the massive coverage by all news media in this community of the activities of this defendant," or, in the alternative, that "the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and on the right of defendant to an impartial jury trial." The trial judge denied the motion, making clear that his ruling was based exclusively on his view that Wisconsin law did not permit a change of venue in misdemeanor cases.[3]

On appeal, the Supreme Court of Wisconsin affirmed the conviction. 41 Wis. 2d 312, 164 N. W. 2d 266. It

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[1] "Whoever knowingly resists or obstructs an officer while such officer is doing any act in his official capacity and with lawful authority, may be fined not more than $500 or imprisoned not more than one year in county jail or both." Wis. Stat. § 946.41 (1) (1967).

[2] Apparently no transcript was made of the *voir dire* proceedings.

[3] The court: "So, therefore, the change of venue as asked for in the motion for a change of venue will be denied; it not being provided for in the Wisconsin Statutes. . . . No, I'm denying the motion for a change of venue because this is a misdemeanor case and not a felony. And the Wisconsin Statute does not provide for a change of venue in a misdemeanor matter."

held that the trial judge had been correct in his understanding that a Wisconsin statute foreclosed the possibility of a change of venue in a misdemeanor prosecution.[4] It further held that this state law was constitutionally valid, pointing out that "it would be extremely unusual for a community as a whole to prejudge the guilt of any person charged with a misdemeanor." 41 Wis. 2d, at 317, 164 N. W. 2d, at 268. The court also noted that a defendant in a Wisconsin misdemeanor prosecution has a right to ask for continuances and to challenge prospective jurors on *voir dire,* and if "these measures are still not sufficient to provide an impartial jury, the verdict can be set aside after trial based on the denial of a fair and impartial trial." 41 Wis. 2d, at 321, 164 N. W. 2d, at 270. Two members of the court dissented, believing that the state statute did not absolutely forbid a change of venue in a misdemeanor prosecution, and that if the statute did contain such a prohibition it was constitutionally invalid. 41 Wis. 2d, at 325, 164 N. W. 2d, at 272.

This appeal followed, and we noted probable jurisdiction. 398 U. S. 957. As the case reaches us we must, of course, accept the construction that the Supreme Court of Wisconsin has put upon the state statute. *E. g., Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 688. The question before us, therefore, goes to the constitu-

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[4] The relevant statute in effect at the time of the appellant's trial was Wis. Stat. § 956.03 (3) (1967), which provided:

"If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to any county where an impartial trial can be had. Only one change may be granted under this subsection."

Wis. Stat. § 971.22, effective July 1, 1970, now permits a change of venue in all criminal cases. See Wis. Laws 1969, c. 255, p. 650.

tionality of a state law that categorically prevents a change of venue for a criminal jury trial, regardless of the extent of local prejudice against the defendant, on the sole ground that the charge against him is labeled a misdemeanor.[5] We hold that this question was answered correctly by the dissenting justices in the Supreme Court of Wisconsin.[6]

The issue in this case is not whether the Fourteenth Amendment requires a State to accord a jury trial to a defendant on a charge such as the appellant faced here.[7] The issue concerns, rather, the nature of the jury trial that the Fourteenth Amendment commands, when trial by jury is what the State has purported to accord.[8] We had occasion to consider this precise question almost 10 years ago in *Irvin* v. *Dowd,* 366 U. S. 717. There we found that an Indiana conviction could not constitutionally stand because the jury had been infected by com-

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[5] We reject the suggestion that the appellant is not in a position to attack the statute because he made an insufficient showing of community prejudice. His motion for a change of venue explicitly asked in the alternative that he be permitted to "offer proof" of the nature and extent of the local prejudice against him. His motion was denied in its entirety, thus foreclosing any opportunity to produce evidence of a prejudiced community. The trial court's ruling was, of course, wholly consistent with its view that it was powerless to grant a change of venue under Wisconsin law, regardless of what showing of local prejudice might have been made.

[6] Accord, *Pamplin* v. *Mason,* 364 F. 2d 1 (CA5); *State ex rel. Ricco* v. *Biggs,* 198 Ore. 413, 255 P. 2d 1055.

[7] That question was answered affirmatively in *Baldwin* v. *New York,* 399 U. S. 66.

[8] Wisconsin grants a right to trial by jury in all misdemeanor cases. See *State ex rel. Murphy* v. *Voss,* 34 Wis. 2d 501, 505, 149 N. W. 2d 595, 597; *State ex rel. Sauk County District Attorney* v. *Gollmar,* 32 Wis. 2d 406, 410, 145 N. W. 2d 670, 672.

munity prejudice before the trial had commenced. What the Court said in that case is wholly relevant here:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver,* 333 U. S. 257; *Tumey* v. *Ohio,* 273 U. S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville,* 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 . . . ." 366 U. S., at 722.

There are many ways to try to assure the kind of impartial jury that the Fourteenth Amendment guarantees.[9] In *Sheppard* v. *Maxwell,* 384 U. S. 333, the Court enumerated many of the procedures available, particularly in the context of a jury threatened by the poisonous influence of prejudicial publicity during the course of the trial itself. 384 U. S., at 357–363. Here we are concerned with the methods available to assure an impartial jury in a situation where, because of prejudicial publicity

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[9] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an *impartial* jury . . . ." (Emphasis added.)

or for some other reason, the community from which the jury is to be drawn may already be permeated with hostility toward the defendant. The problem is an ancient one. Mr. Justice Holmes stated no more than a commonplace when, two generations ago, he noted that "[a]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Frank* v. *Mangum,* 237 U. S. 309, 349 (dissenting opinion).

One way to try to meet the problem is to grant a continuance of the trial in the hope that in the course of time the fires of prejudice will cool. But this hope may not be realized, and continuances, particularly if they are repeated, work against the important values implicit in the constitutional guarantee of a speedy trial.[10] Another way is to provide a method of jury qualification that will promote, through the exercise of challenges to the venire—peremptory and for cause—the exclusion of prospective jurors infected with the prejudice of the community from which they come. But this protection, as *Irvin* v. *Dowd, supra,* shows, is not always adequate to effectuate the constitutional guarantee.[11]

On at least one occasion this Court has explicitly held that only a change of venue was constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment. That was in the case of *Rideau* v. *Louisiana,* 373 U. S. 723. We held that "it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth" to the preju-

[10] See *Klopfer* v. *North Carolina,* 386 U. S. 213; *Smith* v. *Hooey,* 393 U. S. 374; *Dickey* v. *Florida,* 398 U. S. 30; *id.,* at 39 (BRENNAN, J., concurring).

[11] See generally Broeder, Voir Dire Examinations: An Empirical Study, 38 S. Cal. L. Rev. 503 (1965).

dicial pretrial publicity there involved. 373 U. S., at 726. *Rideau* was not decided until 1963, but its message echoes more than 200 years of human experience in the endless quest for the fair administration of criminal justice.[12]

It is doubtless true, as the Supreme Court of Wisconsin said, that community prejudice is not often aroused against a man accused only of a misdemeanor. But under the Constitution a defendant must be given an opportunity to show that a change of venue *is* required in *his* case. The Wisconsin statute wholly denied that opportunity to the appellant.

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[12] See *Rex* v. *Harris,* 3 Burr. 1330, 1333, 97 Eng. Rep. 858, 859 (K. B. 1762): "Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter can not be tried at all, or can not be fairly and impartially tried in the proper county, it shall be tried in the next adjoining county." (Lord Mansfield.)

See also *Crocker* v. *Justices of the Superior Court,* 208 Mass. 162, 178–179, 94 N. E. 369, 376–377 (1911):

"This review demonstrates that the great weight of authority supports the view that courts, which by statute or custom possess a jurisdiction like that of the Kings Bench before our revolution, have the right to change the place of trial, when justice requires it, to a county where an impartial trial may be had.

". . . There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action. Justice cannot be assured in a trial where other considerations enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and the evidence. A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial."

See also, *e. g., State* v. *Albee,* 61 N. H. 423, 60 Am. Rep. 325 (1881).

Accordingly, the judgment is vacated, and the case is remanded to the Supreme Court of Wisconsin for further proceedings not inconsistent with this opinion.[13]

It is so ordered.

MR. JUSTICE BLACKMUN, whom THE CHIEF JUSTICE joins, concurring.

Although I agree in large part with the reasoning of MR. JUSTICE BLACK'S opinion in dissent, I nevertheless join in the Court's judgment that this conviction of Father Groppi must be vacated and the case remanded for further proceedings. In so doing, however, I feel compelled to make the following observations:

1. The primary issue, it seems to me, is whether the appellant (hereafter defendant) received a fair trial, not whether, as a matter of abstract constitutional law, he was entitled to a change of venue in a Wisconsin misdemeanor prosecution in 1968.

2. A fair trial, of course, is fundamental. No one disputes that. As the Court points out in footnote 12 of its opinion, this principle of English-American jurisprudence was evolved prior to the embodiment of the treasured concepts of an impartial jury in the Sixth Amendment and of due process in the Fifth and Fourteenth.

3. If the defense believes that a fair trial is unlikely because of community prejudice, that is a matter for proof by the defense, and, when proved, should constitutionally warrant, and indeed demand, a change of venue in any case, whether the prosecution be for a felony or for a misdemeanor.

4. Thus, I find myself in agreement with the two dissenting Justices of the Supreme Court of Wisconsin and with that court's Chief Justice, in concurring in the

[13] Whether corrective relief can be afforded the appellant short of a new trial will be for the Wisconsin courts to determine in the first instance. Cf. *Coleman* v. *Alabama,* 399 U. S. 1, 10–11.

result of the majority opinion, when the three conclude, 41 Wis. 2d 312, 324, 325, 164 N. W. 2d 266, 272, that a change of venue in a misdemeanor case is constitutionally required upon a proper showing.

5. I am at a loss to understand how a change of venue statute expressed in positive but permissive terms and specifically applicable to felony cases can be construed to embody a negative prohibition for misdemeanor cases, particularly with regard to so fundamental a right as the right to have a trial untainted by community prejudice. The statutory interpretation so made is all the more unexpected because it raises an otherwise quite avoidable constitutional issue.

6. But the Wisconsin court has spoken and, by majority vote, has construed the state statute then in effect in that very way. Construction of the statute is the state court's task. It is not our task. And we are bound by the Wisconsin court's decision as to the meaning and application of a Wisconsin statute.

7. The record before us leaves much to be desired. It discloses no formal offer of proof of the kind customarily made. It contains no transcript of the *voir dire,* and thus there is no way in which we or anyone else can evaluate from the *voir dire* the presence, or the possibility of the presence, of actual prejudice in any member of the jury panel. Although a "motion after verdict" was made and although it referred to "the ground of community prejudice," the motion does not in so many words assert that this defendant actually was denied a fair and impartial trial. Neither is the motion supported by affidavits incorporating the claimed prejudicial media reports.

8. The jury appears to have been selected expeditiously and without difficulty during a single morning. And we note what appears to be conflicting evidence in the record as to Father Groppi's behavior at the point of his arrest, evidence which would support a fair jury's conclusion

either way, that is, that he did resist arrest or that he did not resist arrest, within the meaning and application of the Wisconsin statute. On balance, in the face of what may be regarded as a ruling by the trial court that no showing, however persuasive, of community prejudice and its effect upon the jury actually selected could command a change of venue in this misdemeanor case, I am content to join in the vacation of the judgment of conviction and in the remand in order to allow the defendant to attempt to make his proof.

9. I would stress, however, more than by the three-line final footnote which may be lost to the reader who is more interested in the notoriety of the case than in what we are doing today by way of specific ruling, that this remand does not *necessarily* mean a new trial for Father Groppi, and freedom from his conviction on the charge of resisting arrest. The defendant is to have his opportunity to demonstrate prejudice and the likelihood of an unfair trial. If he fails in that quest, or if he now refuses to undertake it, the judgment of conviction may be reinstated. If he does not fail, then of course the conviction falls and the State is remitted to its choice between a new trial or a dismissal of the charge.

10. Finally, I doubt very much whether this rather unimportant case, but an admittedly sensitive one because of the identity of the defendant and the means he has selected to make his protests known, at all approaches the circumstances and the offensive character of what this Court condemned in *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), in *Rideau* v. *Louisiana,* 373 U. S. 723 (1963), and in *Irvin* v. *Dowd,* 366 U. S. 717 (1961), cited in the Court's opinion. Nevertheless, unfairness anywhere, in small cases as well as in large, is abhorred, is to be ferreted out, and is to be eliminated. Despite the unsatisfactory record, this defendant must have his opportunity to demonstrate what he alleges.

MR. JUSTICE BLACK, dissenting.

I dissent from the Court's vacation of the judgment of conviction. I agree, of course, that this appellant is entitled to trial before an impartial jury. This right is guaranteed by the Sixth Amendment and made binding on the States by the Fourteenth. *Ante,* at 509. Cf. *Parker* v. *Gladden,* 385 U. S. 363 (1966); see also *Adamson* v. *California,* 332 U. S. 46, 68 (1947) (BLACK, J., dissenting).

As the Wisconsin Supreme Court suggested, the right to trial before an impartial jury can be protected in many ways: by granting a continuance until community passions subside; by challenging jurors for cause and by peremptory challenges during *voir dire* proceedings. But it simply cannot be said that the right to trial by an impartial jury must necessarily include a right to change of venue. It may or may not be wiser to implement the Sixth Amendment by a change of venue provision, but in my view, the Constitution does not require it. If the usual devices for protection of the Sixth Amendment right to trial by an impartial jury are insufficient, the defendant can always be given a new trial on the ground of jury prejudice.

The Court suggests that *Rideau* v. *Louisiana,* 373 U. S. 723 (1963), controls the disposition of this case. But there we held that prejudicial publicity was so extensive that it was a denial of due process to refuse a motion for change of venue where the State had provided for venue changes as a method of ensuring an impartial jury. See La. Rev. Stat. § 15:293 (1950). Here Wisconsin has not chosen to provide that means of implementing the Sixth Amendment right in misdemeanor cases. So long as a defendant can protect his Sixth Amendment right by a motion for a new trial, I see no constitutional infirmity in the Wisconsin statute. Nor does *Irvin* v. *Dowd,* 366 U. S. 717 (1961), compel the

majority's result. There we held that a motion for a second change of venue should have been granted despite a state statute which seemingly permitted only one change. However, we carefully pointed out that the Indiana Supreme Court had previously held as a matter of state law that the statute's literal wording did not foreclose a second change of venue. 366 U. S., at 721, citing *Gannon* v. *Porter Circuit Court,* 239 Ind. 637, 159 N. E. 2d 713 (1959).

This is not a case where a State has made it impossible for a defendant to implement his right to an impartial jury trial. Wisconsin law provides for *voir dire* and continuances, and this appellant exercised his right to make peremptory challenges to jurors. In holding that appellant had no constitutional right to a change of venue in a misdemeanor case, the Wisconsin Supreme Court pointed out that he could raise the claim of denial of an impartial jury by a motion for a new trial in accordance with Wisconsin procedure. 41 Wis. 2d 312, 321, 164 N. W. 2d 266, 270 (1969). Of course it is difficult, even in a small county, to show that its population is so saturated with prejudice that no impartial jury can be selected from that group. It is likely to be especially difficult in a county as large as Milwaukee, with its population of more than one million. However difficult that may be, appellant has a right under Wisconsin law to bring forth any relevant evidence to show that the jury that tried him was not impartial. I would remand this case for a hearing on a motion for a new trial.

Syllabus

DONALDSON, FKA SWEET *v.* UNITED STATES ET AL.

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

No. 65. Argued November 19, 1970—Decided January 25, 1971

In furtherance of an investigation of petitioner's tax returns, respondent Grady, an Internal Revenue Service (IRS) Special Agent, issued summonses to petitioner's putative former employer (Acme) and its accountant for the production of Acme's records of petitioner's employment and compensation during the years under investigation. The summonses were issued under § 7602 of the Internal Revenue Code of 1954, which authorizes IRS examinations of records and witnesses for the purpose of determining tax liability. Thereafter respondents, pursuant to 26 U. S. C. §§ 7402 (b) and 7604 (a), filed in the District Court petitions for enforcement of the summonses. Petitioner filed motions to intervene in the enforcement proceeding, relying on Fed. Rule Civ. Proc. 24 (a)(2), which, *inter alia,* provides for intervention in an action "when the applicant claims an interest relating to the property or transaction which is the subject of the action . . . ." Petitioner alleged that the IRS agents were investigating him solely to obtain evidence concerning criminal violations of the tax laws and that consequently the summonses were not issued for any purpose within the scope of § 7602 and could not be enforced. The court denied petitioner's motions and ordered that the records be produced. The Court of Appeals affirmed. *Held:*

1. Petitioner has no proprietary interest in the Acme records (his sole interest therein being that they presumably contain details of payments to him), and since he has no other protectable interest by way of privilege or otherwise, he has no absolute right under Fed. Rule Civ. Proc. 24 (a)(2) to intervene in the IRS summons enforcement proceeding. Pp. 527–531.

2. Under § 7602 an IRS summons may be used in connection with a tax investigation if (as in this case) it is issued in good faith and prior to a recommendation for prosecution. Pp. 531–536.

418 F. 2d 1213, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, STEWART, WHITE, and MARSHALL, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 536. BRENNAN, J., filed a statement concurring in the result, *post*, p. 536.

Robert E. Meldman argued the cause for petitioner. With him on the briefs was *Louis L. Meldman.*

Lawrence G. Wallace argued the cause for the United States et al. On the brief were *Solicitor General Griswold, Assistant Attorney General Walters, Deputy Solicitor General Springer, Samuel Huntington, Joseph M. Howard,* and *John P. Burke.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

We are here concerned with problems arising in connection with the issuance and judicial enforcement of an internal revenue summons directed to someone other than the individual taxpayer.

Kevin L. Donaldson, formerly known as Merton H. Sweet, apparently was once employed by, or was a performer for, Acme Circus Operating Co., Inc., dba Clyde Beatty-Cole Bros. Circus.[1] Mr. Donaldson (sometimes referred to herein as the "taxpayer") is an individual whose income tax returns for the calendar years 1964–1967, inclusive, are under investigation by the Internal Revenue Service.

On September 12 and 13, 1968, Special Agent John P. Grady, purportedly acting under the authority of § 7602 of the Internal Revenue Code of 1954, 26 U. S. C. § 7602,[2]

[1] The record does not specifically support the fact of Donaldson's employment by, or performance for, Acme. In the context of the case, however, this is implied and, obviously, the investigation is directed to the ascertainment of the fact.

[2] "§ 7602. Examination of books and witnesses

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability

issued and served separate summonses to Acme and to Joseph J. Mercurio, Acme's accountant, commanding their appearance before Grady on September 23 and 24 "to give testimony relating to the tax liability" of Donaldson and to produce certain of Acme's records having to do with the taxpayer. The records specified were "applications for employment and/or any other records containing background data including Social Security number furnished you by" the taxpayer; all contracts between the taxpayer and Acme and between him "and the various organizations sponsoring performances of the circus . . . during . . . 1964 through 1967, inclusive"; Forms 1099 and W–2 issued to the taxpayer; a schedule of the payments made to the taxpayer by the sponsoring organizations; checks and vouchers relating to payments to the taxpayer by Acme; expense vouchers submitted by the taxpayer; records containing information as to the identification of each sponsoring organization; and "correspondence or other records relating to the foregoing or to any other financial transactions between Acme" and the taxpayer during 1964–1967, inclusive.

Shortly prior to the issuance of these summonses, the United States District Court for the Middle District of Florida, upon petitions filed by the taxpayer, issued tem-

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of any person for any internal revenue tax . . . or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax . . . or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

porary restraining orders, and then, as to Mercurio, a preliminary injunction, restraining Mercurio and Acme from complying with Grady's requests or with any subsequent summons directing the production of the records "until such time as an order of a court of competent jurisdiction has been issued requiring such compliance."

On November 25, 1968, the United States and Agent Grady, pursuant to 26 U. S. C. §§ 7402 (b) and 7604 (a),[3] filed petitions with the same federal court for the judicial enforcement of the summonses directed to Mercurio and to Acme. The petitions were supported by affidavits of Grady and of Special Agent Bruce B. Miller.[4] Each affidavit was to the effect that the affiant was conducting or assisting in the conduct of "an investigation for the purpose of ascertaining the correct income tax liability" of the taxpayer for the years 1964–1967, inclusive, and that it was "necessary" to examine the records and to take the testimony requested in order to ascertain the taxpayer's correct income tax liability for those years.

[3] "§ 7402. Jurisdiction of district courts

. . . . . .

"(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

"§ 7604. Enforcement of summons

"(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

[4] Agent Grady worked from the Tampa District Office of the Internal Revenue Service, and Agent Miller from the New Orleans District Office. The taxpayer had a New Orleans address; Mercurio and Acme possessed Florida addresses.

In response to the ensuing orders to show cause, the taxpayer, purportedly pursuant to Fed. Rule Civ. Proc. 24 (a)(2), filed motions to intervene in the enforcement proceedings. He accompanied each motion with a proposed answer. In the answer he alleged that Special Agents Grady and Miller were guilty of bad faith in asserting that they were conducting an investigation to ascertain the taxpayer's correct income tax liability for the years in question; that the two agents were assigned to Intelligence Divisions of the Service; that they were investigating the taxpayer "for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States"; and that, as a consequence, the summonses were not issued for any purpose within the scope of § 7602. It was also asserted, although apparently it is not now urged here, that the requests in the summonses were overly broad and "without a showing of particularized relevancy," and that the taxpayer, under the Constitution, "is entitled to be secure in his personal papers and personal effects from unreasonable searches and seizures."

Mercurio and Acme, on their part, also filed responses to the orders to show cause. Each alleged that "were it not for" the preliminary injunction or temporary restraining order theretofore entered, "the Respondent would have complied with the summons." [5]

The orders to show cause were returnable before Judge Lieb. After the submission of memoranda and argument, but without the introduction of testimony, the court denied the motions to intervene and ordered Mercurio and Acme to appear before Grady and to produce

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[5] Mercurio and Acme are not active parties to the present review. They advise the Court that they are "ready to follow the orders of the court, and are nominal parties only."

the records requested. The court then consolidated the two cases for purposes of appeal and granted stays pending appeal. The Fifth Circuit affirmed. *United States* v. *Mercurio,* 418 F. 2d 1213 (CA5 1969).

Certiorari was granted, 397 U. S. 933 (1970), because the case appeared to raise important questions relating to the administration and enforcement of the revenue laws, and because the courts of appeals have differed in their reading of *Reisman* v. *Caplin,* 375 U. S. 440 (1964).[6]

I

Despite the contrary intimations in the motions to intervene, there is now no constitutional issue in the case. The taxpayer on oral argument so conceded.[7] In any event, that question appears to have been settled long ago when the Court upheld, against Fourth Amendment challenge, an internal revenue summons issued under the Revenue Act of 1921 and directed to a third-party bank. *First Nat. Bank* v. *United States,* 267 U. S. 576 (1925), aff'g 295 F. 142, 143 (SD Ala. 1924). See also *United States* v. *First Nat. Bank,* 274 F. Supp. 283, 284 (ED Ky. 1967), aff'd *sub nom. Justice* v. *United States,* 390 U. S. 199 (1968), and *United States* v. *Shlom,* 420 F. 2d 263, 266 (CA2 1969), cert. denied, 397 U. S. 1074 (1970).

II

We emphasize initially, as did Judge Tuttle in his opinion for the Court of Appeals, 418 F. 2d, at 1214, that what is sought here by the Internal Revenue Service

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[6] Compare the Fifth Circuit's holding in the present case; *In re Cole,* 342 F. 2d 5 (CA2), cert. denied, 381 U. S. 950 (1965); and *O'Donnell* v. *Sullivan,* 364 F. 2d 43, 44 (CA1 1966), with *United States* v. *Benford,* 406 F. 2d 1192 (CA7 1969); *United States* v. *Bank of Commerce,* 405 F. 2d 931 (CA3 1969); and *Justice* v. *United States,* 365 F. 2d 312 (CA6 1966).

[7] Tr. of Oral Arg. 9–10.

from Mercurio and from Acme is the production of *Acme's* records and not the records of the *taxpayer.* Further, as Judge Tuttle also emphasized, this is not a case where a summons has been issued to the taxpayer himself seeking access to his books and information from his mouth. Neither is it a case where the summons is directed at the taxpayer's records in the hands of his attorney or his accountant, with the attendant questions of privilege, or even in the hands of anyone with whom the taxpayer has a confidential relationship of any kind. Each of the summonses here, we repeat, was directed to a third person with respect to whom no established legal privilege, such as that of attorney and client, exists, and had to do with records in which the taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer.

III

Mr. Justice Clark, in Part II of his opinion for a unanimous Court in *Reisman,* 375 U. S., at 445–446, reviewed the statutory structure that Congress has provided for the issuance and enforcement of an internal revenue summons. It will perhaps be rewarding for us to outline that structure once again.

Section 7601 of the 1954 Code, 26 U. S. C. § 7601, directs the Secretary or his delegate "to the extent he deems it practicable" to cause Treasury Department officers or employees "to proceed . . . and inquire after and concerning" all persons "who may be liable to pay any internal revenue tax." The section thus flatly imposes upon the Secretary the duty to canvass and to inquire. This is an old statute. It has roots in the first of the modern general income tax acts, namely, the Tariff Act of October 3, 1913, § II, ¶ I, 38 Stat. 178, and prior to

that, in § 3172, as amended, of the Revised Statutes of 1874.

Section 7602 authorizes the Secretary or his delegate for "the purpose of ascertaining the correctness of any return . . . determining the liability of any person for any internal revenue tax . . . or collecting any such liability . . . [t]o summon the person liable for tax . . . or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person the Secretary or his delegate may deem proper, to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . ."

Section 7603 provides for service of the summons. There is no provision for personal enforcement of the summons by the Secretary or his delegate. If enforcement is desired, he must proceed under § 7402 (b), or its sister and essentially identical statute, § 7604 (a), see n. 3, *supra*, each of which grants the district courts of the United States jurisdiction "by appropriate process to compel such attendance, testimony, or production."

Then, as Mr. Justice Clark pointed out, 375 U. S., at 446:

> "Any enforcement action under this section [§ 7402 (b)] would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness. In such a proceeding only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings."

Finally, § 7605 (a) provides that the time and place of the examination "shall be such . . . as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances" and, with respect to a § 7602

summons, that "the date fixed for appearance . . . shall not be less than 10 days from the date of the summons."

Thus the summons is administratively issued but its enforcement is only by federal court authority in "an adversary proceeding" affording the opportunity for challenge and "complete protection to the witness."

IV

Reisman was an action, instituted by attorneys for a husband and wife, for declaratory and injunctive relief against the Commissioner of Internal Revenue and an accounting firm which had been working on the taxpayer-couple's financial records at their request. The Commissioner had issued summonses to the accounting firm for the production of work papers and correspondence. It was contended that the enforced production of the papers was an unlawful appropriation of the attorneys' work product and trial preparation. The Court concluded that the petitioner-attorneys possessed an adequate remedy at law and that the complaint, therefore, was subject to dismissal. In reaching this conclusion, the Court emphasized the employment of the accounting firm by the attorneys "to assist them in connection with certain civil and criminal tax proceedings arising from the alleged tax liability of the" taxpayers; that the products of the joint work of the accountants and the attorneys "were kept separate in the accounting firm's files and labeled as the property of" the attorneys; that at the time of the service of the summonses "there were four civil tax cases pending in the Tax Court contesting alleged deficiencies" and, in addition, "a criminal investigation of Mr. Bromley on the tax matters was in progress."

The Court noted that the petitioners made no claim that § 7602 "suffers any constitutional infirmity on its face" and that the Government conceded that "a witness

or any interested party may attack the summons before the hearing officer." The Court agreed. It went on to observe that "in tax enforcement proceedings the hearing officer has no power of enforcement or right to levy any sanctions"; and that "in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground." Among such grounds the Court included "the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution" or the defense that it is protected by the attorney-client privilege. It went on to say, "In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene" and that this "would be true whether the contempt be of a civil or criminal nature." Finally, it said that there would be no difference should the witness indicate "that he would voluntarily turn the papers over."

Ten months later the Court decided *United States* v. *Powell,* 379 U. S. 48 (1964), and its companion case, *Ryan* v. *United States,* 379 U. S. 61 (1964). These concerned, respectively, internal revenue summonses issued to the president of a corporate taxpayer and to an individual taxpayer with respect to re-examinations and tax years for which assessments would be barred except for fraud. The Court was primarily concerned with the standards the Internal Revenue Service must meet in order to obtain judicial enforcement of its orders. It held that probable cause to suspect fraud was not required under the statutes and that the Commissioner need show only "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession,

and that the administrative steps required by the Code have been followed . . . ." Again it was emphasized that at the adversary hearing to which the taxpayer is entitled before enforcement is ordered, he may challenge the summons on any appropriate ground. It was also stated that the burden of showing an abuse of the court's process is on the taxpayer.

V

With all this as background, our central inquiry here is as to Donaldson's right to intervene in the summons proceedings. Donaldson had obtained preliminary relief (in the form of a temporary restraining order and, as to Mercurio, in the form of the succeeding preliminary injunction as well) in his self-instituted actions to restrain Mercurio's and Acme's voluntary compliance with Grady's request. But when the enforcement proceedings were instituted by the United States and Grady, the taxpayer was not successful either as to intervention or as to relief by way of restraint.

In his motion to intervene, and here (but apparently not at oral argument in the Court of Appeals, see 418 F. 2d, at 1215), Donaldson would take comfort from the provisions of Fed. Rule Civ. Proc. 24 (a)(2).[8] He asserts that, within the rule's literal language, he possesses "an interest relating to the property or transaction which is the subject of the [enforcement] action and he is so situated that the disposition of the action may as a

[8] "Rule 24.

"INTERVENTION

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

practical matter impair or impede his ability to protect that interest," and that his interest is not adequately represented by the parties (Mercurio and Acme) to the enforcement proceedings. He would buttress this approach by reliance upon the reference to both § 7604 (a) and the Civil Rules in n. 18 in *Powell,* 379 U. S., at 58,[9] and by reliance upon language appearing in *Reisman,* 375 U. S., at 445.[10]

In our view, however, the taxpayer's argument goes too far in its reading of Rule 24 (a)(2) and of the quotations from *Powell* and from *Reisman.* The Civil Rules, of course, do have an application to a summons proceeding. Rule 81 (a)(3) expressly so provides.[11] But the Civil Rules are not inflexible in this application. Rule 81 (a)(3) goes on specifically to recognize that a district court, by local rule or by order, may limit the

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[9] "Because § 7604 (a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply . . . . The proceedings are instituted by filing a complaint, followed by answer and hearing. . . ."

[10] "However, the Government concedes that a witness or any interested party may attack the summons before the hearing officer. There are cases among the circuits which hold that both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. . . . We agree with that view and see no reason why the same rule would not apply before the hearing officer."

[11] "Rule 81.

"Applicability in General

"(a) To What Proceedings Applicable.

. . . . . .

"(3) . . . These rules apply . . . to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings."

application of the rules in a summons proceeding. See 7 J. Moore, Federal Practice, ¶ 81.06 [1], p. 4442 (2d ed. 1970). This feature was recognized as purposeful by the Advisory Committee when the pertinent language was added to Rule 81 (a)(3) in 1946. *Id.*, at ¶ 81.01 [6], p. 4413 (2d ed. 1970). The post-*Powell* cases, too, are clearly and consistently to the effect that the footnote in *Powell* was not intended to impair a summary enforcement proceeding so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available. *United States* v. *Gajewski,* 419 F. 2d 1088, 1090–1092 (CA8 1969), cert. denied, 397 U. S. 1040 (1970); *Venn* v. *United States,* 400 F. 2d 207, 212 n. 12 (CA5 1968); *McGarry's, Inc.* v. *Rose,* 344 F. 2d 416, 418 (CA1 1965). We agree with that conclusion.

Similarly, the *Reisman* language set forth in n. 10, *supra,* does not guarantee intervention for the taxpayer. Certainly it recites that the proposed witness "or any interested party" may attack the summons before the hearing officer, as well as before the District Court in any ensuing enforcement proceeding, and certainly it recites that the party summoned and one "affected by a disclosure may appear or intervene" before the court. But this language, as well as subsequent comments in *Reisman,*[12] is permissive only and is not mandatory.

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[12] "Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution . . . as well as that it is protected by the attorney-client privilege . . . . In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene." 375 U. S., at 449.

The language recognizes that the District Court, upon the customary showing, may allow the taxpayer to intervene. Two instances where intervention is appropriate were specified, namely, where "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution" or where "it is protected by the attorney-client privilege." Thus, the Court recognized that intervention by a taxpayer in an enforcement proceeding might well be allowed when the circumstances are proper. But the Court did not there pronounce, even when confronted with a situation concerning an attorney's work product, that the taxpayer possesses an absolute right to intervene in any internal revenue summons proceeding. The usual process of balancing opposing equities is called for.

We, thus, are not in agreement with the holdings or implications in *United States* v. *Benford,* 406 F. 2d 1192, 1194 (CA7 1969); *United States* v. *Bank of Commerce,* 405 F. 2d 931 (CA3 1969); and *Justice* v. *United States,* 365 F. 2d 312, 314 (CA6 1966), to the effect that, under *Reisman,* a taxpayer may intervene as of right simply because it is his tax liability that is the subject of the summons. Instead, we agree with the opposing conclusion reached by the Fifth Circuit here, 418 F. 2d, at 1218, and in *In re Cole,* 342 F. 2d 5, 7–8 (CA2), cert. denied, 381 U. S. 950 (1965), and *O'Donnell* v. *Sullivan,* 364 F. 2d 43, 44 (CA1), cert. denied, 385 U. S. 969 (1966).

VI

We turn, then, to Donaldson's particular situation. The material sought, as has been noted, consists only of Acme's routine business records in which the taxpayer has no proprietary interest of any kind, which are not the work product of his attorney or accountant, and which enjoy no established attorney-client or other privilege. Donaldson's only interest—and of course it looms

large in his eyes—lies in the fact that those records presumably contain details of Acme-to-Donaldson payments possessing significance for federal income tax purposes.

This asserted interest, however, is nothing more than a desire by Donaldson to counter and overcome Mercurio's and Acme's willingness, under summons, to comply and to produce records.

The nature of the "interest" urged by the taxpayer is apparent from the fact that the material in question (once we assume its relevance) would not be subject to suppression if the Government obtained it by other routine means, such as by Acme's independent and voluntary disclosure prior to summons, or by way of identifiable deductions in Acme's own income tax returns, or through Mercurio's appearance as a trial witness, or by subpoena of the records for trial. This interest cannot be the kind contemplated by Rule 24 (a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." What is obviously meant there is a significantly protectable interest. And the taxpayer, to the extent that he has such a protectable interest, as, for example, by way of privilege, or to the extent he may claim abuse of process, may always assert that interest or that claim in due course at its proper place in any subsequent trial. Cf. *United States* v. *Blue,* 384 U. S. 251 (1966).

We therefore hold that the taxpayer's interest is not enough and is not of sufficient magnitude for us to conclude that he is to be allowed to intervene. Were we to hold otherwise, as he would have us do, we would unwarrantedly cast doubt upon and stultify the Service's every investigatory move.

VII

This conclusion could dispose of the case, for our main concern here is with the taxpayer's asserted right to intervene in the particular enforcement proceedings.

Donaldson, however, strenuously urges, in addition, that an internal revenue summons proceeding may not be utilized at all in aid of an investigation that has the potentiality of resulting in a recommendation that a criminal prosecution be instituted against the taxpayer. He argues that a summons so used is invalid and unenforceable because it is outside the scope of § 7602. The Government naturally argues the contrary.

The argument centers in the above-mentioned dictum in *Reisman,* 375 U. S., at 449:

> "[T]he witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker,* 239 F. 2d 767, 772–773, as well as that it is protected by the attorney-client privilege . . . ."

We note initially that, despite the dictum, the courts of appeals in opinions issued since *Reisman* was decided, appear uniformly to approve the use of a summons in an investigation that is likely to lead to civil liability as well as to criminal prosecution.[13] The use of a summons also has been approved, even where it is alleged that its purpose is to uncover crime, if no criminal prosecution

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[13] *Wild* v. *United States,* 362 F. 2d 206, 209 (CA9 1966); *McGarry* v. *Riley,* 363 F. 2d 421, 424 (CA1), cert. denied, 385 U. S. 969 (1966); *Venn* v. *United States,* 400 F. 2d 207, 210 (CA5 1968); *Sanford* v. *United States,* 358 F. 2d 685, 686 (CA5 1966); *United States* v. *Hayes,* 408 F. 2d 932, 936 (CA7), cert. denied, 396 U. S. 835 (1969); *United States* v. *Giordano,* 419 F. 2d 564, 568 (CA8 1969), cert. denied, 397 U. S. 1037 (1970); *United States* v. *Chikata,* 427 F. 2d 385, 390 (CA9 1970); *United States* v. *DeGrosa,* 405 F. 2d 926, 928 (CA3), cert. denied *sub nom. Zudick* v. *United States,* 394 U. S. 973 (1969); see *United States* v. *First Nat. Bank,* 274 F. Supp. 283, 285 (ED Ky. 1967), aff'd *sub nom. Justice* v. *United States,* 390 U. S. 199 (1968).

as yet has been instituted.[14] On the other hand, it has been said, usually citing *Reisman,* that where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution, the purpose is not a legitimate one and enforcement may be denied.[15] This, of course, would likely be the case where a criminal prosecution has been instituted and is pending at the time of issuance of the summons.

It is precisely the latter situation—where the sole object of the investigation is to gather data for criminal prosecution—that is the subject of the *Reisman* dictum. This is evident from the fact that the dictum itself embraces the citation of *Boren* v. *Tucker,* 239 F. 2d 767, 772–773 (CA9 1956), an opinion in which, at the pages cited, the Ninth Circuit very carefully distinguished *United States* v. *O'Connor,* 118 F. Supp. 248 (Mass. 1953), a case where the taxpayer already was under indictment. The *Reisman* dictum is to be read in the light of its citation of *Boren,* and of *Boren*'s own citation of *O'Connor;* when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes.

Any other holding, of course, would thwart and defeat the appropriate investigatory powers that the Congress has placed in "the Secretary or his delegate." When

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[14] *United States* v. *Erdner,* 422 F. 2d 835, 836 (CA3 1970); *United States* v. *Michigan Bell Tel. Co.,* 415 F. 2d 1284, 1286 (CA6 1969); *Howfield, Inc.* v. *United States,* 409 F. 2d 694, 697 (CA9 1969); *United States* v. *Ruggeiro,* 425 F. 2d 1069, 1070 (CA9 1970), petition for certiorari pending *sub nom. Kyriaco* v. *United States,* No. 448, O. T. 1970.

[15] *Wild* v. *United States,* 362 F. 2d, at 208–209; *Venn* v. *United States,* 400 F. 2d, at 210; *United States* v. *Roundtree,* 420 F. 2d 845, 851 (CA5 1969). See *United States* v. *O'Connor,* 118 F. Supp. 248 (Mass. 1953).

Grady's summonses were issued to Mercurio and to Acme, Donaldson was not under indictment and, indeed, no recommendation had been made for his prosecution. That he might be indicted and prosecuted was only a possibility, no more and no less in his case than in the case of any other taxpayer whose income tax return is undergoing audit. Prosecution will necessarily depend on the result of that audit and on what the examination and investigation reveal.

We bear in mind that the Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury under § 7801 (a) of the 1954 Code for the administration and enforcement of the internal revenue laws.[16] See Internal Revenue Service Organization and Functions, § 1112 *et seq.*, 35 Fed. Reg. 2417 *et seq.* (1970). We further bear in mind that the Service has district offices, each with an audit division and a criminal division; that the Audit Division's program emphasizes the civil aspects of enforcement but embraces "participation with special agents of the Intelligence Division in the conduct of tax fraud investigations," § 1118.4; that the Intelligence Division enforces the criminal statutes affecting income and certain other taxes and develops information concerning alleged criminal violations, § 1118.6; that each assistant regional commissioner for intelligence develops programs for the investigation of alleged tax frauds and "certain other civil and alleged criminal violations of tax laws" and "approves or disapproves recommendations for prosecution," § 1114. (10); and that recommendations for prosecution are processed through the office of regional counsel and

[16] "§ 7801. Authority of Department of the Treasury

"(a) Powers and duties of Secretary.—Except as otherwise expressly provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury."

by that office to the Department of Justice, § 1116 (3). This demonstrates that the special agent may well conduct his investigation jointly with an agent from the Audit Division; that their combined efforts are directed to both civil and criminal infractions; and that any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along to support appropriate conclusions. The fact that a full-scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent.[17]

Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. The regulations are positive. Treas. Regs. § 301.7602–1 (c)(4), 26 CFR § 301.7602–1 (c)(4). The underlying statutes are just as authoritative. Section 6659 (a)(2) of the Code defines the term "tax" as used in the Code and, hence, in the authorizing § 7602, to include any addition or penalty. Section 7602 contains no restriction; further, it has its ascertainable roots in the 1939 Code's § 3614 and, also, § 3615 (a)–(c), which, by its very language and by its proximity to § 3616 and § 3654, appears to authorize the use of the summons for investigation into criminal conduct. There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. See *Mathis* v. *United States,* 391 U. S. 1, 4 (1968). To draw a line where a special agent appears would require the

[17] In 1969, 2,080 full-scale tax fraud investigations were undertaken by the intelligence divisions. Only 1,049, or approximately half, of these resulted in recommendations for prosecution. In the 1,031 cases not recommended for prosecution, some $20,000,000 in deficiencies and penalties resulted and were earmarked for collection civilly. 1969 Annual Report of the Commissioner of Internal Revenue 28–31.

Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law. See *United States* v. *Kordel*, 397 U. S. 1, 11 (1970).

We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Affirmed.

MR. JUSTICE BRENNAN, believing that under the facts of this case petitioner has established no right to intervene, concurs in the result.

MR. JUSTICE DOUGLAS, concurring.

The petitioner is the subject of an investigation by the Intelligence Division of the Internal Revenue Service which seeks to obtain information regarding financial transactions between the petitioner-taxpayer and the Acme Circus Operating Co. Summonses have been served on Acme and its accountant, Mr. Mercurio, in order to obtain testimony and to review records relating to petitioner. The petitioner is attempting to prevent Acme and Mercurio from complying with the summonses and to prevent the Federal District Court from enforcing those summonses. He sought to intervene in the enforcement proceedings, alleging that he has a vital interest in the litigation and that the summonses are not enforceable because they were issued improperly, to gather information for a criminal prosecution. The Government challenged his right to intervene. The District Court denied his motion to intervene and enforced the summonses but stayed its mandate. The Court of Appeals affirmed but continued the stay pending dis-

position by this Court. As yet there has been no hearing before the special agent, and this Court rules only that such a hearing may proceed on the summonses issued.

On these facts, I concur with the Court's decision. There is nothing in the language of § 7602 to limit the issuance of summonses to civil investigations. Therefore, even though petitioner is the subject of a criminal investigation, that is no bar to the issuance of the summonses. It is true that a person who is summoned may object that the production of records or testifying would violate *his* rights under the Fourth or Fifth Amendments. And a taxpayer would clearly have standing to raise a claim of violation of his constitutional rights if a third party were ordered to produce records belonging to the taxpayer. *United States* v. *Kordel,* 397 U. S. 1, 7; *Reisman* v. *Caplin,* 375 U. S. 440, 445. But it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress. There is no right to be free from incrimination by the records or testimony of others.

The taxpayer may, however, protect his interests in any hearings held pursuant to § 7602. The Internal Revenue Service is clearly conducting a criminal investigation of the petitioner. That is the function of special agents.[1] The purpose of the summonses is to gather evidence for a criminal prosecution. At such

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[1] Though the Solicitor General argues that an investigation by a special agent might have civil as well as criminal results, and the final decision to prosecute is not made until after an investigation, and approval by a regional counsel, he admits that the special agent is only assigned to the case "as a result of some allegation or indication of criminal conduct." Indeed the Intelligence Division "enforces the criminal statutes . . . by developing information concerning alleged criminal violations thereof . . . ." Internal Revenue Service Organization and Functions § 1118.6, 35 Fed. Reg. 2454.

"investigations" the summoned party may or may not be put under oath, at the discretion of the agent. He does have the right to be accompanied by counsel or an accountant. But the Internal Revenue Service has taken the position that the taxpayer who is being investigated is not entitled to be present at such "ex parte investigations." [2] Moreover, he normally is not given notice of the issuance of the summons to the third party. Our decisions, however, make clear that the taxpayer has the right to be present at the hearing and to confront and cross-examine witnesses and inspect evidence against him.

The traditional federal method for gathering such information is the grand jury. Before that body there is no right to counsel and confrontation, but other protections are present, none of which exist here. The Court in a five-to-four decision relied on the analogy to the grand jury in *In re Groban*, 352 U. S. 330, 333, ruling that a person has no right to counsel when ordered to testify before a fire marshal. MR. JUSTICE BLACK stated, I think, the correct view in his dissent:

> "[A]ny surface support the grand jury practice may lend disappears upon analysis of that institution. The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for

[2] An exception is made where the taxpayer asserts a privileged relationship with the person summoned, such as attorney-client.

> officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them.
>
> . . . . . .
>
> "[T]he Fire Marshal's interrogation is, and apparently was intended to be, an important and integral part in the prosecution of the persons for arson or a similar crime. The rights of a person who is examined in connection with such crimes should not be destroyed merely because the inquiry is given the euphonious label 'administrative.'" 352 U. S., at 346–347, 349.

In *Anonymous* v. *Baker,* 360 U. S. 287, another five-to-four decision, the Court upheld the power of a judge in New York, acting as a one-man grand jury, to interrogate a witness without benefit of counsel, again relying on the distinction between investigation and prosecution. *Id.,* at 294. MR. JUSTICE BLACK again stated the correct view in his dissent that this procedure allowed a state official to lay the groundwork for a future prosecution without the protection of the presence of counsel.

In *Hannah* v. *Larche,* 363 U. S. 420, registrars who were accused of racial discrimination asked to be allowed to confront and cross-examine witnesses appearing before the Commission on Civil Rights. A majority found no such right because the Commission did not "adjudicate" or "issue orders" but only found facts. That criminal prosecutions might follow was "purely conjectural." The Solicitor General relies on this case

for approval of the procedures adopted by the Internal Revenue Service.

My view has not changed:

> "There is . . . only one way the Chief Executive may move against a person accused of a crime and deny him the right of confrontation and cross-examination and that is by the grand jury." 363 U. S., at 497.
>
> "[The grand jury is] the only accusatory body in the Federal Government that is recognized by the Constitution. I would allow no other engine of government, either executive or legislative, to take [its] place—at least when the right of confrontation and cross-examination are denied the accused as is done in these cases." *Id.*, at 499.

In *Jenkins* v. *McKeithen,* 395 U. S. 411, the Court dealt with another state investigative commission. There, however, the authority of the commission was limited to ascertaining facts regarding violations of *criminal* law and reporting its findings for criminal prosecution. There was no right to cross-examination for nonwitnesses and the right was limited for witnesses. The Court held that the commission exercised an accusatory function and was empowered to brand people as criminals. *Id.*, at 427–428. Therefore, due process required the commission to afford a person being investigated the right to confront and cross-examine the witnesses against him.

Given the identity of purpose of the investigations in *Jenkins* and this case, the rule of *Jenkins* clearly applies to the taxpayer in this suit. The requirements of procedural due process do not become more lax when federal rather than state criminal investigations are involved.

The proceeding contemplated in the summonses served on Acme and Mercurio is a criminal investigation. The

result will be a determination of whether to bring criminal charges. The special agent will perform the function traditionally reserved to the grand jury in our Federal Government. The teaching of the *Jenkins* case is that such a proceeding may not be held without affording the taxpayer an opportunity to attend, to cross-examine, and to rebut.

PHILLIPS *v.* MARTIN MARIETTA CORP.

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

No. 73. Argued December 9, 1970—Decided January 25, 1971

Under Title VII of the Civil Rights Act of 1964, an employer may not, in the absence of business necessity, refuse to hire women with pre-school-age children while hiring men with such children.

411 F. 2d 1, vacated and remanded.

William L. Robinson argued the cause for petitioner. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Norman C. Amaker,* and *Earl M. Johnson.*

Donald T. Senterfitt argued the cause for respondent. With him on the brief were *William Y. Akerman, Paul A. Porter, Victor H. Kramer, Dennis G. Lyons, James A. Dobkin, Clark C. Vogel, James T. Ellison, J. Thomas Cardwell,* and *George T. Eidson, Jr.*

Lawrence G. Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Leonard, Robert T. Moore,* and *Stanley P. Hebert.*

Briefs of *amici curiae* urging reversal were filed by *Dorothy Kenyon, Norman Dorsen, Pauli Murray,* and *Melvin L. Wulf* for the American Civil Liberties Union; by *Gilbert Feldman* for the Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL–CIO; by *Jacob D. Hyman, Faith A. Seidenberg, Marguerite Rawalt,* and *Phineas Indritz* for NOW Legal Defense and Education Fund, Inc.; and by *Sylvia Ellison* for Human Rights for Women, Inc.

PER CURIAM.

Petitioner Mrs. Ida Phillips commenced an action in the United States District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964* alleging that she had been denied employment because of her sex. The District Court granted summary judgment for Martin Marietta Corp. (Martin) on the basis of the following showing: (1) in 1966 Martin informed Mrs. Phillips that it was not accepting job applications from women with pre-school-age children; (2) as of the time of the motion for summary judgment, Martin employed men with pre-school-age children; (3) at the time Mrs. Phillips applied, 70–75% of the applicants for the position she sought were women; 75–80% of those hired for the position, assembly trainee, were women, hence no question of bias against women as such was presented.

The Court of Appeals for the Fifth Circuit affirmed, 411 F. 2d 1, and denied a rehearing *en banc*, 416 F. 2d

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*Section 703 of the Act, 78 Stat. 255, 42 U. S. C. § 2000e–2, provides as follows:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

. . . . . .

"(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."

1257 (1969). We granted certiorari. 397 U. S. 960 (1970).

Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703 (e) of the Act. But that is a matter of evidence tending to show that the condition in question "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The record before us, however, is not adequate for resolution of these important issues. See *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256–257 (1948). Summary judgment was therefore improper and we remand for fuller development of the record and for further consideration.

Vacated and remanded.

MR. JUSTICE MARSHALL, concurring.

While I agree that this case must be remanded for a full development of the facts, I cannot agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Martin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities. Certainly, an employer can require that all of his employees, both men and women, meet minimum performance standards, and

he can try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with.

But the Court suggests that it would not require such uniform standards. I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.

By adding [1] the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing "to hire an individual based on stereotyped characterizations of the sexes." Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 CFR § 1604.1 (a)(1)(ii). See *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (CA7 1969); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (CA5 1969). Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.[2] The exception for a "bona fide occupational qualification" was not intended to swallow the rule.

That exception has been construed by the Equal Employment Opportunity Commission, whose regulations are entitled to "great deference," *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), to be applicable only to job situations

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[1] The ban on discrimination based on sex was added to the Act by an amendment offered during the debate in the House by Rep. Smith of Virginia. 110 Cong. Rec. 2577.

[2] See *Neal* v. *American Airlines, Inc.*, 1 CCH Employment Practices Guide ¶ 6002 (EEOC 1968); *Colvin* v. *Piedmont Aviation, Inc.*, 1 CCH Employment Practices Guide ¶ 6003 (EEOC 1968); 110 Cong. Rec. 2578 (remarks of Rep. Bass).

that require specific physical characteristics necessarily possessed by only one sex.[3] Thus the exception would apply where necessary "for the purpose of authenticity or

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[3] The Commission's regulations provide:

"Sex as a bona fide occupational qualification.

"(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—'Men's jobs' and 'Women's jobs'—tend to deny employment opportunities unnecessarily to one sex or the other.

"(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

"(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

"(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

"(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

"(iv) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.

"(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

"(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain

genuineness" [4] in the employment of actors or actresses, fashion models, and the like.[5] If the exception is to be limited [6] as Congress intended, the Commission has given it the only possible construction.

When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.

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prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

"(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." 29 CFR § 1604.1.

[4] 29 CFR § 1604.1 (a)(2), n. 3, *supra*.

[5] See 110 Cong. Rec. 7217 (memorandum of Sens. Clark and Case).

[6] 110 Cong. Rec. 7213 (memorandum of Sens. Clark and Case).

PICCIRILLO *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 97. Argued November 9, 1970—Decided January 25, 1971

Writ of certiorari, granted to resolve question whether "transactional" rather than "use" immunity is constitutionally required to compel a witness to testify before a New York grand jury, is dismissed as improvidently granted in light of another decision by highest state court holding that transactional immunity is required in New York and that its earlier decision in the instant case may have rested on that premise.

24 N. Y. 2d 598, 249 N. E. 2d 412, certiorari dismissed.

Malvine Nathanson argued the cause for petitioner. With her on the briefs was *William E. Hellerstein.*

Stanley M. Meyer argued the cause for respondent. With him on the brief was *Eugene Gold.*

PER CURIAM.

The occasion for granting the writ in this case was to resolve the important question whether it is necessary to accord "transactional" immunity, see *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892), to compel a witness to give testimony before a state grand jury over his claim of the privilege against self-incrimination, or whether mere "use" immunity suffices to that end, see, *e. g., Murphy* v. *Waterfront Comm'n,* 378 U. S. 52 (1964); *Uniformed Sanitation Men Assn.* v. *Commissioner of Sanitation of the City of New York,* 426 F. 2d 619 (CA2 1970).

After considering the briefs and oral arguments of the parties on this writ, we have reached the conclusion that the decision of the New York Court of Appeals in *Gold* v. *Menna,* 25 N. Y. 2d 475, 255 N. E. 2d 235 (1969), which makes clear that transactional immunity is required in New York and also indicates that such court's earlier

decision in the case before us, *People* v. *La Bello,* 24 N. Y. 2d 598, 249 N. E. 2d 412 (1969), may have rested on that premise, makes this case an inappropriate vehicle for deciding a question of such far-reaching importance.

With the intervening decision in *Gold,* no controversy any longer exists between the parties as to the question which impelled us to grant the writ: whether, in the circumstances involved in this case, Piccirillo was entitled to "use" or "transactional" immunity. While it is true that, technically speaking, issues remain in the case concerning the kind of immunity required by federal law and, if it be "transactional" rather than "use" immunity in such a case as this, the proper scope of such immunity, both issues arise only against the sterile background of agreement between the parties that Piccirillo is entitled to "transactional" immunity under state law. Thus, our determination upon the fundamental constitutional question underlying this case would be in no sense necessary to its resolution in this instance.

In this posture of affairs, we conclude that the writ of certiorari should be dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE BLACK dissents from the dismissal of this writ as improvidently granted. He would vacate the judgment below and remand the case to the New York Court of Appeals for reconsideration in light of its later opinion in *Gold* v. *Menna,* 25 N. Y. 2d 475, 255 N. E. 2d 235.

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

I do not approve dismissal of this writ as improvidently granted.

Petitioner was indicted for assault committed by the use of tire irons. He pleaded guilty and was sentenced

to imprisonment. Shortly thereafter a grand jury was impaneled to investigate the assault on the victim and the conspiracies arising in connection with it. Petitioner, while still serving the sentence on the assault conviction, was called to testify before the grand jury.

After refusing to testify, petitioner was granted immunity. He then testified to the assault which he had perpetrated by the use of tire irons. Four days later a police officer testified before the grand jury that after a chase, he had arrested petitioner and another, and thereupon had taken the tire irons from them. The officer also testified that following petitioner's arrest petitioner had offered the officer a bribe to change his testimony. Petitioner was subsequently indicted by the grand jury for bribery, and, following an unsuccessful motion to dismiss based on the grant of immunity, he pleaded guilty to attempted bribery. The New York Court of Appeals held four-to-three that the New York immunity statute only prohibited use of testimony and the fruits of the testimony in a subsequent criminal proceeding and that the police officer's testimony was in no way derived from anything petitioner said. 24 N. Y. 2d 598, 249 N. E. 2d 412.

Counselman v. *Hitchcock,* 142 U. S. 547, held that once immunity was granted, it protected the witness against prosecution not only for a crime that relates to the precise testimony given but also for the fruits of such testimony. *Id.,* at 564–565. But the Court went further: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." *Id.,* at 586. In *Brown* v. *Walker,* 161 U. S. 591, which involved another federal prosecution, the immunity statute provided that the witness would be protected "on account of any transaction . . . concerning which he may testify." *Id.,* at

594. The Court held that the immunity offered was coterminous with the privilege and that the witness could therefore be compelled to testify. Thus, "transactional immunity" became part of the fabric of our federal constitutional law. See *Ullmann* v. *United States,* 350 U. S. 422, 438.

Now that the Self-Incrimination Clause of the Fifth Amendment is applicable to the States, *Malloy* v. *Hogan,* 378 U. S. 1, the same immunity against state prosecutions must be granted by the States as the Federal Government must grant against federal prosecutions. *Id.,* at 10–11.*

Subsequent to petitioner's case the New York Court of Appeals unanimously concluded that their statute provides transactional immunity. *Gold* v. *Menna,* 25 N. Y. 2d 475, 255 N. E. 2d 235. Nevertheless, that court also concluded that petitioner would not have benefited from the change of law because he gave no testimony which related to the offense for which he was prosecuted. *Id.,* at 481 n. 1, 255 N. E. 2d, at 238 n. 1. That approach to the problem is not in keeping with the generous interpretations which the Fifth Amendment has heretofore received by this Court.

Petitioner had just testified to the grand jury concerning facts which provided the underlying basis for the bribery charge. The grand jury knew petitioner had assaulted a man with tire irons because petitioner himself told them so. The tire irons were the "evidence" which according to the police officer petitioner had tried to bribe him "to get rid of." They were the same tire irons used in the assault for which he was convicted and sentenced, not tire irons used to commit another assault. Moreover,

*The present case is not complicated by the question whether *state* immunity must extend immunity against *federal* prosecution. See *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52. Cf. *Abbate* v. *United States,* 359 U. S. 187.

the bribery charge grew out of conversations which petitioner had with the police officer the day of his arraignment on the assault charge. It seems obvious that, if the transactional test is to be honored, this is one of the clearest instances in which to do so.

Accordingly, I would reverse the decision below.

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

This case presents the question of the limitations required by the Fifth Amendment's Self-Incrimination Clause upon subsequent state prosecutions of an individual compelled by the State to answer incriminating questions. Since, in my view, this case presents a record that compels us to decide that question, I cannot agree that the Court may dismiss the writ of certiorari as improvidently granted. I therefore reach the merits and would reverse the judgment of conviction and remand the case with directions to dismiss the indictment.

I

Petitioner and a codefendant were arrested on March 19, 1964, by a New York police officer, William Sewell, for assaulting one Graham, a housing contractor. Patrolman Sewell recovered the tire irons used in the assault from petitioner and the codefendant at the time of the arrest. The following day, the two defendants were arraigned and released on bond. But before leaving the courthouse, they approached Patrolman Sewell and offered him $1,000 or $1,500 to dispose of the seized weapons. The honest Sewell refused the offer and immediately notified the district attorney of the bribe attempt. At the request of the prosecutor, Sewell later attended a meeting with petitioner to confirm the bribe offer. The relevant narrative skips a year during which petitioner and his codefendant were indicted for attempted assault,

pleaded guilty, and were sentenced to jail. On March 18, 1965, a year after the assault and bribery attempt, petitioner was summoned from jail to appear before a grand jury investigating the possibility of criminal conspiracies in connection with the assault on Graham. The prosecutor, after informing petitioner of the purpose of the investigation, told him that the grand jury was going to vote on whether to give petitioner immunity and explained the meaning of immunity to petitioner as follows:

> "I am going to ask this grand jury to vote on the question of giving you immunity and under Penal Law Section 2447 for the testimony that you will give in this grand jury and that means anything that I ask you and any answers that you give in answer to my questions if it connects you with the crime you cannot be prosecuted for it. That's immunity, do you understand that?" App. 33.

When the grand jury voted to grant immunity, the petitioner said that he would answer the prosecutor's questions, but that he would like to consult his lawyer. The prosecutor refused permission, stating:

> "Under these circumstances you are not a defendant, you are a witness, you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney, do you understand that?" App. 34.[1]

Petitioner then answered all questions admitting, *inter alia,* that he and his codefendant had been hired to assault and had in fact assaulted Graham; that the tire irons in the possession of the police were the instruments they had

[1] Petitioner has argued that he had a right to counsel in the circumstances of this case. In view of my conclusion that petitioner's conviction is invalid under the Fifth and Fourteenth Amendments, I have no occasion to pass upon his Sixth Amendment argument.

used in the assault; and that they had been surprised in the midst of the assault and had run away but had been caught by the police. The bribery attempt was not mentioned.

Four days later, Patrolman Sewell appeared before the same grand jury and testified about the bribe attempt. Several months thereafter, the grand jury indicted petitioner and his codefendant for offering a bribe. Petitioner moved to dismiss the indictment on the ground that the crime charged involved subject matter for which petitioner had been granted immunity, as required by the Federal Constitution. When the trial court denied the motion, petitioner pleaded guilty. The New York Court of Appeals affirmed the conviction, three judges dissenting. *People* v. *La Bello,* 24 N. Y. 2d 598, 249 N. E. 2d 412 (1969). The New York court interpreted the New York immunity statute to prevent only "the use of the witness' testimony and any evidence derived therefrom." 24 N. Y. 2d, at 604, 249 N. E. 2d, at 416. After holding that this "use" immunity satisfied the requirements of the Fifth Amendment, the New York court affirmed petitioner's conviction based on its findings that "[w]hatever evidence might have been revealed by the appellants' testimony was wholly insubstantial" and that "the indictment was not the product of that testimony." 24 N. Y. 2d, at 605, 249 N. E. 2d, at 416.

Seven months after its decision in petitioner's case, the New York Court of Appeals on December 4, 1969, in a case wholly unrelated to petitioner's, reversed itself on the proper interpretation of the New York immunity statute, holding that the New York statute granted "immunity from prosecution for any crime revealed by a witness' testimony before a Grand Jury." *Gold* v. *Menna,* 25 N. Y. 2d 475, 481, 255 N. E. 2d 235, 238. In a footnote to *Gold,* the New York court stated that

even under its new interpretation, petitioner's conviction was correctly affirmed because he and his codefendant "gave no testimony which related or pertained to the offense for which they were prosecuted and of which they were convicted." 25 N. Y. 2d, at 481 n. 1, 255 N. E. 2d, at 238 n. 1. We granted certiorari, 397 U. S. 933 (1970).

II

The fact that the New York Court of Appeals has reversed itself and changed its interpretation of the New York immunity statute to grant "transactional" immunity, and not merely "use" immunity as that court held when it affirmed petitioner's conviction, provides no basis for dismissing the writ of certiorari as improvidently granted. The state court's interpretation of state law is at best only tangentially related to the federal constitutional question presented in this case. The petitioner here, upon being told "[Y]ou have been given immunity. That means you cannot be prosecuted," proceeded to testify and answer all questions put to him about the Graham assault. Subsequently, he was indicted and convicted for the bribery attempt which arose out of that assault. The New York courts have affirmed petitioner's conviction for bribery, holding that the immunity granted by the state statute did not bar the present conviction. At that point, the relevance to the constitutional question of the scope of immunity afforded by the state court's interpretation of state law ended. The question for this Court is whether the Fifth Amendment, as applied to the States by the Fourteenth Amendment, permits the present conviction to stand in light of the substance of the compelled testimony and the nature and basis of that conviction. That is a matter of federal constitutional law which does not depend upon the interpretation of the New York immunity statute.

The Court's wholly wrong focus upon the particular state immunity statute [2] involved results from its failure to distinguish two different procedural postures in which the question of the scope of immunity required by the Fifth Amendment can be raised. First, an individual may rely on the Fifth Amendment privilege and refuse to answer a question after he has been granted immunity pursuant to an immunity statute and ordered to respond. If he is then held in contempt (or otherwise penalized) for his refusal to answer, the question presented in reviewing the contempt conviction (or other sanction) is whether the statutory grant of immunity is co-extensive with the scope of the privilege against self-incrimination. *Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892). If the immunity granted is found to be co-extensive with the privilege, then the witness' refusal to answer based on the privilege was unjustified, and the finding of contempt is proper. *Brown* v. *Walker,* 161 U. S. 591 (1896). If, on the other hand, the immunity granted by the statute falls short of the constitutional requirement, the witness properly relied upon his constitutional privilege, and any sanction imposed cannot stand. *McCarthy* v. *Arndstein,* 266 U. S. 34, 42 (1924). In these cases, analysis therefore necessarily focuses on the particular provisions of the immunity statute in question and on the nuances of its inter-

[2] If the Court has doubts that petitioner's conviction would still be affirmed in light of the supervening change in the interpretation of state law, the appropriate course would be to remand to the state court for reconsideration, as my Brother BLACK suggests. *Bell* v. *Maryland,* 378 U. S. 226, 228 (1964). The Court's failure to do so presumably rests on the New York court's footnote in its later opinion stating that, in its view, the transactional immunity granted by the New York statute would not affect petitioner's conviction. But if petitioner's conviction is indeed regarded as final under New York law, then the constitutional issue is posed without regard to New York law for the reasons stated in the text.

pretation because there is nothing else before the court. No testimony has yet been compelled, and there has been no subsequent prosecution in any way related to compelled testimony. Most of the cases in which this Court has considered questions of immunity fall into this category,[3] as do the three cases other than the present case cited in the Court's *per curiam* opinion.

The second class of cases, represented by the present one, involves cases in which an individual is granted immunity, proceeds to testify, and is then prosecuted and convicted for an offense related to that testimony. Once the conviction is upheld under the immunity statute, the question in these cases becomes, not whether the statute grants adequate immunity, but, rather, whether the conviction involved, given the substance of the compelled testimony, falls within the constitutionally required immunity. This decision, of course, must be made on the basis of federal standards under the Fifth Amendment. *Malloy* v. *Hogan, supra.*

Since the present case falls into the second group of cases, any uncertainty over the interpretation of the state immunity statute has little bearing on the question whether this Court, having agreed to hear the case, ought to decide the merits. What is relevant is that the pres-

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[3] *E. g., Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Uniformed Sanitation Men Assn.* v. *Commissioner of Sanitation,* 392 U. S. 280 (1968); *Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52 (1964); *Ullmann* v. *United States,* 350 U. S. 422 (1956); *Hoffman* v. *United States,* 341 U. S. 479 (1951); *United States* v. *Murdock,* 284 U. S. 141 (1931); *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924); *Hale* v. *Henkel,* 201 U. S. 43 (1906); *Ballmann* v. *Fagin,* 200 U. S. 186 (1906); *Jack* v. *Kansas,* 199 U. S. 372 (1905); *Brown* v. *Walker,* 161 U. S. 591 (1896); *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892). But see, *e. g., Adams* v. *Maryland,* 347 U. S. 179 (1954); *Smith* v. *United States,* 337 U. S. 137 (1949); *Feldman* v. *United States,* 322 U. S. 487 (1944); *Heike* v. *United States,* 227 U. S. 131 (1913).

ent case comes to this Court with a complete factual record raising the constitutional question of the scope of immunity required by the Fifth Amendment privilege. It is worth noting that cases falling in the first class present the court with a bare record, consisting of no more than the text of the immunity statute in question and the witness' refusal to answer a question. Without a factual record, the Court is required to decide "abstract controvers[ies] over the use of . . . words," *Regal Knitwear Co.* v. *NLRB,* 324 U. S. 9, 15 (1945), even though the Court has long recognized that important constitutional issues are best decided on the basis of factual records which tender the "underlying constitutional issues in clean-cut and concrete form." *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 584 (1947). The absence of such a record is particularly unfortunate in these Fifth Amendment cases because the constitutional issue posed depends upon a judgment as to how broad a protection is necessary to serve the values, purposes, and policies underlying the Fifth Amendment. A factual record showing, for example, the substance of the individual's compelled testimony, the way that testimony was subsequently used by the prosecutor, and the crime for which the individual was ultimately prosecuted, provides important considerations to anchor and inform the constitutional judgment.

Unlike most of the cases in which this Court has considered the scope of immunity required by the Fifth Amendment, the present case offers the Court that factual background.

In the nature of a confession and avoidance, the *per curiam* concedes that the issues "concerning the kind of immunity required by federal law and, if it be 'transactional' rather than 'use' immunity in such a case as this, the proper scope of such immunity" are presented by petitioner's case, but offers three statements in support

of dismissal. First, the Court states that "no controversy any longer exists between the parties as to the question which impelled us to grant the writ: whether, in the circumstances involved in this case, Piccirillo was entitled to 'use' or 'transactional' immunity." As the first sentence of the *per curiam* itself recognizes, the question which impelled us to grant the writ was whether *the Federal Constitution* requires "use" or "transactional" immunity, as those terms have been defined in federal constitutional law. The parties have always disagreed and continue to disagree over that question,[4] thus the

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[4] Not only do the parties disagree on the extent of the federal constitutional protection, but both parties also see a decision on that sharply disputed question as *necessary* to a decision of this case:

Counsel for respondent:

"[I]f transactional immunity is required by the federal Constitution, then the decision of the Court of Appeals that this was or wasn't a thing as specified in the New York State statute, is a matter of federal importance, and it is to be decided by a uniform standard.

"On the other hand, if the only thing that the Constitution requires is a use plus fruits immunity, then when New York decided whether this crime, this bribery was one of the things testified to in the grand jury, becomes strictly a matter of the state interpretation of its own statute, and there is no federal constitutional question involved.

"*And so it is necessary to decide whether transactional immunity is required by the federal Constitution.* Now, the petitioner relies a great deal on the case of Counselman vs. Hitchcock. Now, it is our position that Counselman vs. Hitchcock is not the law any more, that it has been overruled, or if it hasn't, it should be . . . ." Tr. of Oral Arg. 24 (emphasis added).

Counsel for petitioner:

"This is the transaction[al] immunity rule that we assert is required under the Fifth Amendment . . . .

"It is our position that this is the rule that first was enunciated in the first case in this Court to deal with the question of immunity and the abrogation of the Fifth Amendment privilege in Counselman

Court's statement that "no controversy any longer exists . . . as to [that] question" is simply contrary to fact.

The Court then suggests that the "agreement between the parties that Piccirillo is entitled to 'transactional' immunity *under state law*" (emphasis added) somehow renders this case an inappropriate one for our decision on the federal constitutional question. The phrase "transactional" immunity is just that—a phrase or shorthand symbol. Something labeled "transactional" immunity by a state court may or may not coincide with the constitutional "transactional" immunity defined by decisions of this Court. Indeed, the petitioner vigorously argues that the state immunity granted in this case falls far short of the "transactional" immunity defined by federal constitutional standards. Thus it is fair to describe the "agreement" between the parties to which the Court refers, as merely an agreement that the New York Court of Appeals, in describing the immunity granted by the state statute, used the label "transactional" immunity. Moreover, since the State has finally affirmed petitioner's conviction in this case, the precise formulation of the immunity granted by state law does not, in any event, have any relevance to our consideration of the constitutional validity of petitioner's conviction.[5] The Court makes no reference to what is relevant—the

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vs. Hitchcock. It has been constantly reiterated in numerous decisions of this Court, and we believe it is a very sound rule.

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"So we feel that there was no question but that there was a substantial relationship [between the compelled testimony and petitioner's conviction] and that under the transactional immunity test, which we contend is a federal constitutional test, and as it has been explained by this Court in Heike and applied in other cases, the bribery indictment must be found to have been covered by the transaction[al] immunity to which this petitioner was entitled." *Id.*, at 11, 15.

[5] See *supra*, at 555–558.

facts of petitioner's compelled testimony and his present conviction.

Finally, the Court asserts that "our determination upon the fundamental constitutional question underlying this case would be in no sense necessary to its resolution in this instance." This is simply not so. If the Court resolves this case, it must make a "determination upon the fundamental constitutional question." Indeed, the *per curiam* has already conceded that. The issue is why resolution of this case, and hence decision on the constitutional question, is being withheld. In my judgment, the Court has yet to articulate a reason for not deciding this case.

In sum, the Court attempts, none too successfully in my judgment, to create a smokescreen by focusing on questions of state law. Petitioner's conviction, without more, squarely raises the federal constitutional question on a concrete, factual record which provides an excellent basis for constitutional adjudication. Under these circumstances, there exists no basis upon which the Court can justify dismissal of the writ of certiorari as improvidently granted. I therefore turn to the merits.

III

Only one sovereignty, New York State, is involved. Thus the case raises the basic question of the constitutional restrictions upon the power of a state government to prosecute an individual for matters related to incriminating testimony which that State has compelled the individual to give. Unlike, for example, *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52 (1964), there is no problem here of limitations imposed on other jurisdictions by New York's act of compelling petitioner to testify against himself. And "where there is only one government involved, be it state or federal, not only is the danger of prosecution more imminent and indeed the likely purpose of the investigation to facilitate prose-

cution and conviction, but that authority has the choice of exchanging immunity for the needed testimony." *Id.*, at 98 (WHITE, J., concurring).

I believe that the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony.[6] Such transactional immunity, in my view, steers a well-conceived middle path between, on the one hand, a position that no immunity statute can supplant the constitutional privilege and, on the other, a position that affords the individual the altogether too narrow protection of use immunity as applied to the very government that has compelled him to incriminate himself. While a position broader than transactional immunity finds some support in the language and history of the Fifth Amendment,[7] the

[6] "Transactional" immunity presupposes "use" immunity. "[C]ompelled testimony and its fruits cannot be used in any manner . . . in connection with a criminal prosecution against [the witness]." *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79 (1964).

[7] Historians have noted that the clause itself is absolute and may not originally have been viewed as allowing the government to compel men to incriminate themselves if it only promised not to prosecute them for the crimes revealed:

"The clause by its terms also protected against more than just 'self-incrimination,' a phrase that had never been used in the long history of its origins and development. The 'right against self-incrimination' is a short-hand gloss of modern origin that implies a restriction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him.

. . . . . .

"The state courts of the framers' generation followed the extension of the right to cover self-infamy as well as self-incrimination, although the self-infamy rule eventually fell into disuse." L. Levy, Origins of the Fifth Amendment 427, 429 (1968).

requirements of today's society and broad governmental economic regulation combined with the existence of the adequate alternative of transactional immunity convince me that the Constitution does not require so sweeping an interpretation as completely to invalidate the immunity technique. Mere use immunity, which protects the individual only against the actual use of his compelled testimony and its fruits, satisfies neither the language of the Constitution itself nor the values, purposes, and policies that the privilege was historically designed to serve and that it must serve in a free country. Finally, this Court's decisions in the course of the past century have consistently read the Constitution as requiring no more, but no less, than transactional immunity.

The Fifth Amendment's guarantee against self-incrimination—"No person . . . shall be compelled in any criminal case to be a witness against himself"—has occupied a central place in our jurisprudence, since before the Nation's birth:

> "By 1776 the principle of the *nemo tenetur* maxim was simply taken for granted and so deeply accepted that its constitutional expression had the mechanical quality of a ritualistic gesture in favor of a self-evident truth needing no explanation." L. Levy, Origins of the Fifth Amendment 430 (1968).

Not only the Federal Constitution, but every State guarantees the individual the privilege against self-incrimination, all States save two by provision in the state constitution.[8] This Court has repeatedly emphasized its role as guardian against even inadvertent or gradual erosion of the guarantee. "This provision must have a

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[8] See 8 J. Wigmore, Evidence § 2252 and n. 3 (McNaughton rev. 1961).

broad construction in favor of the right which it was intended to secure." *Counselman* v. *Hitchcock,* 142 U. S., at 562. The Court's holding that the Fifth Amendment privilege "is also protected by the Fourteenth Amendment against abridgment by the States," *Malloy* v. *Hogan,* 378 U. S. 1, 6 (1964), is modern affirmation that the privilege is the "essential mainstay" of the American accusatorial system of criminal prosecution, *id.,* at 7; *Malloy* held that the Fourteenth Amendment applied the privilege's requirements to the States as fully as to the Federal Government.

The words of the Fifth Amendment do not, in terms, suggest that government may compel men to incriminate themselves provided it promises that it will not prosecute them for the crimes revealed. The clause does not prohibit a *prosecution* or *conviction;* it prohibits the application *vel non* of compulsion to an individual to force testimony that incriminates him, regardless of whether he is actually prosecuted. Historically, one of the major evils sought to be allayed by the development of the privilege was the use of torture to extract a confession,[9] not the subsequent use of the confession in a criminal trial. We continue to recognize this distinction; for example, we permit the use of voluntary confessions in criminal prosecutions.[10] Thus we object not so much to convicting a man on the basis of evidence from his own mouth, but rather to the practice of compelling him to incriminate himself, regardless of a subsequent prosecution.

Implicitly, of course, "in any criminal case" suggests a limitation upon the reach of the privilege, although

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[9] See *Brown* v. *Walker,* 161 U. S. 591, 596–597 (1896); Levy, n. 7, *supra,* at 426 and *passim.*

[10] Talmudic law prohibits the admission in evidence of any self-incriminatory testimony or statement, even if voluntarily given. Levy, n. 7, *supra,* at 433–441.

ever since Mr. Chief Justice Marshall's opinion in the *Aaron Burr* case, the reach has been the *possibility* of a criminal charge, not whether one is in fact brought. *United States* v. *Burr,* 25 F. Cas. 38 (No. 14692e) (C. C. D. Va. 1807). But if there is no possibility of a criminal case, then the privilege would not apply. And that is precisely the basis on which this Court has consistently upheld grants of immunity from *Brown* v. *Walker,* 161 U. S. 591 (1896), to *Ullmann* v. *United States,* 350 U. S. 422 (1956):

> "[I]f [a man's] testimony operate[s] as a complete pardon for the offence to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question." *Brown* v. *Walker,* 161 U. S., at 595.

Or, as the Court put it more succinctly 10 years later,

> "if the criminality has already been taken away, the Amendment ceases to apply." *Hale* v. *Henkel,* 201 U. S. 43, 67 (1906).

It is clear, of course, that mere "use" immunity does not "operate as a complete pardon for the offence," nor does it take the criminality away from the testimony in question. If the individual is only promised that the Government will not actually use his compelled testimony or its fruits to convict him, he is still being compelled to testify against himself "in [a] criminal case," in clear contradiction of the constitutional command. He is still being forced by the State to admit criminal conduct for which he may be punished, albeit not on the basis of his compelled testimony.

The policies and purposes which the privilege serves are promoted by the transactional immunity standard. Mr. Justice Frankfurter's oft-quoted remark that "[t]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is

worth a volume of logic,' " *Ullmann* v. *United States,* 350 U. S., at 438, reflects the fact that the privilege safeguards many interrelated fundamental values: "It will not do, therefore, to assign one isolated policy to the privilege," *Murphy* v. *Waterfront Comm'n,* 378 U. S., at 56 n. 5, and attempt to argue from "the" policy so identified. In *Murphy,* the Court identified some of the complex of values that the privilege serves:

> "[O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' " *Id.,* at 55 (citations omitted).

I quote this summary of some of the values and purposes served by the privilege at such length because I think it is noteworthy that many, if not most, of them are severely infringed by compelling an individual to testify under any circumstances. I do not seek to reopen the debate of *Brown* v. *Walker, supra,* and *Ullmann* v. *United States, supra,* whether the Fifth Amendment is compatible with immunity statutes of any nature, not only because *Brown* and *Ullmann* foreclose that inquiry, but also because the competing considerations identified in those

opinions and my Brother WHITE's concurring opinion in *Murphy,* 378 U. S., at 93–96, as well as the language of the Fifth Amendment, convince me that that result is not required. It is, however, important to appreciate the breadth and significance of the values that the Fifth Amendment was designed to protect.

In light of those values, it seems clear to me that mere "use" immunity is insufficient when the government involved is the one that has compelled the incriminating testimony. It has been argued that if the State is prohibited from using testimony or information obtained by compulsion, then both the government and the individual are in the same position as if the witness had not testified. As the *Murphy* statement of values shows, from the standpoint of the individual (which is also the standpoint of the Fifth Amendment) that is simply not true. The individual has been compelled to incriminate himself, and if he is granted only use immunity, compelled to do so in matters for which he may ultimately be prosecuted. Even from the standpoint of the State it clearly is not in the same position that it would have been had it not compelled the witness to testify. It has obviously obtained information, which may help it to pursue its general investigation, as well as its specific investigation of others. Whether that information will enable the investigation to generate enough steam and continue long enough to produce "independent" evidence incriminating the individual originally compelled to testify is an open question. In short, use immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality. See *Hale* v. *Henkel, supra.*

Finally, the uncertainties of the factfinding process argue strongly against "use" immunity and in favor of transactional immunity. This Court has recognized that "[t]here is always in litigation a margin of error, repre-

senting error in factfinding, which both parties must take into account." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). In dealing with a single jurisdiction, we ought to recognize the enormous difficulty in attempting to ascertain whether a subsequent prosecution of an individual, who has previously been compelled to incriminate himself in regard to the offense in question, derives from the compelled testimony or from an "independent source." For one thing, all the relevant evidence will obviously be in the hands of the government—the government whose investigation included compelling the individual involved to incriminate himself. Moreover, this argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained. By hypothesis, the situation involves one jurisdiction with presumably adequate exchange of information among its various law enforcement officers. Moreover, the possibility of subtle inferences drawn from action or non-action on the part of fellow law enforcement personnel would be difficult if not impossible to prove or disprove. This danger, substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction that compelled the testimony. Concern over informal and undetected exchange of information is also correspondingly less when two different jurisdictions are involved.

Transactional immunity raises none of these problems. It provides the individual with an assurance that he is not testifying about matters for which he may later be

prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony. Both witness and government know precisely where they stand. Respect for law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony.

The transactional immunity standard was first articulated by this Court in *Counselman* v. *Hitchcock, supra,* in 1892; it has consistently been reaffirmed and reiterated in both holding and dicta ever since, and has never been seriously questioned in a case involving the actions of a single jurisdiction. In *Counselman,* the Court held that the immunity granted by an 1868 federal statute was inadequate to supplant the right of the witness to rely on his constitutional privilege: "In view of the constitutional provision, a statutory enactment, to be valid, must afford *absolute immunity against future prosecution* for the offence to which the question relates." 142 U. S., at 586 (emphasis added). Four years later, the Court in *Brown* v. *Walker, supra,* upheld a contempt conviction for a witness' refusal to answer a question after he had been granted immunity under a new 1893 federal statute enacted after the *Counselman* decision. The 1893 statute provided,

> "[N]o person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify." Act of February 11, 1893, 27 Stat. 443, 49 U. S. C. § 46.

Finding that under this statute a witness' testimony "operate[s] as a . . . pardon" for criminal conduct to which it relates, the Court held that the statute "fully accomplished" the Fifth Amendment objective. 161 U. S., at

610. Only by relying on full transactional immunity did the Court sustain the immunity statute before it over the dissent of four Justices who thought the statute's protection still not coextensive with the constitutional privilege. 161 U. S., at 610–638 (dissenting opinions of Shiras and Field, JJ.).

In *Hale* v. *Henkel, supra,* the Court sustained a contempt citation for refusing to answer questions after transactional immunity had been granted under a federal immunity statute, resting on the proposition that "if the criminality has already been taken away, the Amendment ceases to apply." 201 U. S., at 67. In 1924, Mr. Justice Brandeis, speaking for a unanimous Court, held the privilege was available to a bankrupt subpoenaed before a special commissioner for examination

> "because the present statute fails to afford complete immunity from prosecution. If Congress should hereafter conclude that a full disclosure of the bankrupt estate by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity. Compare *Brown* v. *Walker,* 161 U. S. 591; *Glickstein* v. *United States,* 222 U. S. 139, 142; *Ensign* v. *Pennsylvania,* 227 U. S. 592." *McCarthy* v. *Arndstein,* 266 U. S. 34, 42.

See also *United States* v. *Monia,* 317 U. S. 424, 428 (1943) (*Counselman* "indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege"); *Smith* v. *United States,* 337 U. S. 137, 147 (1949) (transactional immunity "met the 'absolute' test of the constitutional provision against self-incrimination").

By 1956, Mr. Justice Frankfurter, writing for the Court, could assert that the 1893 statute, enacted shortly after *Counselman* and adopting the transactional immunity standard, had "become part of our constitutional fabric." *Ullmann* v. *United States,* 350 U. S. 422, 438. Again, the Court in *Ullmann* relied on the transactional immunity standard to reaffirm the holding of *Brown* v. *Walker* against the dissent of two Justices who repeated the arguments of the *Brown* dissenters that even transactional immunity did not satisfy the constitutional privilege. *Ullmann* v. *United States, supra,* at 440–455.

Ullmann's assertion that transactional immunity has become part of our "constitutional fabric" finds support in the action of Congress in the 78 years since *Counselman* first announced the standard. Congress has written more than 40 immunity provisions into various federal statutes during that time, and with one minor and unexplained exception in 1898 and two exceptions in 1970,[11] every provision has provided for transactional immunity.[12] Moreover, as reflected by an appendix in petitioner's brief, the majority of state immunity statutes provide for transactional immunity, even though the States were not

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[11] 11 U. S. C. § 25 (a)(10). This immunity provision was first enacted in the Bankruptcy Act of July 1, 1898, § 7 (a)(9), 30 Stat. 548, six years after *Counselman.* Professor Wigmore has speculated that the drafters of this provision were hostile to the Bankruptcy Act and purposely drafted an imperfect immunity. 8 J. Wigmore, Evidence § 2283, p. 528 (3d ed. 1940). *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924), established that the immunity granted by the section is inadequate to remove the constitutional privilege. Title 18 U. S. C. § 6002 (1970 ed.) codifies the use immunity provision enacted in the Organized Crime Control Act of 1970, 84 Stat. 927; 21 U. S. C. § 884 (1970 ed.) codifies the use immunity provision enacted in § 514 (a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1278.

[12] 8 J. Wigmore, Evidence § 2281, p. 495 n. 11 (McNaughton rev. 1961), and 1970 Supp., p. 51.

subject to the full effect of the Fifth Amendment until 1964. *Malloy* v. *Hogan, supra.*

The wisdom of this consistent view of the protection required by the Fifth Amendment is illustrated and supported by the facts of this case. At the time the petitioner was summoned from his prison cell to testify before the grand jury, the prosecutor knew that the petitioner had offered to bribe Patrolman Sewell. He knew that the basis of the bribery was the assault on Graham and that petitioner had sought to influence Sewell to dispose of the tire irons involved in the assault. Nonetheless, the District Attorney made his decision: he elected to call petitioner before the grand jury which was investigating various conspiracies associated with that assault. Before the grand jury, the prosecutor obtained immunity for petitioner and, under the threat of contempt, compelled the petitioner to testify about the assault and about various matters connected with it. The petitioner complied, relinquishing his constitutionally guaranteed right not to incriminate himself, in the face of a considered decision by a state official to utilize official state processes to compel him to testify.

This Court emphasized in *Brown* v. *Walker, supra,* one of the major evils the Amendment was designed to guard against:

> "[I]f an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials . . . made the system so odious as to give rise to a demand for its total abolition. . . . So deeply

> did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law." 161 U. S., at 596–597.

So too in this case: an accused was put in the same position, with the same attendant temptations and pressures upon the prosecutor. That the questioning occurred in the secrecy of the grand jury, does not affect the protection afforded the individual by the Constitution. Only if both prosecutor and witness are clearly on notice that questioning about an incident will relieve the witness of all criminal liability substantially related to that subject can we guarantee that the inquisitorial character of the proceeding will be removed, and still allow the prosecutor to seek out facts relevant to the crimes of others.

IV

Under the transactional immunity standard, I do not believe that petitioner's conviction can stand. Mr. Justice Holmes, in *Heike* v. *United States,* 227 U. S. 131 (1913), in interpreting a federal immunity statute so as to render it "coterminous with what otherwise would have been the privilege of the person concerned," 227 U. S., at 142, held that "[w]hen the statute speaks of testimony concerning a matter it means concerning it in a substantial way." *Id.,* at 144. I agree that immunity attaches only to matters substantially related to the compelled testimony.

Petitioner testified that he had committed the assault on Graham with tire irons. He testified that the tire irons in the possession of the police were the tire irons that he had used. He testified that he was caught immediately after the assault by the police, taken to the station house, booked on the assault charge, and released on bail the next day. His testimony carried

right up to the time Patrolman Sewell later testified that petitioner offered him a bribe; it concerned the events and underlying circumstances that gave rise to the bribe. It established the motive for the bribe and established all the facts underlying the substance of the bribe. These are not facts that had "no connection" with the subsequent prosecution, see *Heike* v. *United States,* 227 U. S., at 143–144; to the contrary, they were not merely substantially related to the bribery charge, but actually quite pertinent to that prosecution. Consequently, petitioner's motion to dismiss the indictment should have been granted.

I would reverse the judgment below and remand with instructions to dismiss the indictment.

Reporter's Note

The next page is purposely numbered 801. The numbers between 574 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1969, THROUGH FEBRUARY 3, 1971

Cases Dismissed In Vacation

No. 5075. Campbell *v.* Florida. Sup. Ct. Fla. Petition for writ of certiorari dismissed July 15, 1970, pursuant to Rule 60 of the Rules of this Court. Reported below: 227 So. 2d 873.

No. 5452. Gardner *v.* California et al. Motion for leave to file petition for writ of habeas corpus dismissed August 3, 1970, pursuant to Rule 60 of the Rules of this Court.

No. 5604. Ball *v.* United States. C. A. 6th Cir. Petition for writ of certiorari dismissed August 28, 1970, pursuant to Rule 60 of the Rules of this Court. Reported below: 428 F. 2d 26.

No. 101. Blount, Postmaster General *v.* National Association of Letter Carriers. Appeal from D. C. D. C. dismissed September 1, 1970, pursuant to Rule 60 of the Rules of this Court. Reported below: 305 F. Supp. 546. [Probable jurisdiction noted, 397 U. S. 1062.]

No. 187. Cities Service Gas Co. *v.* Federal Power Commission et al. C. A. 10th Cir. Petition for writ of certiorari dismissed September 22, 1970, pursuant to Rule 60 of the Rules of this Court. Reported below: 424 F. 2d 411.

October 6, 1970

Order Appointing Deputy Clerk

It is ordered that William M. Allison be, and he hereby is, appointed a Deputy Clerk of this Court.

Miscellaneous Orders

No. 43, Orig. OREGON *v.* MITCHELL, ATTORNEY GENERAL. Motion for leave to file bill of complaint granted. Motion of New York City Board of Elections for leave to intervene in this case and in No. 44, Orig. [*infra*], denied. Motion of Youth Franchise Coalition et al. for leave to participate in oral argument as *amici curiae* in this case and in No. 46, Orig. [*infra*], denied.

No. 44, Orig. TEXAS *v.* MITCHELL, ATTORNEY GENERAL. Motion for leave to file bill of complaint granted. Motion of the State of Indiana for leave to participate in oral argument as *amicus curiae* denied. Motion of the State of Indiana for leave to join the State of Arkansas et al. in *amicus curiae* brief of State of Indiana granted.

No. 46, Orig. UNITED STATES *v.* ARIZONA. Motion for leave to file bill of complaint granted. Motion of defendant for permission for two attorneys for leave to participate in oral argument granted.

No. 47, Orig. UNITED STATES *v.* IDAHO. Motion for leave to file bill of complaint granted. Motion of the Commonwealth of Virginia for leave to participate in oral argument as *amicus curiae* denied.

No. 281. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. C. A. 4th Cir. [Certiorari granted, 399 U. S. 926.] Motion of the Solicitor General for leave to participate in oral argument in this case and in No. 349 [certiorari granted, *infra*] as *amicus curiae* granted and 30 minutes allotted for that purpose. An additional 15 minutes allotted to each side in these cases and the cases are consolidated with a total of three hours for oral argument. Motions of the National Edu-

cation Association, William C. Cramer, and the Governor of Florida for leave to participate in oral argument as *amici curiae* denied. Motion of Classroom Teachers Assn. of the Charlotte-Mecklenburg School System, Inc., for leave to participate in oral argument as *amicus curiae* in this case and in No. 349 denied. Motions of the Commonwealth of Virginia and the Attorney General of Florida for leave to participate in oral argument as *amici curiae* also denied; THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE MARSHALL dissent from denial of the latter motions. Motion of Newton Collier Estes for leave to file a brief as *amicus curiae* granted, but motion for leave to participate in oral argument as *amicus curiae* denied. Motion of Albert W. Watson et al. for leave to join in *amicus curiae* brief of William C. Cramer granted. Motion of the Charlotte-Mecklenburg Board of Education for an ancillary writ of certiorari in this case and in No. 349 pertaining to proceedings subsequent to granting of certiorari in No. 281 granted; and treating the motion as a petition for a writ of certiorari, certiorari granted.

Probable Jurisdiction Noted or Postponed

No. 444. MOORE ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. Appeal from D. C. W. D. N. C. Further consideration of question of jurisdiction in this case postponed to hearing of case on the merits. Case consolidated with No. 498 [*infra*] for oral argument. One hour allotted for oral argument for appellees in No. 498 and a similar amount of time allotted to all other parties in both cases. Cases set for oral argument immediately following No. 349 [certiorari granted, *infra*]. Motion of appellants as to scheduling oral argument and apportionment of time denied. Reported below: 312 F. Supp. 503.

No. 498. NORTH CAROLINA STATE BOARD OF EDUCATION ET AL. *v.* SWANN ET AL. Appeal from D. C. W. D. N. C. Probable jurisdiction noted. Motion of Charlotte-Mecklenburg Board of Education to join in the appeal granted. Reported below: 312 F. Supp. 503.

Certiorari Granted. (See also No. 281, *supra.*)

No. 420. MCDANIEL, SUPERINTENDENT OF SCHOOLS OF CLARKE COUNTY ET AL. *v.* BARRESI ET AL. Sup. Ct. Ga. Certiorari granted and case set for oral argument immediately following No. 498 [probable jurisdiction noted, *supra*]. Motion of the State of Georgia for leave to participate in oral argument as *amicus curiae* denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE MARSHALL dissent from the denial of the motion. Reported below: 226 Ga. 456, 175 S. E. 2d 649.

No. 436. DAVIS ET AL. *v.* BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, ET AL. C. A. 5th Cir. Motion for leave to supplement petition for certiorari granted. Certiorari granted and case set for oral argument immediately following No. 420 [*supra*]. Motion of the Solicitor General for additional time for oral argument granted and 30 minutes allotted for that purpose. An additional 15 minutes allotted to each side. Motion of the State of Mississippi for leave to participate in oral argument as *amicus curiae* denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE MARSHALL dissent from the denial of this motion. Motion of respondents Mobile County Council Parents-Teachers Assn. et al. for additional time for oral argument denied, except as indicated above; and permission granted for two attorneys to participate in oral argument for respondents. Reported below: 430 F. 2d 883 and 889.

No. 349. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. *v.* SWANN ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 431 F. 2d 138.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Sixth Circuit for the week beginning November 30, 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.

OCTOBER 8, 1970

Miscellaneous Orders

No. 281. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. C. A. 4th Cir. Motion of Charles E. Bennett for leave to file a brief as *amicus curiae* granted. Motion of Mr. Bennett for leave to participate in oral argument as *amicus curiae* denied. [For earlier orders herein, see, *e. g., ante,* p. 802.]

No. ——. PRATT ET AL. *v.* BEGLEY, SECRETARY OF STATE OF KENTUCKY, ET AL. D. C. E. D. Ky. Application for injunction pending appeal presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

OCTOBER 9, 1970

Dismissal Under Rule 60

No. 255. E. B. ELLIOTT ADVERTISING CO. ET AL. *v.* METROPOLITAN DADE COUNTY. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 425 F. 2d 1141.

OCTOBER 12, 1970

Affirmed on Appeal

No. 357. PATE ET AL. *v.* EL PASO COUNTY, TEXAS, ET AL. Affirmed on appeal from D. C. W. D. Tex. Reported below: 324 F. Supp. 935.

No. 482. ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. *v.* SOCIALIST WORKERS PARTY ET AL. Affirmed on appeal from D. C. S. D. N. Y. Stay order of MR. JUSTICE HARLAN vacated. THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART dissent from the affirmance of the judgment and are of the opinion that probable jurisdiction should be noted and the case set for oral argument. Reported below: 314 F. Supp. 984.

Appeals Dismissed

No. 114. KELLER *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 170. WEINER, DBA LOUIS WEINER REAL ESTATE CO., ET AL. *v.* STATE REAL ESTATE COMMISSION OF NEBRASKA. Appeal from Sup. Ct. Neb. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 184 Neb. 752, 171 N. W. 2d 783.

No. 218. BELKER *v.* BOARD OF EDUCATIONAL LANDS AND FUNDS ET AL. Appeal from Sup. Ct. Neb. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 184 Neb. 621 and 185 Neb. 270; 171 N. W. 2d 156 and 175 N. W. 2d 63.

No. 220. JACOBS, TREASURER OF SUFFOLK COUNTY, ET AL. *v.* ROGERS ET AL.; and

No. 221. PACT REALTY CORP. *v.* ROGERS ET UX. Appeals from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied.

No. 234. GOETZ ET AL. *v.* BOARD OF REGENTS, STATE SENIOR COLLEGES, ET AL. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 453 S. W. 2d 290.

No. 311. TYGART *v.* ARKANSAS. Appeal from Sup. Ct. Ark. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 248 Ark. 125, 451 S. W. 2d 225.

No. 348. WELCH *v.* MISSISSIPPI. Appeal from Sup. Ct. Miss. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 233 So. 2d 219.

No. 405. CONNELLY FOUNDATION *v.* SCHOOL DISTRICT OF HAVERFORD TOWNSHIP. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 437 Pa. 536, 264 A. 2d 679.

No. 486. WHEELRIGHT ET AL. *v.* COUNTY OF MARIN ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 2 Cal. 3d 448, 467 P. 2d 537.

No. 5149. BORRAS *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 229 So. 2d 244.

No. 5296. MELTON *v.* MCCALL, GOVERNOR OF OREGON, ET AL. Appeal from Sup. Ct. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 119. MCKINNON *v.* BROWN. Appeal from App. Dept., Super. Ct. Cal., County of Riverside, 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 further consideration of question of jurisdiction should be postponed to a hearing of the case on the merits.

No. 159. RIOS *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 4th Sup. Jud. Dist., dismissed. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted. Reported below: 448 S. W. 2d 187.

No. 418. H. H. ROBERTSON CO. ET AL. *v.* NEWBERRY, GUARDIAN. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question.

No. 256. FIRST MERCANTILE CONSUMER DISCOUNT CO. *v.* STEFANELLI ET AL.; and

No. 257. OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA *v.* STEFANELLI ET AL. Appeals from Sup. Ct. N. J. dismissed. MR. JUSTICE BLACK and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted. Reported below: 55 N. J. 489, 262 A. 2d 874.

No. 223. SOUTHLAND RACING CORP. *v.* RODGERS ET AL. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. Reported below: 247 Ark. 1115, 450 S. W. 2d 3.

No. 5425. JONES *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

*Miscellaneous Orders**

No. 853. IN RE DISBARMENT OF WOLDEN. It is ordered that Russell L. Wolden, of San Francisco, California, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. ——. RIVERA *v.* RESOR, SECRETARY OF THE ARMY, ET AL.; and

No. ——. PACHL *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. D. C. N. D. Cal. Applications for stays previously granted by MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the stays should be continued.

No. ——. SIRAK *v.* BROWN, SECRETARY OF STATE OF OHIO, ET AL. C. A. 6th Cir. Application for stay and temporary injunction presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. ——. CHRISTOPHER ET AL. *v.* MITCHELL, ATTORNEY GENERAL, ET AL. D. C. D. C. Motion to dispense with printing, to dispense with jurisdictional statement, to expedite, and for other relief denied. Reported below: 318 F. Supp. 994.

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*For order amending the Court's Rules, see *post*, p. 1027.

No. —. ENGELMAN, DIRECTOR, DIVISION OF PUBLIC WELFARE, DEPARTMENT OF INSTITUTIONS AND AGENCIES OF NEW JERSEY, ET AL. *v.* AMOS ET AL. D. C. N. J. Application for stay presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 43, Orig. OREGON *v.* MITCHELL, ATTORNEY GENERAL;

No. 44, Orig. TEXAS *v.* MITCHELL, ATTORNEY GENERAL;

No. 46, Orig. UNITED STATES *v.* ARIZONA; and

No. 47, Orig. UNITED STATES *v.* IDAHO. [Motions to file bills of complaint granted, *ante,* p. 802.] Motion of the Solicitor General to consolidate these cases for oral argument granted. Motion of Frederick J. Christopher, Jr., et al. for leave to intervene and participate in oral argument in No. 46, Orig., denied.

No. 41, Orig. OHIO *v.* WYANDOTTE CHEMICALS CORP. ET AL. Case set for oral argument on motion for leave to file bill of complaint and responses thereto. The Solicitor General is invited to file a brief expressing the views of the United States and to participate in oral argument as *amicus curiae.*

No. 29. U. S. BULK CARRIERS, INC. *v.* ARGUELLES. [Certiorari granted, 398 U. S. 957.] C. A. 4th Cir. Treating motion of respondent for leave to proceed further herein *in forma pauperis* as a motion to dispense with printing respondent's brief, motion granted.

No. 51. HILL *v.* CALIFORNIA. Sup. Ct. Cal. Motion of International Association of Chiefs of Police, Inc., et al. for leave to file a brief as *amici curiae* granted. [For earlier orders herein see, *e. g.,* 398 U. S. 956.]

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. [Motion to file bill of complaint granted, 398 U. S. 956.] Motion of the State of Connecticut for leave to intervene as a party plaintiff granted.

IT IS ORDERED that John F. Davis, Esquire, of Washington, D. C., 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 compensation of the Special Master, 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 the authority to make a new designation which shall have the same effect as if originally made by the Court herein.

No. 107. 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 James Moore et al. for leave to file a brief as *amici curiae* granted.

No. 108. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* PERALES. C. A. 5th Cir. [Certiorari granted, *sub nom. Finch* v. *Perales,* 397 U. S. 1035.] Motion of American Bar Assn. for leave to file a brief as *amicus curiae* granted.

No. 59. NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. D. C. Cir. [Certiorari granted, 397 U. S. 986.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and an additional 15 minutes allotted for argument. An additional 15 minutes allotted to counsel for petitioner. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 61. INVESTMENT COMPANY INSTITUTE ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL. C. A. D. C. Cir. [Certiorari granted, 397 U. S. 986.] Motion of the Solicitor General for additional time for oral argument granted and 15 minutes allotted for that purpose. An additional 15 minutes allotted to counsel for petitioner. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 63. GROVE PRESS, INC., ET AL. *v.* MARYLAND BOARD OF CENSORS. Appeal from Ct. App. Md. [Probable jurisdiction noted, 397 U. S. 984.] Motions of Adult Film Association of America, Inc., Motion Picture Association of America, Inc., and National Association of Theater Owners, Inc., for leave to file briefs as *amici curiae* granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions.

No. 113. DECKER, U. S. DISTRICT JUDGE, ET AL. *v.* HARPER & ROW PUBLISHERS, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 397 U. S. 1073.] Motion of American Bar Assn. for leave to file a brief as *amicus curiae* granted. Motions of Illinois State Bar Assn., Ohio State Bar Assn., and Minnesota Bar Assn. for leave to join in *amicus curiae* brief of American Bar Assn. granted. Motions of Association of the Bar of the City of New York et al. and Edward S. Irons et al. for leave to file briefs as *amici curiae* granted.

No. 75. CALIFORNIA *v.* BYERS. Sup. Ct. Cal. [Certiorari granted, 397 U. S. 1035.] Motion of respondent for appointment of counsel granted. It is ordered that John W. Poulos, Esquire, of Davis, California, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 84. UNITED STATES *v.* VUITCH. Appeal from D. C. D. C. [Probable jurisdiction postponed, 397 U. S. 1061.] Motions of Robert L. Sassone and the National Legal Program on Health Problems of the Poor for leave to file briefs as *amici curiae* granted. Motion of Dr. Bart Heffernan for leave to participate in oral argument as *amicus curiae* denied.

No. 115. JIMENEZ ET AL. *v.* NAFF, YAKIMA COUNTY AUDITOR, ET AL. Appeal from D. C. E. D. Wash. [Probable jurisdiction noted, 397 U. S. 1005.] Motion of appellants to consolidate with No. 46, Orig. [*supra*], for oral argument denied.

No. 123. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL–CIO *v.* HARDEMAN. C. A. 5th Cir. [Certiorari granted, 398 U. S. 926.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 124. GRIGGS ET AL. *v.* DUKE POWER CO. C. A. 4th Cir. [Certiorari granted, 399 U. S. 926.] Motion of United Steelworkers of America, AFL–CIO, for leave to file a brief as *amicus curiae* granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 128. IN RE BURRUS ET AL. Sup. Ct. N. C. [Certiorari granted, 397 U. S. 1036.] Motion of Commonwealth of Massachusetts for leave to participate in oral argument as *amicus curiae* denied.

No. 203. McGautha *v.* California. Sup. Ct. Cal. [Certiorari granted, 398 U. S. 936]; and

No. 204. Crampton *v.* Ohio. Sup. Ct. Ohio. [Certiorari granted, 398 U. S. 936.] Motions of NAACP Legal Defense and Educational Fund, Inc., et al. for leave to file a brief as *amici curiae* in both cases granted. Motion to participate in oral argument as *amici curiae* denied. Mr. Justice Marshall took no part in the consideration or decision of these motions. Motions of American Friends Service Committee et al. and American Civil Liberties Union, Illinois Division, et al. for leave to file briefs as *amici curiae* in No. 204, granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 30 minutes allotted for that purpose. An additional 15 minutes allotted to counsel in each of these cases.

No. 299. Cohen *v.* California. Appeal from Ct. App. Cal., 2d App. Dist. [Probable jurisdiction postponed, 399 U. S. 904.] Motion of American Civil Liberties Union of Northern California for leave to file a brief as *amicus curiae* granted.

No. 323. Coolidge *v.* New Hampshire. Sup. Ct. N. H. [Certiorari granted, 399 U. S. 926.] Motion of petitioner for appointment of counsel granted. It is ordered that Archibald Cox, Esquire, of Cambridge, Massachusetts, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 324. Tate *v.* Short. Ct. Crim. App. Tex. [Certiorari granted, 399 U. S. 925.] Motion of National Legal Aid & Defender Assn. for leave to file a brief as *amicus curiae* granted. The Chief Justice took no part in the consideration or decision of this motion.

No. 242. SAMADJOPOULOS *v.* NATIONAL WESTERN LIFE INSURANCE CO. C. A. 1st Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 423 F. 2d 236.

No. 326. CROSSLIN ET VIR *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. C. A. 9th Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 422 F. 2d 1028.

No. 463. SEA PAK, A DIVISION OF W. R. GRACE & CO. *v.* INDUSTRIAL, TECHNICAL & PROFESSIONAL EMPLOYEES, A DIVISION OF NATIONAL MARITIME UNION, AFL–CIO. Appeal from C. A. 5th Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 423 F. 2d 1229.

No. 281. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. C. A. 4th Cir. [For earlier orders herein, see, *e. g., ante,* p. 805]; and

No. 436. DAVIS ET AL. *v.* BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, ET AL. C. A. 5th Cir. [Certiorari granted, *ante,* p. 804.] Motion of United Negro College Fund, Inc., et al. for leave to file a brief as *amici curiae* in both cases granted. Motions of Commonwealth of Virginia and William C. Cramer for reconsideration of denials of motions for leave to participate in oral argument as *amici curiae* in No. 281 denied.

No. 286. ALASKA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. The parties are requested to file further memoranda on the following questions:

(1) Must Congress authorize or ratify the withdrawal of territorial lands by the President?;

(2) If so, did Executive Order No. 8979 have the necessary authorization or ratification?; and

(3) Was this matter adequately raised below?

Reported below: 423 F. 2d 764.

No. 409. BOARD OF EDUCATION OF LITTLE ROCK SCHOOL DISTRICT ET AL. *v.* CLARK ET AL. C. A. 8th Cir. Motion to advance denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion. Reported below: 426 F. 2d 1035.

No. 420. MCDANIEL, SUPERINTENDENT OF SCHOOLS OF CLARKE COUNTY, ET AL. *v.* BARRESI ET AL. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 804.] Motion to dispense with printing respondents' brief granted.

No. 430. REED *v.* REED, ADMINISTRATOR. Appeal from Sup. Ct. Idaho. The Attorney General of Idaho is invited to file a brief expressing the views of the State of Idaho. Parties requested to file supplemental briefs on question of residence of each of the litigants at time of instigation of this litigation. Reported below: 93 Idaho 511, 465 P. 2d 635.

No. 679. FRIEDMAN *v.* O'ROURKE ET AL. Appeal from Ct. App. N. Y. Application for injunctive and affirmative relief presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. Reported below: 27 N. Y. 2d 645, 261 N. E. 2d 904.

No. 704. WOOD ET AL. *v.* PUTTERMAN ET AL. Appeal from D. C. Md. Application for interim injunctive relief presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 316 F. Supp. 646.

No. 769. ELLINGTON, GOVERNOR OF TENNESSEE, ET AL. *v.* BLUMSTEIN. Appeal from D. C. M. D. Tenn. Application for stay presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. THE CHIEF JUSTICE and MR. JUSTICE WHITE are of the opinion that the stay should be granted. Motion to advance denied. Reported below: —— F. Supp. ——.

No. 5167. LEWIS *v.* LICAVOLI. App. Dept., Super. Ct. Cal., County of San Francisco. Motion to defer consideration of the petition for certiorari granted.

No. 5317. MCCONNEY *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL.; and

No. 5494. KAMSLER *v.* HOFFMAN, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 5295. ADDONIZIO *v.* BARLOW, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 133. UNITED STATES *v.* THIRTY-SEVEN (37) PHOTOGRAPHS (LUROS, CLAIMANT). Appeal from D. C. C. D. Cal. Probable jurisdiction noted. Reported below: 309 F. Supp. 36.

No. 160. UNITED STATES *v.* MARYLAND SAVINGS-SHARE INSURANCE CORP. Appeal from D. C. Md. Probable jurisdiction noted. Reported below: 308 F. Supp. 761.

No. 534. UNITED STATES *v.* REIDEL. Appeal from D. C. C. D. Cal. Probable jurisdiction noted and case set for oral argument with No. 133, *supra.*

No. 5257. LABINE, TUTRIX *v.* VINCENT, ADMINISTRATOR. Appeal from Sup. Ct. La. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 255 La. 480, 231 So. 2d 395.

Certiorari Granted. (See also No. 350, *ante,* p. 3; No. 5156, *ante,* p. 2; and No. 5191, *ante,* p. 2.)

No. 125. UNITED STATES *v.* RANDALL, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Certiorari granted. Reported below: 419 F. 2d 1068.

No. 189. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* UNITED TRANSPORTATION UNION. C. A. 7th Cir. Certiorari granted. Reported below: 422 F. 2d 979.

No. 370. MAGNESIUM CASTING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari granted. Reported below: 427 F. 2d 114.

No. 434. UNITED TRANSPORTATION UNION (AS SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN) *v.* STATE BAR OF MICHIGAN. Sup. Ct. Mich. Certiorari granted. Reported below: 383 Mich. 201, 174 N. W. 2d 811.

No. 5175. PEREZ ET UX. *v.* CAMPBELL ET AL. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 421 F. 2d 619.

No. 5342. REWIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 418 F. 2d 1218.

Certiorari Denied. (See also Nos. 114, 119, 170, 218, 220, 221, 234, 311, 348, 405, 486, 5149, and 5296, *supra.*)

No. 139. KILBY *v.* NOYCE. C. C. P. A. Certiorari denied. Reported below: 57 C. C. P. A. (Pat.) 1156, 416 F. 2d 1391.

No. 140. BIGHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 1344.

No. 155. TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES, ET AL. *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. C. A. 8th Cir. Certiorari denied. Reported below: 419 F. 2d 933.

No. 150. California State Board of Equalization *v.* Carlson. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 714.

No. 161. Ross *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 424 F. 2d 1016.

No. 163. Cleveland Trust Co. et al., Executors *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 421 F. 2d 475.

No. 164. Continental Can Co., Inc. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 190 Ct. Cl. 811, 422 F. 2d 405.

No. 165. Stamp et al. *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 2 Cal. App. 3d 203, 82 Cal. Rptr. 598.

No. 166. Moyer *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 420 F. 2d 375.

No. 167. Exton Drive-In, Inc. *v.* Home Indemnity Co. et al. Sup. Ct. Pa. Certiorari denied. Reported below: 436 Pa. 480, 261 A. 2d 319.

No. 168. American National Bank of Austin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 442.

No. 171. Frederick Snare Corp. *v.* Vigo Steamship Corp. et al. Ct. App. N. Y. Certiorari denied. Reported below: 26 N. Y. 2d 157, 257 N. E. 2d 624.

No. 172. Nolan et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 2d 552.

No. 174. Gila River Pima-Maricopa Indian Community et al. *v.* United States. Ct. Cl. Certiorari denied. Reported below: 190 Ct. Cl. 790, 427 F. 2d 1194.

No. 176. SHAKESPEARE CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 189 Ct. Cl. 411, 419 F. 2d 839.

No. 177. FELICE *v.* LONG ISLAND RAILROAD CO. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 192.

No. 178. DEVERS *v.* DISTRICT OF COLUMBIA NATIONAL BANK. Sup. Ct. App. Va. Certiorari denied.

No. 180. ZEMLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 503.

No. 181. LADZINSKI *v.* SPERLING STEAMSHIP & TRADING CORP. C. A. 2d Cir. Certiorari denied.

No. 182. MCGUIRE *v.* BAKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 895.

No. 183. AMERICAN ALOE CORP. *v.* ALOE CREME LABORATORIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 420 F. 2d 1248.

No. 184. HOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 737.

No. 185. DEANE HILL COUNTRY CLUB, INC. *v.* SHULTZ, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied.

No. 188. GUGLIELMINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 439.

No. 192. CLARK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 425 F. 2d 827.

No. 193. FRYD CONSTRUCTION CORP. ET AL. *v.* T/N PLUMBING & HEATING CO.; and

No. 382. UNITED STATES FOR THE USE AND BENEFIT OF T/N PLUMBING & HEATING CO. *v.* AMERICAN FIRE & CASUALTY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 980.

No. 194. MONDAY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 421 F. 2d 1210.

No. 195. DAVIS, DBA DAVIS MFG. CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 1241.

No. 197. ECKERD ET AL. *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 84 S. D. 511, 173 N. W. 2d 287.

No. 198. DALLI *v.* UNITED STATES; and

No. 5303. PYTEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 45.

No. 199. URBANA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 412 F. 2d 1081.

No. 201. MCCONNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 2d 248.

No. 202. PEREZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 229 So. 2d 601.

No. 208. UNIVERSAL BUILDERS, INC., ET AL. *v.* CLARK ET AL.;

No. 213. ACTION REALTY CO. ET AL. *v.* BAKER ET AL.; and

No. 222. BAKER ET AL. *v.* F & F INVESTMENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 420 F. 2d 1191.

No. 210. DAVIDA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 422 F. 2d 528.

No. 211. DETROIT VITAL FOODS, INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: See 407 F. 2d 570.

No. 212. CRANE CO. *v.* WESTINGHOUSE AIR BRAKE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 419 F. 2d 787.

No. 216. B. F. GOODRICH CO. *v.* NORTHWEST INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 424 F. 2d 1349.

No. 219. UNITED MINE WORKERS OF AMERICA *v.* TENNESSEE PRODUCTS & CHEMICAL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 423 F. 2d 169.

No. 224. VLCEK ET UX. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 114 Ill. App. 2d 74, 252 N. E. 2d 377.

No. 225. ARRUDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 227. RUSSO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 230. VITELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 2d 416.

No. 231. COUNTY OF ORANGE ET AL. *v.* STERLING LIQUOR DISTRIBUTORS, INC. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 3 Cal. App. 3d 510, 83 Cal. Rptr. 571.

No. 232. MATTOX ET AL. *v.* CARSON, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 202.

No. 235. STANLEY, INC. *v.* SCHUSTER, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 421 F. 2d 1360.

No. 237. BEREND *v.* J. F. PRITCHARD & Co. C. A. 5th Cir. Certiorari denied. Reported below: 422 F. 2d 1247.

No. 239. FELICIANO ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 422 F. 2d 943.

No. 240. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 2d 1048.

No. 241. UNITED STATES *v.* McGUGIN, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 718.

No. 243. NOSSEN ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 189 Ct. Cl. 1, 416 F. 2d 1362.

No. 245. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 506.

No. 247. ST. MICHAEL & ARCHANGEL RUSSIAN ORTHODOX GREEK CATHOLIC CHURCH ET AL. *v.* UHNIAT ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 436 Pa. 222, 259 A. 2d 862.

No. 249. SCHMERLER FORD, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 250. BOREK MOTOR SALES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: No. 249, 424 F. 2d 1335; No. 250, 425 F. 2d 677.

No. 252. WILSON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 357 Mass. 49, 255 N. E. 2d 744.

No. 258. SHANKLIN *v.* AMERICAN NATIONAL TRUST ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 420 F. 2d 1117.

No. 259. KENNEDY BOOK STORE, INC. *v.* DEPARTMENT OF REVENUE ET AL. Ct. App. Ky. Certiorari denied. Reported below: 450 S. W. 2d 524.

No. 260. GRANGER *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 2d 206.

No. 263. BRISTOL-MYERS CO. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 138 U. S. App. D. C. 22, 424 F. 2d 935.

No. 264. BERKAW ET AL. *v.* MAYFLOWER CONGREGATIONAL CHURCH. Ct. App. Mich. Certiorari denied. Reported below: 18 Mich. App. 245, 170 N. W. 2d 905.

No. 266. S. S. SILBERBLATT, INC., ET AL. *v.* RENEGOTIATION BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 290.

No. 271. WILLIAMS *v.* INTERNATIONAL TYPOGRAPHICAL UNION, AFL–CIO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 423 F. 2d 1295.

No. 272. CALARCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 657.

No. 273. PORTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 426 F. 2d 519.

No. 274. PARROTT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 972.

No. 278. SINGLETON PACKING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 418 F. 2d 275.

No. 279. UNITED TRANSPORTATION UNION *v.* CLINCHFIELD RAILROAD CO. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 161.

No. 280. CONBOY ET AL. *v.* CITY OF NAPLES ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 230 So. 2d 476.

No. 282. HICKS-PONDER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 538.

No. 283. PERKINS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 287. ARTIM TRANSPORTATION SYSTEM, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 853.

No. 294. GRIECO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 407, 255 N. E. 2d 897.

No. 295. ELMORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 775.

No. 298. ALBERT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 437 Pa. 195, 262 A. 2d 855.

No. 305. SKEGA AKTIEBOLAG, FORMERLY SKELLEFTEA GUMMIFABRIKS A.-B., ET AL. *v.* B. F. GOODRICH CO. C. A. 6th Cir. Certiorari denied. Reported below: 420 F. 2d 1358.

No. 306. ARROW LINES, INC. *v.* BRAMMER ET VIR. C. A. 4th Cir. Certiorari denied. Reported below: 422 F. 2d 398.

No. 308. DIOGUARDI, AKA DIO *v.* UNITED STATES; and

No. 315. PLUMERI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 1033.

No. 309. TULLOCH *v.* VON UTTER. C. A. 1st Cir. Certiorari denied. Reported below: 426 F. 2d 1.

No. 310. HARRIS ET AL. *v.* HARRIS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 137 U. S. App. D. C. 318, 424 F. 2d 806.

No. 312. MATERIAL HANDLING INSTITUTE, INC. *v.* MCLAREN, ASSISTANT ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 426 F. 2d 90.

No. 314. NEVILLE CHEMICAL CO. *v.* UNION CARBIDE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 422 F. 2d 1205.

No. 317. MCMAHAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 1216.

No. 319. MOGULNICKI *v.* CONNECTICUT. App. Div., Cir. Ct. Conn. Certiorari denied.

No. 320. SCHY *v.* SUSQUEHANNA CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 419 F. 2d 1112.

No. 321. BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, ET AL. *v.* SCOVILLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 2d 10.

No. 327. BAIRD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 521.

No. 328. SEGAL ET AL. *v.* MORRISSEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 2d 393.

No. 329. ZARRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 423 F. 2d 1227.

No. 330. SIMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 1049.

No. 331. UNION PLANTERS NATIONAL BANK OF MEMPHIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 426 F. 2d 115.

No. 333. BENNETT ET AL. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari denied.

No. 334. BRASWELL MOTOR FREIGHT LINES, INC. *v.* LOCAL FREIGHT DRIVERS, LOCAL NO. 208, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 109.

No. 335. NEADERLAND *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 639.

No. 341. LAKEWOOD MANUFACTURING CO. *v.* HOME INSURANCE CO. OF NEW YORK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 2d 796.

No. 344. KILARJIAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: See 424 F. 2d 281.

No. 347. KELEMEN ET AL. *v.* SERBIAN ORTHODOX CHURCH CONGREGATION OF ST. DEMETRIUS OF AKRON. Sup. Ct. Ohio. Certiorari denied. Reported below: 21 Ohio St. 2d 154, 256 N. E. 2d 212.

No. 352. CONNELLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 991.

No. 353. PETLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 1101.

No. 359. CANTONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 902.

No. 361. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 426 F. 2d 93.

No. 363. BRICKEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 426 F. 2d 680.

No. 366. STATE BANK & TRUST CO. *v.* MARYLAND CASUALTY CO. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 979.

No. 371. RODEO MUSIC CORP., DBA BELAIR ENTERPRISES *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 373. MASTERSON, RECEIVER *v.* VALLEY NATIONAL BANK OF LONG ISLAND. C. A. 3d Cir. Certiorari denied. Reported below: 424 F. 2d 296.

No. 374. MILLER-DAVIS CO. *v.* PREMIER ELECTRICAL CONSTRUCTION CO. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 1132.

No. 375. MARQUEZ ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 236.

No. 376. RAMAPO BANK ET AL. *v.* COMPTROLLER OF THE CURRENCY ET AL.; and

No. 406. BRADY, COMMISSIONER OF DEPARTMENT OF BANKING OF NEW JERSEY *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 425 F. 2d 333.

No. 378. LEONE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 379. ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 423.

No. 380. THE KLAUS OLDENDORFF ET AL. *v.* POTASH IMPORT & CHEMICAL CO. C. A. 4th Cir. Certiorari denied. Reported below: 422 F. 2d 818.

No. 384. LONG ISLAND RAILROAD CO. *v.* PARKER. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 1013.

No. 389. TREMONT *v.* UNITED STATES; and
No. 5638. LEACH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 427 F. 2d 1107.

No. 390. BONAGURO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 204.

No. 393. WAGONER TRANSPORTATION CO. ET AL. *v.* BAIRD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 425 F. 2d 407.

No. 394. MINK-DAYTON, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 426 F. 2d 255.

No. 397. WILSHIRE OIL CO. OF TEXAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 2d 969.

No. 398. ADDABBO ET AL. *v.* CURTISS-WRIGHT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 411 F. 2d 451 and 424 F. 2d 427.

No. 402. JENKINS ET AL., EXECUTORS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 538.

No. 403. SAGERS, TRAINING SCHOOL DIRECTOR, ET AL. *v.* BRIGGS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 424 F. 2d 130.

No. 404. DEL TORO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 181.

No. 408. CHAPLIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 427 F. 2d 14.

No. 413. AJEM LABORATORIES, INC., ET AL. *v.* C. M. LADD CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 424 F. 2d 1124.

No. 414. DUNN *v.* NEWSPAPERS, INC. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied. Reported below: 446 S. W. 2d 101.

No. 426. AETNA CASUALTY & SURETY CO. *v.* PACIFIC EMPLOYERS INSURANCE CO. C. A. 6th Cir. Certiorari denied.

No. 427. DAWSON *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1192.

No. 431. KURFESS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 2d 1017.

No. 433. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* UNION PACIFIC RAILROAD CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 673.

No. 435. JOHNSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 446 S. W. 2d 570.

No. 437. SELLERS ET AL. *v.* TIME, INC. C. A. 3d Cir. Certiorari denied. Reported below: 423 F. 2d 887.

No. 438. SCRIVEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 439. TESTA *v.* UNITED STATES; and

No. 447. RIGGIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 378.

No. 440. EASTER *v.* AETNA INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 420 F. 2d 698.

No. 441. ISBELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 557.

No. 442. ORSINGER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 138 U. S. App. D. C. 403, 428 F. 2d 1105.

No. 443. BUCKS COUNTY CABLE TV, INC. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 427 F. 2d 438.

No. 446. TRIPOLI CO., INC. *v.* WELLA CORP. C. A. 3d Cir. Certiorari denied. Reported below: 425 F. 2d 932.

No. 449. TAGLIA *v.* LAIRD, SECRETARY OF DEFENSE. C. A. D. C. Cir. Certiorari denied.

No. 450. SMITH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 452. S. E. NICHOLS-DOVER, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 414 F. 2d 561.

No. 453. PRUDDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 1021.

No. 456. GULF STEVEDORE CORP. ET AL. *v.* HOLLIS, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 160.

No. 459. WESTINGHOUSE ELECTRIC CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 1151.

No. 460. POLLACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 1168.

No. 461. TREMONT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 429 F. 2d 1166.

No. 466. GUSTIN-BACON DIVISION, CERTAIN-TEED PRODUCTS CORP. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 426 F. 2d 539.

No. 468. DREYFUS, TRUSTEE, ET AL. *v.* FIRST NATIONAL BANK OF CHICAGO, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 1171.

No. 471. MONOSSON ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 428 F. 2d 211.

No. 473. SHERWOOD, ADMINISTRATOR *v.* PEARL RIVER VALLEY WATER SUPPLY DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 717.

No. 474. ABRAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 427 F. 2d 86.

No. 475. LIBEN ET AL., DBA M. LIBEN TIRE CO. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 476. PERLMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 22.

No. 478. ROMANO ET AL. *v.* UNITED STATES;

No. 5504. SHERBICKI *v.* UNITED STATES; and

No. 5591. GUANTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 792.

No. 479. OCEAN DRILLING & EXPLORATION CO. *v.* SIGNAL OIL & GAS CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 684.

No. 480. HOWZE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 1290.

No. 487. STEVENSON *v.* DIEBOLD, INC. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 1228.

No. 481. BUSH *v.* ALLSTATE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 393.

No. 488. PITCHFORD ET UX. *v.* KUZEMCHAK ET UX. Sup. Ct. N. M. Certiorari denied. Reported below: 81 N. M. 438, 468 P. 2d 409.

No. 489. MOHAN ET AL. *v.* KERR. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 1134.

No. 490. OGILVIE, GOVERNOR OF ILLINOIS *v.* JACKSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 2d 1333.

No. 491. DIFCO LABORATORIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 170.

No. 497. A & S ELECTRONIC DIE CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 2d 218.

No. 504. IMBURGIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 514. WINKLER *v.* WINKLER. Ct. App. N. Y. Certiorari denied.

No. 518. TIMMONS *v.* SOUTH CAROLINA TRICENTENNIAL COMMISSION ET AL. C. A. 4th Cir. Certiorari denied.

No. 547. M. P. HOWLETT, INC. *v.* THE MICHAEL MORAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 619.

No. 549. ARMSTRONG *v.* COMMERCE TANKERS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 2d 957.

No. 5107. PACHECO *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 54 N. J. 579, 258 A. 2d 368.

No. 5109. JEFFERSON *v.* BRANTLEY, WARDEN. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 31, 253 N. E. 2d 378.

No. 5119. HUGULEY *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 120 Ga. App. 332, 170 S. E. 2d 450.

No. 5124. HASKINS *v.* POINT TOWING CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 421 F. 2d 532.

No. 5128. RIDGLEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 5131. HOSKINS *v.* WINGO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 5132. CURLEY ET AL. *v.* SOUTH CAROLINA; and
No. 5150. PEARSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 253 S. C. 513, 171 S. E. 2d 699.

No. 5138. CAMPAGNE *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 419 F. 2d 833.

No. 5140. SCHOELLER *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 1183.

No. 5144. RAVICH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 1196.

No. 5146. BABCHAK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 5151. Bass *v.* North Carolina. Ct. App. N. C. Certiorari denied.

No. 5152. Rasnick *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 7 Md. App. 564, 256 A. 2d 543.

No. 5158. Mead *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 5163. Marnin *v.* New Jersey. Sup. Ct. N. J. Certiorari denied.

No. 5169. Hicks *v.* Warden, New York City Penitentiary, et al. C. A. 2d Cir. Certiorari denied.

No. 5173. Amato *v.* United States Board of Parole. C. A. 2d Cir. Certiorari denied.

No. 5174. Silva-Palacios *v.* Attorney General of the United States. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 725.

No. 5176. Burris *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 116 Ill. App. 2d 79, 253 N. E. 2d 628.

No. 5177. Jackson *v.* Official Representatives and Employees of the Los Angeles Police Department et al. C. A. 9th Cir. Certiorari denied.

No. 5179. Chambers *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 422 F. 2d 379.

No. 5181. Arrington *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 2d 244.

No. 5182. Vansant *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 620.

No. 5184. Swartz *v.* Laird, Secretary of Defense, et al. C. A. 6th Cir. Certiorari denied.

No. 5189. RHODES *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 2d 265.

No. 5192. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 1061.

No. 5193. BEARDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 805.

No. 5194. HAYES *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 5196. FULLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 1 Cal. App. 3d 664, 82 Cal. Rptr. 78.

No. 5200. RICE *v.* SCHMIDT, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 12.

No. 5201. PAYNE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 1125.

No. 5202. JONES *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 2d 1326.

No. 5203. ALLEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 5204. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 974.

No. 5206. MONTIJO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 424 F. 2d 207.

No. 5209. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 1226.

No. 5212. NIX *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 114 Ill. App. 2d 297, 252 N. E. 2d 677.

No. 5213. LAMBRIGHT *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5214. STEGEMAN ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 2d 984.

No. 5215. STARR *v.* COX, PENITENTIARY SUPERINTENDENT. Sup. Ct. App. Va. Certiorari denied.

No. 5216. GIBSON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 357 Mass. 45, 255 N. E. 2d 742.

No. 5219. SHAH *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied.

No. 5220. GILMORE *v.* GORDON ET AL., MEMBERS OF CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 860.

No. 5221. ALEXANDER *v.* LYNCH, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 5222. TROCHE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 5223. LARES *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 5225. NEWSOME *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 5227. SHARPE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 5228. CORTES ET AL. *v.* PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 422 F. 2d 1308.

No. 5229. GIBSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 662.

No. 5230. BLANKNER *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied.

No. 5231. GUERIN *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5232. SUNIGA *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 5233. BOLICK *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 723.

No. 5234. NORRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 695.

No. 5235. HILL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5236. WASHINGTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 34.

No. 5237. LA BRASCA *v.* MISTERLY, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 708.

No. 5238. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 465 P. 2d 481.

No. 5239. AGUECCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 5240. WORKMAN *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 5241. BARTLETT *v.* BAYNES, JUDGE, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 20 Ohio St. 2d 129, 253 N. E. 2d 748.

No. 5242. GRUVER *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 5243. CISNEROS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 201.

No. 5244. ALERS *v.* MUNICIPALITY OF SAN JUAN ET AL. C. A. 1st Cir. Certiorari denied.

No. 5248. MOHLAND *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 1258.

No. 5252. TYLER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 424 F. 2d 510.

No. 5253. CASEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 229.

No. 5255. SHOLE *v.* O'FERRALL, ASSISTANT ATTORNEY GENERAL OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 1229.

No. 5262. YOUNG *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 5263. JARRELS *v.* WARDEN, QUEENS HOUSE OF DETENTION FOR MEN. C. A. 2d Cir. Certiorari denied.

No. 5264. MANCUSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 23.

No. 5266. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 252.

No. 5267. WALKER *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 5268. SANDERS *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 5273. CALLAHAN *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 418 F. 2d 903.

No. 5277. FRESHWATER, AKA MORRISON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. App. ——, 453 S. W. 2d 446.

No. 5278. FOSTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 33 App. Div. 2d 813, 305 N. Y. S. 2d 399.

No. 5279. IAROSSI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 5281. BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 5282. DVORSKY *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 5283. BOOTH *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 5284. NOBLE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 5285. KEINE *v.* UNITED STATES; and

No. 5328. KREGAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 424 F. 2d 39.

No. 5286. DINNEEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 834.

No. 5287. TAYLOR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5292. NIPP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 416 F. 2d 1044 and 424 F. 2d 554.

No. 5289. CARRIER *v.* BOLING. C. A. 5th Cir. Certiorari denied.

No. 5293. HUNT *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 5294. MALONEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 105 Ariz. 348, 464 P. 2d 793.

No. 5297. EISEN *v.* EASTMAN. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 560.

No. 5298. MATALON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 70.

No. 5299. CRAWFORD *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 5300. MORENO-VALLEJO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 414 F. 2d 901 and 422 F. 2d 872.

No. 5301. APPLEGATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 1042.

No. 5302. INSANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 2d 1165.

No. 5304. RODRIQUEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 424 F. 2d 205.

No. 5306. REED *v.* KIRK, GOVERNOR OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 5307. PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 426 F. 2d 799.

No. 5308. MATTHEWS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 5310. HARPER *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 426 F. 2d 108.

No. 5313. FITTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 406 F. 2d 518.

No. 5314. KELLEY *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 424 F. 2d 518.

No. 5315. DESIMONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 2d 576.

No. 5316. COLEMAN *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 2d 985.

No. 5318. MORALES *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 81 N. M. 333, 466 P. 2d 899.

No. 5319. MCGEE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 5320. SCOTT *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5323. FONTANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 886.

No. 5324. AUSTIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 276 N. C. 391, 172 S. E. 2d 507.

No. 5329. PRICE *v.* FOLLETTE, WARDEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 5330. AYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 524.

No. 5335. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 2d 1112.

No. 5333. RAMBEAU *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 5336. PHILLIPS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 1069.

No. 5337. FORD *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 2d 178.

No. 5340. HURST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 5343. OBSTEIN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 5347. GLAZEWSKI *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 5348. BROBERG *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 287 Minn. 66, 176 N. W. 2d 904.

No. 5350. RAYBORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5352. CARTER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. App. ——, —— S. W. 2d ——.

No. 5355. DIXON *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5356. SAVAGE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 5359. CONNOLLY *v.* MASSACHUSETTS; and
No. 5436. COTE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 356 Mass. 617, 255 N. E. 2d 191.

No. 5362. DANCY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5363. WIGGINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 424 F. 2d 476.

No. 5364. MASTON, AKA MASSEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5367. RANDALL *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 5368. PATTEN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. App. ——, 452 S. W. 2d 664.

No. 5369. DOCKERY *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 5371. DENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 424 F. 2d 329.

No. 5372. STEBBINS *v.* BLUE CROSS-BLUE SHIELD ET AL. C. A. D. C. Cir. Certiorari denied.

No. 5375. CHURCHWELL *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 5376. SEARS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 231.

No. 5378. HEMSTREET *v.* LEAVEY ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 5379. WILLIAMSON *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 5381. GERBERDING *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 426 F. 2d 247.

No. 5384. BEAN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 86 Nev. 80, 465 P. 2d 133.

No. 5386. OWENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 424 F. 2d 266.

No. 5389. PRESTON *v.* WINGO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 5390. GILMORE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 118 Ill. App. 2d 100, 254 N. E. 2d 590.

No. 5391. HICKS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 550, 256 N. E. 2d 823.

No. 5392. CROSBY *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 5393. RICHARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 432.

No. 5395. REED *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 5400. WAPNICK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 2d 1361.

No. 5401. ELMER *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 463 P. 2d 14 and 466 P. 2d 375.

No. 5402. MINOR *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5404. GRANT ET UX. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 1 Cal. App. 3d 563, 81 Cal. Rptr. 812.

No. 5405. FERRELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5407. COLEMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 466, 259 N. E. 2d 269.

No. 5408. MONETT *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 190 Ct. Cl. 1, 419 F. 2d 434.

No. 5410. HOWELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 264, 255 N. E. 2d 435.

No. 5414. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1290.

No. 5415. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 423 F. 2d 479.

No. 5416. ROGERS *v.* WARDEN, NEVADA STATE PRISON. Sup. Ct. Nev. Certiorari denied. Reported below: 86 Nev. 359, 468 P. 2d 993.

No. 5420. WALTON *v.* CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied.

No. 5421. REED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 5422. MCMATH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 33, 256 N. E. 2d 835.

No. 5423. ONICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1292.

No. 5424. PARHMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 152.

No. 5430. KAUFFMAN *v.* MOSS, DISTRICT ATTORNEY OF MONTGOMERY COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 420 F. 2d 1270.

No. 5434. LAMB *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 85.

No. 5431. TAYLOR *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5440. MARKEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 2d 1043.

No. 5441. WHITE *v.* UNITED STATES;
No. 5445. CARLSON *v.* UNITED STATES;
No. 5446. HENDERSON *v.* UNITED STATES;
No. 5451. DIX *v.* UNITED STATES; and
No. 5639. DIEMERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 431.

No. 5442. CARUSIELLO *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 868.

No. 5444. GILPIN *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 24 Utah 2d 107, 466 P. 2d 834.

No. 5450. GODFREY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 5453. OVERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5495. WOODMANSEE *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: —— Vt. ——, 264 A. 2d 802.

No. 5496. JORDAN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 121 Ga. App. 303, 173 S. E. 2d 462.

No. 5498. BROWN *v.* SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 421 F. 2d 1402.

No. 5505. JACKSON *v.* ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 131. HARGRAVES *v.* VIRGINIA. Sup. Ct. App. Va. Motion of respondent to dispense with printing response to petition for certiorari granted. Certiorari denied.

No. 157. HOLLYWOOD BASEBALL ASSN. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 423 F. 2d 494.

No. 268. NOLAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 423 F. 2d 1031.

No. 467. GORDON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 424 F. 2d 378.

No. 5403. BOYDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 427 F. 2d 895.

No. 162. HATCHER *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 423 F. 2d 1086.

No. 229. BLACKWELL *v.* MISSISSIPPI. Sup. Ct. Miss. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 231 So. 2d 790.

No. 307. NEPSTEAD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 424 F. 2d 269.

No. 391. SANTORO *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 402 F. 2d 920.

No. 392. GALLAGHER *v.* UNITED STATES. Ct. Cl. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 191 Ct. Cl. 546, 423 F. 2d 1371.

No. 196. FRUCHTMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 421 F. 2d 1019.

No. 200. JACKMAN ET AL. *v.* BODINE ET AL. Sup Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 55 N. J. 371, 262 A. 2d 389.

No. 207. FEBRE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 425 F. 2d 107.

No. 214. WESTERN LAUNDRY & LINEN RENTAL CO. ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 441.

No. 244. CZEPIL *v.* TARR ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 425 F. 2d 251.

No. 293. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 427 F. 2d 658.

No. 303. STEVENSON *v.* CARPENTER ET AL. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 44 Ill. 2d 525, 256 N. E. 2d 766.

No. 318. STATE CINEMA OF PITTSFIELD, INC. *v.* RYAN ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 422 F. 2d 1400.

No. 337. TIERNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 643.

No. 351. PADDOCK POOL BUILDERS, INC., ET AL. *v.* GEORGE R. WHITTEN, JR., INC., DBA WHITTEN CORP. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 25.

No. 355. JACKSON ET AL. *v.* DORRIER ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 213.

No. 388. SAFIR ET AL. *v.* GIBSON, MARITIME ADMINISTRATOR, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 417 F. 2d 972.

No. 5126. ALLISON *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 418 F. 2d 332.

No. 5137. WARDEN *v.* HOCKER, WARDEN. Sup. Ct. Nev. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5141. PATTERSON *v.* DISTRICT COURT OF OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5143. LANGFORD *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 422 F. 2d 760.

No. 5170. MARTINEZ *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 1 Cal. 3d 641, 463 P. 2d 734.

No. 5183. RODGERS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 S. W. 2d 465.

No. 5254. YUKL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 25 N. Y. 2d 585, 256 N. E. 2d 172.

No. 5259. MUNROE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 421 F. 2d 644.

No. 5291. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5322. GILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 421 F. 2d 1353.

No. 5396. WILLIAMS *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5426. CHAUDRON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 425 F. 2d 605.

No. 253. WINGO, WARDEN *v.* BENOIT. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 423 F. 2d 880.

No. 277. TURNER, WARDEN *v.* LASSITER. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 423 F. 2d 897.

No. 342. MUSICK *v.* MACDONALD. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 425 F. 2d 373.

No. 267. SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT, ET AL. *v.* HILL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted.

No. 270. VANDERBOOM ET AL. *v.* SEXTON ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 422 F. 2d 1233.

No. 292. GRAIN HANDLING CO., INC. *v.* HARTNETT ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 421 F. 2d 1011.

No. 502. SHEEHAN ET AL. *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: 428 F. 2d 67.

No. 5325. MITCHELL *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: 425 F. 2d 1353.

No. 5380. MCLEAN *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: 424 F. 2d 513.

No. 5417. MEYER *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: 424 F. 2d 1181.

No. 340. KIRK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. 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: 138 U. S. App. D. C. 61, 425 F. 2d 492.

No. 343. NEW YORK CITY HOUSING AUTHORITY ET AL. *v.* ESCALERA ET AL. C. A. 2d Cir. Motions of respondents Escalera et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 425 F. 2d 853.

No. 367. LYKES BROS. STEAMSHIP CO., INC. *v.* HESS SHIPPING CORP. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 417 F. 2d 346 and 424 F. 2d 633.

No. 5195. CHURDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 401. ROBERTSON *v.* THE SANYO MARU ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 520.

No. 477. RKO GENERAL, INC. *v.* NEWMARK. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted. Reported below: 425 F. 2d 348.

No. 5095. REAMS *v.* WINGO, WARDEN. C. A. 6th Cir. Upon representations of the Attorney General of Kentucky that petitioner now has available an appropriate remedy, certiorari denied.

No. 5171. PIERRE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE MARSHALL is of the opinion that certiorari should be granted. Reported below: 114 Ill. App. 2d 283, 252 N. E. 2d 706.

No. 5188. LAVOIE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 418 F. 2d 732.

No. 5211. LUSTER *v.* COOKSEY. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL would grant petition for certiorari, vacate judgment below, and remand for reconsideration in light of *Mulloy* v. *United States,* 398 U. S. 410. Reported below: 422 F. 2d 562.

No. 5346. JACKSON *v.* HARTFORD ACCIDENT & INDEMNITY CO. 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: 422 F. 2d 1272.

Rehearing Denied

No. 1522, October Term, 1969. ADAMS ET AL. *v.* CITY OF COLORADO SPRINGS ET AL., 399 U. S. 901;

No. 1523, October Term, 1969. MOSCA *v.* UNITED STATES, 399 U. S. 911;

No. 1548, October Term, 1969. MAIORANI *v.* KAWASAKI KISEN K. K., KOBE, ET AL., 399 U. S. 910;

No. 1554, October Term, 1969. DAPPER *v.* MUNICIPAL COURT, SAN DIEGO JUDICIAL DISTRICT, 399 U. S. 910;

No. 1558, October Term, 1969. ZIMMERMAN *v.* UNITED STATES ET AL., 399 U. S. 911;

No. 1560, October Term, 1969. SOMMER ET AL. *v.* UNITED STATES, 399 U. S. 911;

No. 1568, October Term, 1969. CARLOUGH *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 399 U. S. 920;

No. 1619, October Term, 1969. VASILJ *v.* UNITED STATES, 399 U. S. 928;

No. 1399, Misc., October Term, 1969. CARTER ET AL. *v.* UNITED STATES, 399 U. S. 935;

No. 2066, Misc., October Term, 1969. TAYLOR *v.* SUPERIOR COURT, COUNTY OF RIVERSIDE, 399 U. S. 931;

No. 2111, Misc., October Term, 1969. LOPEZ *v.* UNITED STATES, 399 U. S. 932; and

No. 2130, Misc., October Term, 1969. HARDIE *v.* NEVILLE, U. S. DISTRICT JUDGE, 399 U. S. 922. Petitions for rehearing denied.

No. 81, October Term, 1969. SIMMONS ET UX. *v.* WEST HAVEN HOUSING AUTHORITY, 399 U. S. 510;

No. 661, October Term, 1969. HELLENIC LINES LTD. ET AL. *v.* RHODITIS, 398 U. S. 306;

No. 830, October Term, 1969. CHAMBERS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, 399 U. S. 42;

No. 1310, Misc., October Term, 1969. LEE *v.* FAULKNER, SHERIFF, 399 U. S. 919;

No. 1590, Misc., October Term, 1969. MURRAY *v.* MURRAY, 399 U. S. 902; and

No. 1730, Misc., October Term, 1969. TAYLOR *v.* CALIFORNIA, 399 U. S. 901. Petitions for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

No. 1398, October Term, 1969. ALOE CREME LABORATORIES, INC. *v.* MILSAN, INC., ET AL., 398 U. S. 928;

No. 1424, October Term, 1969. ALOE CREME LABORATORIES, INC. *v.* AMERICAN ALOE CORP., 398 U. S. 929;

No. 1459, October Term, 1969. RUEHLMANN, EXECUTOR *v.* COMMISSIONER OF INTERNAL REVENUE, 398 U. S. 950;

No. 1495, October Term, 1969. CIMINI *v.* UNITED STATES, 398 U. S. 939;

No. 1502, October Term, 1969. MCGEE *v.* UNITED STATES, 398 U. S. 951;

No. 1183, Misc., October Term, 1969. HIGGINS *v.* UNITED STATES, 398 U. S. 279;

No. 1195, Misc., October Term, 1969. LEWIS *v.* KROPP, WARDEN, 398 U. S. 952; and

No. 1923, Misc., October Term, 1969. BROWN *v.* UNITED STATES, 398 U. S. 941. Petitions for rehearing denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

No. 1932, Misc., October Term, 1969. DEDMON *v.* CRAVEN, WARDEN, 398 U. S. 941;

No. 1941, Misc., October Term, 1969. DOMER *v.* UNITED STATES, 398 U. S. 953;

No. 1946, Misc., October Term, 1969. KALEC *v.* LASH, WARDEN, 398 U. S. 953;

No. 1994, Misc., October Term, 1969. CARSON *v.* ELROD, SUPERINTENDENT, DEPARTMENT OF PUBLIC WELFARE, 398 U. S. 942; and

No. 1999, Misc., October Term, 1969. BENSON *v.* UNITED STATES ET AL., 398 U. S. 943. Petitions for rehearing denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

No. 1508, October Term, 1969. POWELL *v.* COMMITTEE ON ADMISSIONS AND GRIEVANCES ET AL., 398 U. S. 951. Petition for rehearing denied. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 1514, October Term, 1969. SABINO *v.* SUPERIOR COURT OF LOS ANGELES COUNTY ET AL., 398 U. S. 959;

No. 1520, October Term, 1969. HORTON *v.* NORTH CAROLINA, 398 U. S. 959;

No. 1524, October Term, 1969. WILLIAMS *v.* WILLIAMS, 398 U. S. 959;

No. 531, Misc., October Term, 1969. COOK *v.* UNITED STATES, 398 U. S. 968;

No. 2039, Misc., October Term, 1969. CURL *v.* BURKE, WARDEN, 398 U. S. 966; and

No. 2100, Misc., October Term, 1969. FLETCHER *v.* WAYCHOFF, DISTRICT ATTORNEY OF GREENE COUNTY, PENNSYLVANIA, ET AL., 398 U. S. 967. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 1340, October Term, 1969. GORDON *v.* UNITED STATES, 398 U. S. 927. Motion for leave to file petition for rehearing and remand denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 1053, Misc., October Term, 1969. TERRY *v.* CALIFORNIA, 399 U. S. 911. Motion for leave to file petition for rehearing denied.

No. 1670, Misc., October Term, 1969. MEARS *v.* HOCKER, WARDEN, ET AL., 399 U. S. 919. Motion for leave to file petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 2038, Misc., October Term, 1969. WHITE *v.* YOUNG, U. S. DISTRICT JUDGE, 398 U. S. 949. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

OCTOBER 13, 1970

Miscellaneous Orders

No. —. MARCELLO *v.* UNITED STATES. C. A. 5th Cir. Application for bail presented to MR. JUSTICE BLACK, and by him referred to the Court, denied.

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

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*[REPORTER'S NOTE: The text of this dissenting opinion is the same as MR. JUSTICE BLACK's in-chambers opinion as reported, *post*, p. 1208, except that the following sentence at the end of the dissenting opinion appears in lieu of the last three sentences of the in-chambers opinion: "I have no doubt that the Government's conduct in this case raises questions worthy of review, and I therefore dissent from the Court's denial of bail."]

No. —. GERARDO ET AL. *v.* NEW JERSEY; and

No. —. BOIARDO *v.* NEW JERSEY. Sup. Ct. N. J. Applications for bail presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the applications should be granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of these applications.

No. 420. MCDANIEL, SUPERINTENDENT OF SCHOOLS OF CLARKE COUNTY, ET AL. *v.* BARRESI ET AL. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 804.] Motion of State of Georgia for reconsideration of denial of motion for leave to participate in oral argument as *amicus curiae* [*ante*, p. 804] denied.

OCTOBER 19, 1970

Affirmed on Appeal

No. 704. WOOD ET AL. *v.* PUTTERMAN ET AL. Affirmed on appeal from D. C. Md. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this appeal. Reported below: 316 F. Supp. 646. [For earlier order herein, see *ante*, p. 816.]

Appeals Dismissed

No. 451. JOHNSON *v.* STATE BAR OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 588. POPPENHEIMER ET AL. *v.* TENNESSEE ET AL. Appeal from D. C. W. D. Tenn. dismissed. *Schackman* v. *Arnebergh*, 387 U. S. 427.

No. 5354. RUDERER *v.* JOHNSON ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Motion of appellant to strike scandalous matter denied. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal and motion.

No. 5480. ANDERSON *v.* KNOTT HOTELS CORP. ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Motion to postpone case denied. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. 621, October Term, 1969. WISEMAN ET AL. *v.* MASSACHUSETTS ET AL., 398 U. S. 960. Respondents requested to file within 30 days a response to petition for rehearing.

No. 1385, October Term, 1969. HUTCHERSON ET AL. *v.* LEHTIN ET AL., 399 U. S. 522. Appellees requested to file within 30 days a response to petition for rehearing.

No. 43, Orig. OREGON *v.* MITCHELL, ATTORNEY GENERAL;

No. 44, Orig. TEXAS *v.* MITCHELL, ATTORNEY GENERAL;

No. 46, Orig. UNITED STATES *v.* ARIZONA; and

No. 47, Orig. UNITED STATES *v.* IDAHO. Motion of State of Mississippi for leave to participate in oral argument as *amicus curiae* denied. [For earlier orders herein, see, *e. g., ante,* p. 810.]

No. 73. PHILLIPS *v.* MARTIN MARIETTA CORP. C. A. 5th Cir. [Certiorari granted, 397 U. S. 960.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioner granted and 20 minutes allotted for that purpose. Respondent allotted 20 additional minutes for oral argument.

No. 77. UNITED STATES *v.* WELLER. Appeal from D. C. N. D. Cal. [Probable jurisdiction postponed, 397 U. S. 985.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Appellee allotted 15 additional minutes for oral argument.

No. 78. ATLANTIC CITY ELECTRIC CO. ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. S. D. N. Y.; and

No. 106. ALABAMA POWER CO. ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 398 U. S. 903.] Motion of the Solicitor General for additional time for oral argument granted and 20 additional minutes allotted for argument on behalf of the United States. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 88. RAMSEY ET AL., DBA LEON NUNLEY COAL CO., ET AL. *v.* UNITED MINE WORKERS OF AMERICA. C. A. 6th Cir. [Certiorari granted, 397 U. S. 1006.] Motion of respondent for enlargement of time for oral argument denied.

No. 124. GRIGGS ET AL. *v.* DUKE POWER CO. C. A. 4th Cir. [Certiorari granted, 399 U. S. 926.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* on behalf of petitioners denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 99. PORT OF BOSTON MARINE TERMINAL ASSN. ET AL. *v.* REDERIAKTIEBOLAGET TRANSATLANTIC. C. A. 1st Cir. [Certiorari granted, 397 U. S. 1035.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioner granted and 20 minutes allotted for that purpose. Respondent granted 20 additional minutes for oral argument.

No. 113. DECKER, U. S. DISTRICT JUDGE, ET AL. *v.* HARPER & ROW PUBLISHERS, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 397 U. S. 1073.] Motion of petitioners to advance denied. Motion of State Bar of Texas for leave to join in *amicus curiae* brief of American Bar Assn. granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions.

No. 144. GRIFFIN ET AL. *v.* BRECKENRIDGE ET AL. C. A. 5th Cir. [Certiorari granted, 397 U. S. 1074.] Motion of respondents for leave to proceed *in forma pauperis* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioners granted and 30 minutes allotted for that purpose. Respondents allotted 30 additional minutes for oral argument.

No. 281. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. [Certiorari granted, 399 U. S. 926]; and

No. 349. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. *v.* SWANN ET AL. [Certiorari granted, *ante*, p. 805.] C. A. 4th Cir. Motion to supplement record granted. Motions of Congress of Racial Equality and Jackson Chamber of Commerce, Inc., et al. for leave to file briefs as *amici curiae* in No. 281 granted.

No. 153. TILTON ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, *sub nom. Tilton* v. *Finch*, 399 U. S. 904.] Motion of the Solicitor General for additional time for oral argument on behalf of appellees granted and 30 additional minutes allotted for that purpose. Appellants allotted 30 additional minutes for oral argument.

No. 154. JAMES ET AL. *v.* VALTIERRA ET AL. [Probable jurisdiction noted, 398 U. S. 949]; and

No. 226. SHAFFER *v.* VALTIERRA ET AL. [Probable jurisdiction noted, 399 U. S. 925.] Appeals from D. C. N. D. Cal. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of appellees denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 301. BIVENS *v.* SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS. C. A. 2d Cir. [Certiorari granted, 399 U. S. 905.] Motion of petitioner for additional time for oral argument denied.

No. 728. HODGSON ET AL. *v.* RANDALL ET AL. Appeal from D. C. Minn. Application for a partial stay presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the application should be granted. Reported below: 314 F. Supp. 32.

No. 5497. BROWN *v.* UNITED STATES. C. A. 3d Cir. Motion to defer consideration granted. Reported below: 423 F. 2d 751.

No. 5466. STURM *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. Motion for leave to file petition for writ of mandamus denied.

No. 5448. WELLS *v.* CRAVEN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 5489. JACOBS *v.* HILL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 345. UNITED STATES *v.* FREED ET AL. Appeal from D. C. C. D. Cal. Probable jurisdiction noted.

No. 169. RADICH *v.* NEW YORK. Appeal from Ct. App. N. Y. Probable jurisdiction noted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 26 N. Y. 2d 114, 257 N. E. 2d 30.

Certiorari Granted. (See also No. 175, *ante,* p. 16.)

No. 156. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE *v.* YEE CHIEN WOO. C. A. 9th Cir. Certiorari granted. Reported below: 419 F. 2d 252.

No. 362. MCGEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 426 F. 2d 691.

No. 338. BLONDER-TONGUE LABORATORIES, INC. *v.* UNIVERSITY OF ILLINOIS FOUNDATION ET AL. C. A. 7th Cir. Motion of Finney Co. for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 422 F. 2d 769.

No. 5247. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and petition. Reported below: 138 U. S. App. D. C. 174, 426 F. 2d 651.

No. 5481. SCHLANGER *v.* SEAMANS, SECRETARY OF THE AIR FORCE, ET AL. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied. (See also Nos. 451, 5354, and 5480, *supra.*)

No. 146. ABEX CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 420 F. 2d 928.

No. 191. SAMS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 121 Ga. App. 46, 172 S. E. 2d 473.

No. 251. CALIFORNIA ET AL. *v.* IMBLER. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 631.

No. 354. RAMOS *v.* THE DETROIT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 423 F. 2d 916.

No. 372. WILSON ET AL. *v.* BLOUNT, POSTMASTER GENERAL, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 422 F. 2d 866.

No. 381. JENKINS *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 399. LYKES-YOUNGSTOWN CORP. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 190 Ct. Cl. 348, 420 F. 2d 735.

No. 400. ZELECHOWER ET AL. *v.* YOUNGER, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 1256.

No. 407. DECCA LIMITED *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 190 Ct. Cl. 454, 420 F. 2d 1010.

No. 428. AMERICAN SURETY CO. OF NEW YORK *v.* BARRIENTOS ET AL. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 445. COOGAN *v.* CINCINNATI BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 21 Ohio St. 2d 147, 256 N. E. 2d 218.

No. 458. FIFTH DISTRICT REPUBLICAN COMMITTEE *v.* MICHIGAN EMPLOYMENT SECURITY COMMISSION. Ct. App. Mich. Certiorari denied. Reported below: 19 Mich. App. 449, 172 N. W. 2d 825.

No. 509. SEEBURG CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 425 F. 2d 124.

No. 5168. MESSER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 120 Ga. App. 747, 172 S. E. 2d 194.

No. 5419. CUNNINGHAM *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 5433. MCGROGAN *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 5438. STARKEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 422 F. 2d 1331.

No. 5449. CALVILLO *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5455. BANE *v.* SPENCER ET AL. C. A. 1st Cir. Certiorari denied.

No. 5456. PERKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 139 U. S. App. D. C. 179, 432 F. 2d 612.

No. 5461. HINES *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 5463. HOLNAGEL *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 426 F. 2d 777.

No. 5464. BARBER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 2d 70.

No. 5465. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 1035.

No. 5468. BATTLE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 5469. BRIGHT *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 5472. MITCHELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 434 F. 2d 483.

No. 5473. NORRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5474. MILANI *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 425 F. 2d 6.

No. 5475. GAY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5479. CLEVELAND *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 5486. FLOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 63.

No. 5488. ROBERTSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1386.

No. 5487. PRUNEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1289.

No. 5493. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 426 F. 2d 275.

No. 5502. PLASCENCIA-PLASCENCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 803.

No. 5503. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 5508. MCKINNON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 845.

No. 5509. LAUCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 2d 258.

No. 158. ELLIS ET AL., TRUSTEES *v.* MDG SUPPLY, INC. Sup. Ct. Hawaii. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 51 Haw. 375, 463 P. 2d 525.

No. 215. GREYHOUND LINES, INC. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SHASTA (CHISEFSKI ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 3d App. Dist. Motion of National Association of Motor Bus Owners for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 3 Cal. App. 3d 356, 83 Cal. Rptr. 343.

No. 265. NATIONAL LABOR RELATIONS BOARD *v.* CLARK'S GAMBLE CORP., DBA CLARK'S DISCOUNT DEPARTMENT STORE, ET AL. C. A. 6th Cir. Motion to use record in No. 439, October Term, 1969, granted. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 422 F. 2d 845.

No. 365. McIntosh *v.* United States; and

No. 368. Persico *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of these petitions. Reported below: 425 F. 2d 1375.

No. 395. Lazarus *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. Reported below: 425 F. 2d 638.

No. 415. United States *v.* Waterman, Largen & Co., Inc. Ct. Cl. Certiorari denied. Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice Blackmun are of the opinion that certiorari should be granted. Reported below: 189 Ct. Cl. 364, 419 F. 2d 845.

No. 416. Commissioner of Internal Revenue *v.* Steadman et ux. C. A. 6th Cir. Certiorari denied. Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice Blackmun are of the opinion that certiorari should be granted. Reported below: 424 F. 2d 1.

No. 425. Schieffelin & Co. et al. *v.* United States. C. C. P. A. Certiorari denied. Mr. Justice Douglas and Mr. Justice Stewart are of the opinion that certiorari should be granted. Reported below: 57 C. C. P. A. (Cust.) 66, 424 F. 2d 1396.

No. 5121. Donaldson *v.* O'Connor et al. Sup. Ct. Fla. Motions of Medical Committee for Human Rights, Connecticut Psychologists for Social Action, American Civil Liberties Union, and New York Lawyers' Committee for Civil Rights Under Law for leave to file briefs as *amici curiae* granted. Certiorari denied without prejudice to petitioner's right to apply to appropriate United States District Court for relief. Reported below: 234 So. 2d 114.

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No. 5122. CHAMBERS *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

MR. JUSTICE BRENNAN, dissenting.

I dissent. I think we should take this case and decide the important question it presents of the *res judicata* effect of a federal habeas court's determination that evidence used to obtain a state court conviction was improperly admitted because it was the fruit of an unconstitutional search and seizure.

Petitioner was convicted in a Virginia state court of unlawful possession of narcotics seized from his person after his arrest when he entered the apartment of another during a lawful police search of the apartment for narcotics. After exhausting state remedies, he sought federal habeas relief, contending that his mere entry into the apartment provided no probable cause for his arrest and the subsequent search of his person. The parties declined the District Court's offer of a hearing to augment the trial record and stipulated that it contained all the "necessary" facts. The District Court determined on the state record that the police did not have probable cause for petitioner's arrest, and therefore that the narcotics seized from his person had been improperly admitted in evidence. The court ordered petitioner discharged if not retried by the State within 30 days.

Virginia took no appeal from this judgment. Instead, it proceeded to retry petitioner. Over petitioner's objection, the State was allowed to repair the deficiency in its probable-cause case by introducing other evidence available to it but not offered at the first state trial. With the State's case thus buttressed, the Virginia trial court once again found probable cause for petitioner's arrest, and admitted the seized narcotics in evidence.

When the Supreme Court of Appeals of Virginia declined to hear his appeal, petitioner filed the present ap-

plication for federal habeas corpus, contending that the earlier federal habeas judgment was *res judicata* on the issue of probable cause. The District Court, however, viewed the sole question before it as "whether the retrial . . . produced additional evidence weighing on probable cause to lend propriety to the arrest and the subsequent search." Answering that question in the affirmative, the District Court denied the application in an unreported opinion and the Court of Appeals affirmed.

"The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. . . . And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties." *Angel* v. *Bullington,* 330 U. S. 183, 192–193 (1947). Although this Court has decided the question of the application of this principle in cases of the *denial* of habeas relief, see *Sanders* v. *United States,* 373 U. S. 1 (1963), the *res judicata* effect of a habeas judgment *granting* the writ remains a debatable question here. The common law recognized that the reasons which precluded the application of *res judicata* to a *denial* of the writ, were not relevant when a court *granted* the writ: a habeas judgment *granting* the application constituted *res judicata* as to the illegality of the custody and of all issues of law and fact necessarily involved in that result. See, *e. g., McConologue's Case,* 107 Mass. 154, 170–171 (1871). At least one opinion in this Court seems to adopt the same rule: in *Collins* v. *Loisel,* 262 U. S. 426, 430 (1923), Mr. Justice Brandeis, writing for a unanimous Court in a habeas proceeding instituted by a person being held for extradition, said,

> "a judgment in *habeas corpus* proceedings discharging a prisoner held for preliminary examination may

operate as *res judicata*. But the judgment is *res judicata* only that he was at the time illegally in custody, *and of the issues of law and fact necessarily involved in that result.*" (Italics supplied in part.)

However, federal and state courts have given varying scope to this pronouncement. Thus, considerable confusion (as evidenced by the present case), has developed over the appropriate scope of the principle of *res judicata* in cases in which the prisoner obtains habeas relief, and over the issues to which it ought properly to apply if it is applicable. Too wide an interpretation of the habeas judgment's scope might deter a State from retrying a prisoner who should properly be brought to account for his actions. On the other hand, failure to give *res judicata* effect to habeas judgments determining as in the present case specific factual issues, may seriously undermine the writ: a State would have no incentive fully to litigate a question in the habeas proceeding if it could always relitigate the question on retrial. Moreover, in the present case, the State offered no reason for its failure to adduce at the first proceeding evidence concededly available at that time. No policy is served—and overburdened judicial resources are wasted—by needless relitigation of issues already fairly decided.

This case thus presents an issue of substantial importance in the administration of federal habeas corpus jurisdiction. It is an issue that will not go away, and we should take this case and decide it now.

No. 5471. BROOKS *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 1149.

No. 5148. BRASWELL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 230 So. 2d 192.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I would grant certiorari in this case to hold that Florida cannot enforce a mere procedural rule by denying a criminal defendant his constitutional right to present witnesses on his own behalf. In this assault trial, the defendant asked the judge to invoke the "Witness Rule," directing prospective witnesses "not [to] permit anyone to discuss [the case] in your presence." The judge invoked the rule but instructed only those witnesses who were then present. A defense witness who arrived late missed the instruction, and, unknown to the defendant or his counsel, heard some of the prosecution's evidence. When the defense later attempted to call this witness to support the defendant's testimony that the alleged assault was an act of self-defense, the prosecutor objected to the competency of the witness because he had violated the "Witness Rule." Over the defendant's objection that the witness would give material testimony in the defendant's favor, the judge refused to permit the witness to testify.

While the "Witness Rule" has a valid purpose and can contribute to the search for truth, a breach of the rule cannot be used to deny a criminal defendant his constitutional right to obtain and present witnesses in his favor. U. S. Const., Amdt. VI; cf. *Washington* v. *Texas*, 388 U. S. 14 (1967). A simple rule of courtroom "fairness" has been misused to destroy a sacred constitutional right.

I would grant certiorari in this case and reverse the conviction below so that the defendant might have the right to present his side of the story.

No. 457. LASH, WARDEN *v.* SMITH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

Rehearing Denied

No. 1187, October Term, 1968. PERSICO ET AL. *v.* UNITED STATES, 395 U. S. 911. Joint motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 1518, October Term, 1969. HUIE *v.* BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, 399 U. S. 905. Motions for THE CHIEF JUSTICE and MR. JUSTICE BLACK to recuse themselves denied. Petition for rehearing denied.

OCTOBER 20, 1970

Dismissals Under Rule 60

No. 505. UNITED STATES *v.* FIX. Appeal from D. C. N. D. Cal. dismissed pursuant to Rule 60 of the Rules of this Court.

No. 5374. CASHAW *v.* WOODS, SHERIFF, ET AL. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

No. 5526. STEPHENS *v.* UNITED STATES. C. A. 10th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 425 F. 2d 247.

OCTOBER 23, 1970

Miscellaneous Orders

No. —. MECK *v.* COMMANDING OFFICER, VALLEY FORGE GENERAL HOSPITAL, ET AL. C. A. 3d Cir. Application for stay of deployment and injunction pending appeal presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted.

No. ——. Baker et al., Trustees of Property of Penn Central Transportation Co. *v.* Pennsylvania et al. D. C. W. D. Pa. Application for stay of interlocutory injunction pending appeal presented to Mr. Justice Brennan, and by him referred to the Court, denied.

October 26, 1970

Appeal Dismissed

No. 5811. Anderson *v.* American Broadcasting Co. et al. Appeal from D. C. S. D. N. Y. Application for stay presented to Mr. Justice Harlan, and by him referred to the Court, denied. Appeal dismissed for want of jurisdiction.

Miscellaneous Orders

No. 1109, October Term, 1968. Weed *v.* Bilbrey et al., 394 U. S. 1018, 395 U. S. 971, 397 U. S. 930. Respondents requested to file response within 30 days to motion for leave to file third petition for rehearing. The Chief Justice and Mr. Justice Blackmun took no part in the consideration or decision of this matter.

No. 31, Orig. Utah *v.* United States. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs, shall be filed within 60 days. [For previous actions, see, *e. g.*, 393 U. S. 921 and 394 U. S. 89.]

No. 121. Mayberry *v.* Pennsylvania. Sup. Ct. Pa. [Certiorari granted, 397 U. S. 1020.] Motion of Carol Mary Los for leave to participate in oral argument, *pro hac vice*, granted.

No. 420. McDaniel, Superintendent of Schools, et al. *v.* Barresi et al. [Certiorari granted, *ante*, p. 804.] Motion of respondents for leave to file a brief after argument granted.

No. 712. TRIANGLE IMPROVEMENT COUNCIL ET AL. *v.* RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF WEST VIRGINIA, ET AL. C. A. 4th Cir. Application for injunction pending disposition of petition for writ of certiorari presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the application should be granted. Reported below: 429 F. 2d 423.

No. 799. COCANOWER *v.* MARSTON, RECORDER FOR MARICOPA COUNTY, ET AL. Appeal from D. C. Ariz. Motion to advance and expedite hearing denied. Reported below: 318 F. Supp. 402.

No. 825. NEW YORK *v.* COOPER, U. S. DISTRICT JUDGE. C. A. 2d Cir. Motion to expedite consideration of petition for certiorari denied.

No. 882. HADNOTT ET AL. *v.* AMOS, SECRETARY OF STATE OF ALABAMA, ET AL. Appeal from D. C. M. D. Ala. Application for continuance of stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the application should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application. Reported below: 320 F. Supp. 107.

No. 5875. ANDERSON *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeal from D. C. S. D. N. Y. Motion to advance denied. Application for stay presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied.

No. 465. SAYLES *v.* WIEGAND ET AL. Motion to dispense with printing motion for leave to file petition for writ of mandamus granted. Motion for leave to file petition for writ of mandamus denied.

No. 5520. JOHNSON *v.* MICHIGAN ET AL. Motion for leave to file petition for writ of certiorari denied.

Probable Jurisdiction Noted

No. 507. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL. *v.* JAVA ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted. Reported below: 317 F. Supp. 875.

No. 5714. JENNESS ET AL. *v.* FORTSON, SECRETARY OF STATE OF GEORGIA. Appeal from D. C. N. D. Ga. Motion to advance denied. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 315 F. Supp. 1035.

Certiorari Granted. (See also No. 5272, *ante*, p. 17.)

No. 464. GAINESVILLE UTILITIES DEPARTMENT ET AL. *v.* FLORIDA POWER CORP.; and

No. 469. FEDERAL POWER COMMISSION *v.* FLORIDA POWER CORP. C. A. 5th Cir. Motion of American Public Power Assn. for leave to file a brief as *amicus curiae* in No. 464 granted. Certiorari granted. Reported below: 425 F. 2d 1196.

Certiorari Denied

No. 248. INDIANA REVENUE BOARD ET AL. *v.* INDIANA EX REL. CITY OF INDIANAPOLIS ET AL.; and

No. 610. INDIANA REVENUE BOARD ET AL. *v.* INDIANA EX REL. CITY OF INDIANAPOLIS ET AL. App. Ct. Ind. Certiorari denied. Reported below: No. 248, —— Ind. App. ——, 253 N. E. 2d 725; No. 610, —— Ind. App. ——, 255 N. E. 2d 833.

No. 385. PUERTO RICO TELEPHONE CO. *v.* FIGUEROA DE ARROYO ET AL.; and

No. 522. FIGUEROA DE ARROYO ET AL. *v.* PUERTO RICO TELEPHONE CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 425 F. 2d 281.

No. 421. TREFINA, A. G. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 1118.

No. 462. BARR RUBBER PRODUCTS CO. *v.* SUN RUBBER CO. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 1114.

No. 483. ALMSTEAD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 485. HAWTHORNE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 176, 258 N. E. 2d 319.

No. 492. GALLAGHER ET UX. *v.* WILBOUR ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 77 Wash. 2d 306, 462 P. 2d 232.

No. 494. KASTENBAUM *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 499. GRINNELL CORP. ET AL. *v.* RUSS TOGS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 850.

No. 501. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 503. HUDSON OIL COMPANY OF MOBILE, INC. *v.* MCLEOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 1269.

No. 506. DALY *v.* DALY. Sup. Ct. App. Va. Certiorari denied.

No. 510. MULLER ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 511. ALFRED M. LEWIS, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 303.

No. 512. HY-VEE FOOD STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 426 F. 2d 763.

No. 516. WEBER ET AL. *v.* HIATT. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 1366.

No. 519. ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* NIVENS. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 114.

No. 5500. LEYVAS *v.* UNITED STATES; and
No. 5645. SENDEJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 1040.

No. 5510. MACDONALD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5511. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 1358.

No. 5512. PRINCIPE *v.* KELLER, DISTRICT ATTORNEY OF SAN DIEGO COUNTY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 5517. ORME *v.* FIELD, MEN'S COLONY SUPERINTENDENT, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5521. FAIRLEY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 5523. LI *v.* ROSENBERG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 5524. PURSLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 961.

No. 5525. MILLER *v.* PLEASURE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 1205.

No. 5527. STEBBINS *v.* GEORGE WASHINGTON UNIVERSITY. C. A. D. C. Cir. Certiorari denied.

No. 5528. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 1164.

No. 5530. FORTMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 4 Cal. App. 3d 495, 84 Cal. Rptr. 458.

No. 5534. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 426 F. 2d 793.

No. 5535. MOORE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 5536. MCKNIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 2d 75.

No. 5538. LOCKHART *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 5541. TILLERY *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5542. HALL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 540, 259 N. E. 2d 799.

No. 5544. JUNGER *v.* HERTZ, NEUMARK & WARNER. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 805.

No. 5545. PENNINGTON *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 2d 615, 261 N. E. 2d 415.

No. 5546. TAYLOR ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 8th Cir. Certiorari denied. Reported below: 423 F. 2d 1277.

No. 5548. RIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 5550. MARTINEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 86.

No. 5552. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 426 F. 2d 253.

No. 5556. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5557. LIMA *v.* CHRYSLER CORP. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 5558. ROMEO *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 56 N. J. 249, 265 A. 2d 704.

No. 5563. SHARLOW *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 47 Wis. 2d 259, 177 N. W. 2d 88.

No. 5564. SAVAGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5568. MEEKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 881.

No. 5569. BENNETT *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 425 F. 2d 181.

No. 5572. HUCKABAY *v.* WOODMANSEE, JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 5573. COX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 428 F. 2d 683.

No. 5575. GELB *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 190 Ct. Cl. 937.

No. 5576. HOULE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 816.

No. 5579. SULLIVAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 5585. WARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 2d 244.

No. 296. MITCHELL ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 45 Ill. 2d 148, 258 N. E. 2d 345.

No. 304. BAK ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 45 Ill. 2d 140, 258 N. E. 2d 341.

No. 419. MCDOUGALD *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Cumberland County. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted.

No. 472. ELLIOTT *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 426 F. 2d 775.

No. 513. BEAUMONT *v.* AUSSENHEIMER ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 427 F. 2d 667.

Rehearing Denied

No. 1348, October Term, 1969. PACIFIC NATIONAL INSURANCE CO. *v.* UNITED STATES, 398 U. S. 937. Motion for leave to file petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 1380, October Term, 1969. HORELICK ET AL. *v.* NEW YORK, 398 U. S. 939. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Reed (retired) to perform judicial duties in the United States Court of Claims beginning October 5, 1970, and ending June 30, 1971, 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.

OCTOBER 31, 1970

Miscellaneous Order

No. —. BEYTAGH ET AL. *v.* NOBLE ET AL. D. C. N. D. Ind. Application for temporary and conditional injunctive relief presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

NOVEMBER 3, 1970

Dismissals Under Rule 60

No. 752. STANDARD INDUSTRIES, INC. *v.* TIGRETT INDUSTRIES, INC., ET AL. C. A. 6th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

No. 5382. JONES *v.* PROCUNIER, CORRECTIONS DIRECTOR. C. A. 9th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

NOVEMBER 6, 1970

Miscellaneous Order

No. 729. HODGSON *v.* MINNESOTA. Appeal from Sup. Ct. Minn. Application for stay presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

NOVEMBER 9, 1970

Affirmed on Appeal

No. 254. PARISH SCHOOL BOARD OF PARISH OF ST. CHARLES ET AL. *v.* STEWART ET AL. Affirmed on appeal from D. C. E. D. La., *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204. MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 310 F. Supp. 1172.

No. 540. BOWER, STATE HOSPITAL SUPERINTENDENT *v.* VAUGHAN ET AL. Affirmed on appeal from D. C. Ariz. Motion of appellees for leave to proceed *in forma pauperis* granted. MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 313 F. Supp. 37.

Appeals Dismissed

No. 679. FRIEDMAN *v.* O'ROURKE ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. [For earlier order herein, see *ante*, p. 816.]

No. 5387. SMITH *v.* IOWA LIQUOR CONTROL COMMISSION. Appeal from Sup. Ct. Iowa 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 and case set for oral argument. Reported below: 169 N. W. 2d 803.

No. 5531. RUDERER *v.* GERKEN ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Motion of appellant to strike scandalous matter denied. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and appeal.

No. 5652. LEHMAN *v.* CALIFORNIA. Appeal from D. C. S. D. Cal. dismissed for want of jurisdiction.

Miscellaneous Orders

No. —. ANNUNZIATA *v.* UNITED STATES. C. A. 3d Cir. Application for bail presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 71. ABATE ET AL. *v.* MUNDT ET AL. Ct. App. N. Y. [Certiorari granted, 397 U. S. 904.] Motion of petitioners for leave for three attorneys to participate in oral agreement granted.

No. 203. MCGAUTHA *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, 398 U. S. 936.] Motion for appointment of counsel to represent petitioner granted. Motion of Luke McKissack for leave to file a brief as *amicus curiae* granted.

No. 42, Orig. MASSACHUSETTS *v.* LAIRD, SECRETARY OF DEFENSE. Motion of Constitutional Lawyers' Committee on Undeclared War for leave to file supplemental brief as *amicus curiae* granted. Motion of John M. Wells et al. for leave to file a brief as *amici curiae,* to participate in oral argument, or alternative motion to be named as parties plaintiff, denied. Motion for leave to file bill of complaint denied. MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent. They would set the latter motion for argument on questions of standing and justiciability.

MR. JUSTICE DOUGLAS, dissenting.

This motion was filed by the Commonwealth of Massachusetts against the Secretary of Defense, a citizen of another State. It is brought pursuant to a mandate contained in an act of the Massachusetts Legislature. 1970 Laws, c. 174. Massachusetts seeks to obtain an adjudication of the constitutionality of the United States' participation in the Indochina war. It requests that the United States' participation be declared "unconstitutional in that it was not initially authorized or subsequently ratified by Congressional declaration"; it asks that the Secretary of Defense be enjoined "from carrying out, issuing or causing to be issued any further orders which would increase the present level of United States troops in Indochina"; and it asks that, if appropriate congressional action is not forthcoming within 90 days of this Court's decree, the Secretary of Defense be enjoined "from carrying out, issuing, or causing to be issued any further orders directing any inhabitant of the Commonwealth of Massachusetts to Indochina for the purpose of participating in combat or supporting combat troops in the Vietnam war." Today this Court denies leave to file the complaint. I dissent.

The threshold issues for granting leave to file a complaint in this case are standing and justiciability. I believe that Massachusetts has standing and the controversy is justiciable. At the very least, however, it is apparent that the issues are not so clearly foreclosed as to justify a summary denial of leave to file.

STANDING

In *Massachusetts* v. *Mellon,* 262 U. S. 447 (hereafter *Mellon*), the Court held that a State lacked standing to challenge, as *parens patriae,* a federal grant-in-aid program under which the Federal Government was allegedly usurping powers reserved to the States. It was said in *Mellon:*

> "[T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri* v. *Illinois,* 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." *Id.,* at 485–486.

The Solicitor General argues that *Mellon* stands as a bar to this suit.

Yet the ruling of the Court in that case is not dispositive of this one. The opinion states: "We need not go so far as to say that a State may never intervene by

suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here." *Id.*, at 485. Thus the case did not announce a *per se* rule to bar all suits against the Federal Government as *parens patriae,* and a closer look at the bases of the opinion is necessary to determine the limits on its applicability.

Mellon relates to an Act of Congress signed by the Executive, a distinction noted in other original actions. In *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, we stated, "[t]his is not a suit like those in *Massachusetts* v. *Mellon,* and *Florida* v. *Mellon, supra,* [273 U. S. 12] where a State sought to protect her citizens from the operation of federal statutes." *Id.,* at 446–447.

Massachusetts attacks no federal statute. In fact, the basis of Massachusetts' complaint is the absence of congressional action.

It is said that the Federal Government "represents" the citizens. Here the complaint is that only one representative of the people, the Executive, has acted and the other representatives of the citizens have not acted, although, it is argued, the Constitution provides that they must act before an overseas "war" can be conducted.

There was a companion case to *Mellon* in which the Court held that a taxpayer lacked standing to challenge the same federal spending statute. *Frothingham* v. *Mellon,* 262 U. S. 447 (hereafter *Frothingham*). Two years ago we reconsidered *Frothingham* and found at least part of the ruling could not stand the test of time. Concurring in the result, I stated:

> "*Frothingham,* decided in 1923, was in the heyday of substantive due process, when courts were sitting in judgment on the wisdom or reasonableness of legislation. The claim in *Frothingham* was that a

> federal regulatory Act dealing with maternity deprived the plaintiff of property without due process of law. When the Court used substantive due process to determine the wisdom or reasonableness of legislation, it was indeed transforming itself into the Council of Revision which was rejected by the Constitutional Convention. It was that judicial attitude, not the theory of standing to sue rejected in *Frothingham,* that involved 'important hazards for the continued effectiveness of the federal judiciary,' to borrow a phrase from my Brother HARLAN. A contrary result in *Frothingham* in that setting might well have accentuated an ominous trend to judicial supremacy." *Flast* v. *Cohen,* 392 U. S. 83, 107.

In *Flast* we held that a taxpayer had standing to challenge a federal spending program, if he showed that Congress breached a specific limitation on its taxing and spending power. As MR. JUSTICE STEWART stated in his concurring opinion, "[t]he present case is thus readily distinguishable from *Frothingham* v. *Mellon,* 262 U. S. 447, where the taxpayer did not rely on an explicit constitutional prohibition but instead questioned the scope of the powers delegated to the national legislature by Article I of the Constitution." 392 U. S., at 114.

The erosion of *Frothingham* does not, of course, necessarily mean that the authority of *Mellon* has been affected. But if the current debate over *Frothingham* "suggests that we should undertake a fresh examination of the limitations upon standing to sue," 392 U. S., at 94, then surely the erosion of *Frothingham* suggests it is time to re-examine its companion case.

Mellon, too, has been eroded by time. In the spring of 1963 the Governor of Alabama moved for leave to file

a complaint to prevent the President from using troops in Birmingham during civil rights marches there. Under the Solicitor General's reading of *Mellon* Alabama would have lacked standing to challenge such an exercise of presidential authority. The Court denied Alabama relief, not because of *Mellon,* but because:

> "In essence the papers show no more than that the President has made ready to exercise the authority conferred upon him by 10 U. S. C. § 333 by alerting and stationing military personnel in the Birmingham area. Such purely preparatory measures and their alleged adverse general effects upon the plaintiffs afford no basis for the granting of any relief." *Alabama* v. *United States,* 373 U. S. 545.

In *South Carolina* v. *Katzenbach,* 383 U. S. 301, *Mellon* was further weakened. In that case we denied standing to South Carolina to assert claims under the Bill of Attainder Clause of Art. I and the principle of separation of powers which were regarded "only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt." 383 U. S., at 324. Yet we went on to allow South Carolina to challenge the Voting Rights Act of 1965 as beyond congressional power under the Fifteenth Amendment.

The main interest of South Carolina was in the continuing operation of its election laws. Massachusetts' claim to standing in this case is certainly as strong as South Carolina's was in the *Katzenbach* case.

Massachusetts complains, as *parens patriae,* that its citizens are drafted and sent to fight in an unconstitutional overseas war. Their lives are in jeopardy. Their liberty is impaired.

Furthermore, the basis on which *Flast* distinguished *Frothingham* is also present here. The allegation in

both *Mellon* and *Frothingham* was that Congress had exceeded the general powers delegated to it by Art. I, § 8, and invaded the reserved powers of the States under the Tenth Amendment. The claim was not specific; but, as *Flast* held, if a taxpayer can allege spending violates a *specific constitutional limitation,* then he has standing. Here Massachusetts points to a specific provision of the Constitution. Congress by Art. I, § 8, has the power "To declare War." Does not that make this case comparable to *Flast?*

It has been settled, at least since 1901, that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them," *Missouri* v. *Illinois,* 180 U. S. 208, 241, in an original action in this Court. And see *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237–238; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 591–592; *North Dakota* v. *Minnesota,* 263 U. S. 365, 372–376; *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 450–451. Those cases involved injury to inhabitants of one State by water or air pollution of another State, by interference with navigation, by economic losses caused by an out-of-state agency, and the like. The harm to citizens of Massachusetts suffered by being drafted for a war are certainly of no less a magnitude. Massachusetts would clearly seem to have standing as *parens patriae* to represent, as alleged in its complaint, its male citizens being drafted for overseas combat in Indochina.

JUSTICIABILITY

A question that is "political" is opposed to one that is "justiciable." In reviewing the dimensions of the "political" question we said in *Baker* v. *Carr,* 369 U. S. 186, 217:

> "Prominent on the surface of any case held to involve a political question is found a textually

> demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

1. *A textually demonstrable constitutional commitment of the issue to a coordinate political department.* At issue here is the phrase in Art. I, § 8, cl. 11: "To declare War." Congress definitely has that power. The Solicitor General argues that only Congress can determine whether it has declared war. He states, " 'To declare War' includes a power to determine, free of judicial interference, the form which its authorization of hostilities will take." This may be correct. But, as we stated in *Powell* v. *McCormack,* 395 U. S. 486, the question of a textually demonstrable commitment and "what is the *scope* of such commitment are questions [this Court] must resolve for the first time in this case." *Id.,* at 521 (emphasis added). It may well be that it is for Congress, and Congress alone, to determine the form of its authorization, but if that is the case we should make that determination only after full briefs on the merits and oral argument.

2. *A lack of judicially discoverable and manageable standards for resolving the issue.* The standards that are applicable are not elusive. The case is not one where

the Executive is repelling a sudden attack.[1] The present Indochina "war" has gone on for six years. The question is whether the Gulf of Tonkin Resolution was a declaration of war or whether other Acts of Congress were its equivalent.

3. *The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.* In *Ex parte Milligan,* 4 Wall. 2, 139 (concurring opinion), it was stated that "neither can the President, in war more than in peace, intrude upon the proper authority of Congress . . . ." [2] The issue in this case is not whether we ought to fight a war in Indochina, but whether the Executive can authorize it without congressional authorization. This is not a case where we would have to determine the wisdom of any policy.

4. *The impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government.* The Solicitor General argues that it would show disrespect of the Executive to go behind his statements and determine his au-

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[1] An early draft of the Constitution vested in Congress the power to "make" war rather than the power to "declare" war. The change from "make" to "declare" was intended to authorize the President the power to repel sudden attacks and to manage, as Commander in Chief, any war declared by Congress. The change was not intended to give the President power to initiate hostilities and commit troops in war at his own will. The Framers were afraid of unlimited executive power and "resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us." A. Lincoln as quoted in E. Corwin, The President: Office & Powers, 1787–1957, p. 451 (4th ed. 1957). See generally Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771 (1968).

[2] The majority in *Milligan* stated: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." 4 Wall., at 120–121.

thority to act in these circumstances. Both *Powell* and the *Steel Seizure Case* (*Youngstown Sheet & Tube* v. *Sawyer,* 343 U. S. 579), however, demonstrate that the duty of this Court is to interpret the Constitution, and in the latter case we did go behind an executive order to determine his authority. As Mr. Justice Frankfurter stated in the *Steel Seizure Case:*

> "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action. And so, with the utmost unwillingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the government, I cannot escape consideration of the legality of Executive Order No. 10340.
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> . . . . .
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> "Marshall's admonition that 'it is *a constitution* we are expounding' [*McCulloch* v. *Maryland,* 4 Wheat. 316, 407] is especially relevant when the Court is required to give legal sanctions to an underlying principle of the Constitution—that of separation of powers." 343 U. S., at 596–597 (concurring opinion).

It is far more important to be respectful to the Constitution than to a coordinate branch of government.[3]

5. *An unusual need for unquestioning adherence to a political decision already made.* This test is essentially

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[3] "When all is said and done, one is inclined to think that a rigid constitutional frame is on the whole preferable even if it serves no better purpose than to embarrass an overactive Executive." G. Hausner, Individual Rights in the Courts of Israel, International Lawyers' Convention in Israel 201, 228 (1958).

a reference to a commitment of a problem and its solution to a coordinate branch of government[4]—a matter not involved here.

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[4] The classic political questions case is *Luther* v. *Borden,* 7 How. 1, growing out of the Dorr Rebellion in Rhode Island. That State had been unaffected by the constitutional changes during the Revolutionary War and when Connecticut acquired a new constitution in 1818, Rhode Island was the only State which retained its original colonial charter as fundamental law. The charter government was malapportioned and required ownership of $134 of real property for voting purposes.

From the early 1820's on there was agitation for a new constitution in Rhode Island. Finally one constitution put to the "voters" was passed. A "people's" convention on November 18, 1841, put forth a new constitution with a Bill of Rights, better apportionment, and white manhood suffrage. Under the voting requirements established by that constitution, all white adult males were allowed to vote for or against the "people's" constitution. A majority of the voters ratified the constitution. Following the ratification, elections were held. Rhode Island then had two governments, one under the "people's" constitution, the other under the original charter. The "people's" government had a quick legislative session and did not attempt to change either the judiciary or the administrative officers of the State. On June 26, 1842, the charter governor finally proclaimed martial law to establish his authority. *Luther* v. *Borden* arose out of Borden's attempt pursuant to instructions to arrest Luther. Luther brought action in the federal courts for trespass and Borden defended his actions as taken under martial law, lawfully proclaimed. Judge Story refused to give Luther's requested jury instructions, that the "people's" constitution was in full force in June 1842 because "a majority of the free white male citizens of Rhode Island, of twenty-one years and upwards, had a right to reassume the powers of government and establish a written constitution; and that, having so exercised such right, the pre-existing charter government became null and void." The case then went to the Supreme Court and, faced with the question of which of the two governments was the lawful one, the Court held that determination was a political question, not for judicial determination—that the political question was for Rhode Island

6. *The potentiality of embarrassment from multifarious pronouncements by various departments of government on one question.* Once again this relates back to whether the problem and its solution are committed to a given branch of government.

We have never ruled, I believe, that when the Federal Government takes a person by the neck and submits him to punishment, imprisonment, taxation, or to some ordeal, the complaining person may not be heard in court. The rationale in cases such as the present is that government cannot take life, liberty, or property of the individual and escape adjudication by the courts of the legality of its action.

That is the heart of this case. It does not concern the wisdom of fighting in Southeast Asia. Likewise no question of whether the conflict is either just or necessary is present. We are asked instead whether the Executive has power, absent a congressional declaration of war, to commit Massachusetts citizens to armed hostilities on foreign soil. Another way of putting the question is whether under our Constitution presidential wars are permissible. Should that question be answered in the negative we would then have to determine whether Congress has declared war. That question which Massachusetts presents is in my view justiciable.

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to resolve or for Congress under Art. IV, § 4, of the Constitution, 7 How., at 38–43.

Dorr, who had been the governor under the "people's" constitution, was tried and convicted of treason against the State in early 1844. In January he was offered a legislative pardon if he would take an oath affirming support for the government in power. He refused since he believed the "people's" constitution was still binding. In June 1845, he was unconditionally pardoned under a new governor. Finally, in February 1854, the legislature reversed and annulled Dorr's conviction. For a history of the Dorr Rebellion, see A. Mowry, The Dorr War (1970).

It is said that "the notion has persisted, despite the results in *Baker v. Carr* and *Powell v. McCormack,* [395 U. S. 486] . . . that there is a means for the Court to avoid deciding any case or issue upon the basis of a broad, highly general, and almost entirely discretionary principle of nondecision." Tigar, Judicial Power, The "Political Question Doctrine," and Foreign Relations, 17 U. C. L. A. L. Rev. 1135, 1163 (1970). Yet no such discretionary principle, if germane to our problem, is applicable here.

"The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations." *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 156. No less than the war power—the greatest leveler of them all—is the power of the Commander in Chief subject to constitutional limitations. That was the crux of the *Steel Seizure Case.* Concurring in the judgment in that case, Mr. Justice Clark stated: "I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis . . . . I cannot sustain the seizure in question because . . . Congress had [*sic*] prescribed methods to be followed by the President . . . ." 343 U. S., at 662. If the President must follow procedures prescribed by Congress, it follows *a fortiori* that he must follow procedures prescribed by the Constitution.

This Court has previously faced issues of presidential war making. The legality of Lincoln's blockade was considered in the *Prize Cases,* 2 Black 635, and although the Court narrowly split in supporting the President's position, the split was on the merits, not on whether the claim was justiciable. And even though that war was the Civil War and not one involving an overseas expedition, the decision was 5 to 4.

In the *Steel Seizure Case* members of this Court wrote seven opinions and each reached the merits of the Executive's seizure. In that case, as here, the issue related to the President's powers as Commander in Chief and the fact that all nine Justices decided the case on the merits and construed the powers of a coordinate branch at a time of extreme emergency should be instructive. In that case we said:

> "It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that 'The executive Power shall be vested in a President . . .'; that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'
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> "The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." 343 U. S., at 587.

If we determine that the Indochina conflict is unconstitutional because it lacks a congressional declaration of war, the Chief Executive is free to seek one, as was President Truman free to seek congressional approval after our *Steel Seizure* decision.

There is, of course, a difference between this case and the *Prize Cases* and the *Steel Seizure Case*. In those cases a private party was asserting a wrong to him: his *property* was being taken and he demanded a determination of the legality of the taking. Here the *lives* and *liberties* of Massachusetts citizens are in jeopardy. Certainly the Constitution gives no greater protection to *property* than to *life* and *liberty*. It might be argued that the authority in the *Steel Seizure Case* was not textually apparent in the Constitution, while the power of the Commander in Chief to commit troops is obvious and therefore a different determination on justiciability is needed. The *Prize Cases*, however, involved Lincoln's exercise of power in ordering a blockade by virtue of his powers as the Commander in Chief.

Since private parties—represented by Massachusetts as *parens patriae*—are involved in this case, the teaching of the *Prize Cases* and the *Steel Seizure Case* is that their claims are justiciable.

The Solicitor General urges that no effective remedy can be formulated. He correctly points out enforcing or supervising injunctive relief would involve immense complexities and difficulties. But there is no requirement that we issue an injunction. Massachusetts seeks declaratory relief as well as injunctive relief. In *Baker* v. *Carr* we stated that we must detemine whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." 369 U. S., at 198. The Declaratory Judgment Act, 28 U. S. C. § 2201, provides that "any court of the United States . . .

may declare the rights . . . of any interested party . . . whether or not further relief is or could be sought." It may well be that even declaratory relief would be inappropriate respecting many of the numerous issues involved if the Court held that the war were unconstitutional. I restrict this opinion to the question of the propriety of a declaratory judgment that no Massachusetts man can be taken against his will and made to serve in the war. *Powell* involved just one man while this case involves large numbers of men. But that goes only to the mechanical task of making any remedy granted available to all members of a large class.

Today we deny a hearing to a State which attempts to determine whether it is constitutional to require its citizens to fight in a foreign war absent a congressional declaration of war. Three years ago we refused to hear a case involving draftees who sought to prevent their shipment overseas. *Mora* v. *McNamara,* 128 U. S. App. D. C. 297, 387 F. 2d 862, cert. denied, 389 U. S. 934 (1967). The question of an unconstitutional war is neither academic nor "political." This case has raised the question in an adversary setting. It should be settled here and now.

I would set the motion for leave to file down for argument and decide the merits only after full argument.

Probable Jurisdiction Noted

No. 573. KIRK, GOVERNOR OF FLORIDA, ET AL. *v.* HARGRAVE ET AL. Appeal from D. C. M. D. Fla. Probable jurisdiction noted. Reported below: 313 F. Supp. 944.

No. 5161. JOHNSON *v.* LOUISIANA. Appeal from Sup. Ct. La. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 255 La. 314, 230 So. 2d 825.

No. 569. EARLEY *v.* DICENSO ET AL.; and

No. 570. ROBINSON, COMMISSIONER OF EDUCATION OF RHODE ISLAND, ET AL. *v.* DICENSO ET AL. Appeals from D. C. R. I. Probable jurisdiction noted. Cases consolidated and a total of 1½ hours allotted for oral argument. Cases set for oral argument immediately following No. 89 [*Lemon* v. *Kurtzman,* probable jurisdiction noted, 397 U. S. 1034] and No. 153 [*Tilton* v. *Finch,* probable jurisdiction noted, 399 U. S. 904]. Reported below: 316 F. Supp. 112.

Certiorari Granted. (See also No. 412, *ante,* p. 18.)

No. 544. COMMISSIONER OF INTERNAL REVENUE *v.* LINCOLN SAVINGS & LOAN ASSN. C. A. 9th Cir. Certiorari granted. Reported below: 422 F. 2d 90.

No. 336. NELSON, WARDEN *v.* O'NEIL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 422 F. 2d 319.

No. 5029. ROMONTIO *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 400 F. 2d 618.

No. 5338. APODACA ET AL. *v.* OREGON. Ct. App. Ore. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: —— Ore. ——, 462 P. 2d 691.

Certiorari Denied. (See also No. 300, *ante,* p. 23; and Nos. 5387 and 5531, *supra.*)

No. 339. SLAKMAN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 222 So. 2d 221.

No. 525. CABBLER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 429 F. 2d 577.

No. 527. SMITH ET AL. *v.* HUMBLE OIL & REFINING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1287.

No. 528. SOUTHWEST FOREST INDUSTRIES, INC. *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 9th Cir. Certiorari denied. Reported below: 422 F. 2d 1013.

No. 529. W. M. WEBB, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 1070.

No. 530. MARTIN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 1368.

No. 531. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 171 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 425 F. 2d 157.

No. 532. MORGAN *v.* METRO-GOLDWYN-MAYER, INC. Ct. App. Ariz. Certiorari denied. Reported below: 11 Ariz. App. 223, 463 P. 2d 118.

No. 533. SOUTHERN STEVEDORING & CONTRACTING CO. *v.* D/S OVE SKOU. C. A. 5th Cir. Certiorari denied. Reported below: 365 F. 2d 341.

No. 535. WALLACE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 539. LOUISIANA TRAILER SALES, INC. *v.* HODGSON, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 61.

No. 546. WONG PAK YAN ET AL. *v.* RINALDI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 429 F. 2d 151.

No. 537. SNYDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 520.

No. 550. SOUTHERN PACIFIC TRANSPORT CO. *v.* SHANNON. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 545.

No. 551. AVEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 1159.

No. 552. STANDARD FORGE & AXLE CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 420 F. 2d 508 and 427 F. 2d 344.

No. 554. THE ORIENTAL INVENTOR *v.* DILLON. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 977.

No. 556. SACCO, AKA ROSSELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 264.

No. 558. CLOSE *v.* LEDERLE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 424 F. 2d 988.

No. 559. CALLAHAN MINING CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 731. COMMISSIONER OF INTERNAL REVENUE *v.* CALLAHAN MINING CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 721.

No. 560. CITY OF CHATTANOOGA ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 1154.

No. 562. BAILES, TRUSTEE IN BANKRUPTCY *v.* FIRST NATIONAL BANK OF MOBILE. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 160.

No. 563. UNIVERSAL CIGAR CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 867.

No. 564. GREATER LAFOURCHE PORT COMMISSION *v.* TENNECO, INC. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 1061.

No. 566. MORISON *v.* GENERAL MOTORS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 952.

No. 568. HOFFMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 221, 258 N. E. 2d 326.

No. 571. JACKSONVILLE TERMINAL CO. *v.* HODGE, ADMINISTRATRIX. Sup. Ct. Fla. Certiorari denied. Reported below: 234 So. 2d 645.

No. 572. COUSINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 1271.

No. 575. HAYNEY ET AL. *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 580. MAKEKAU ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 1403.

No. 581. PANAGIOTOPOULOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 148.

No. 585. COOPER AGENCY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 422 F. 2d 1331.

No. 5154. BELLOMY ET AL. *v.* UNION CONCRETE PIPE CO. C. A. 4th Cir. Certiorari denied. Reported below: 420 F. 2d 1382.

No. 5134. CAMPBELL *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Cal. Certiorari denied.

No. 5165. MOSLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 3d 913, 464 P. 2d 473.

No. 5198. LUCAS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 5261. HIGGINS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 177.

No. 5270. MARTINEZ *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5345. WOODS *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 5351. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 423 F. 2d 457.

No. 5383. GRESHAM *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 226 Ga. 290, 174 S. E. 2d 420.

No. 5454. WILLIAMS *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 426 F. 2d 241.

No. 5458. CHIPLEY *v.* ROBERTS ET AL. Sup. Ct. S. C. Certiorari denied.

No. 5467. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 165.

No. 5513. BRIDGES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 544.

No. 5547. HOLMES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 5549. ALLEN *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 424 F. 2d 134.

No. 5551. CORTEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 425 F. 2d 453.

No. 5554. BUNKER *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5566. YOUNG *v.* ZELKER, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5567. JONES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 9 Md. App. 455, 265 A. 2d 271.

No. 5571. CAPITOLI *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 868.

No. 5578. DANIEL *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 427 F. 2d 896.

No. 5581. PEPITONE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 5582. SPOSATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 5583. HAROLD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 721.

No. 5584. MARSHALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 428 F. 2d 464.

No. 5588. FALANGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 930.

No. 5590. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5592. ZUCKER *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 5593. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 5595. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 428 F. 2d 1183.

No. 5596. ROBINSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 6 Cal. App. 3d 448, 86 Cal. Rptr. 56.

No. 5597. HARTLEY ET AL. *v.* HARTLEY, EXECUTRIX. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 5598. WHITE *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 5599. FRANCIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5601. OVERMAN *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 5603. SEARLES *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 428 F. 2d 1188.

No. 5605. LAMIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 373.

No. 5606. LEVIN *v.* PROBATION DEPARTMENT OF THE CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 5607. SMITH *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 426 F. 2d 814.

No. 5608. KREPEL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 5609. ALEXANDER *v.* ATTORNEY GENERAL OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 5612. CARSON *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 424 F. 2d 554.

No. 5613. PHIPPS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 912.

No. 5614. FEELEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5619. HAMMOND *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 5620. ADAMS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 5621. PARK *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 5622. FELDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 534.

No. 5623. PILAPIL *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 424 F. 2d 6.

No. 5624. ROLLINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 6 Cal. App. 3d 428, 85 Cal. Rptr. 908.

No. 5625. CHAFA *v.* MOSELEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 5626. CHUTE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5628. HAMM *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 258 N. E. 2d 311.

No. 5629. RUCKER *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 5631. STEBBINS *v.* ALLSTATE INSURANCE COMPANIES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 5632. FLETCHER *v.* MAXWELL ET AL. C. A. 3d Cir. Certiorari denied.

No. 5635. COLLIS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 5636. MARSHALL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 440 F. 2d 195.

No. 5637. RUELAZ *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 5640. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 5641. CHRISTIAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 427 F. 2d 1299.

No. 5642. WILSON *v.* BRAYER. C. A. 4th Cir. Certiorari denied.

No. 5643. HICKS *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 5644. SANTIAGO *v.* CHARGE ACCOUNT CREDIT CORP. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 5646. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5650. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 1031.

No. 5649. DAVIDSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 428 F. 2d 461.

No. 5653. DOCKERY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 5654. PITTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 534.

No. 5655. KREAGER *v.* INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 5656. WATKINS *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 429 F. 2d 5.

No. 5657. BEEDLE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 5658. THOGMARTIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 430 F. 2d 1178.

No. 5659. MCCLOUD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 427 F. 2d 242.

No. 5660. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 488.

No. 332. WILHITE *v.* CITY OF MONROE. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 255 La. 838, 233 So. 2d 535.

No. 555. BIGMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 429 F. 2d 13.

No. 5251. JACKSON *v.* INTERNATIONAL HARVESTER CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 1220.

No. 5258. ROSS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5580. THURMAN *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 988.

No. 5627. UPTGRAFT ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 8 Cal. App. 3d Supp. 1, 87 Cal. Rptr. 459.

No. 432. UNITED ORDER OF AMERICAN BRICKLAYERS & STONE MASONS, LOCAL 21 *v.* WATERS ET AL.; and

No. 454. INTERNATIONAL HARVESTER CO. *v.* WATERS ET AL. C. A. 7th Cir. Motion to dispense with printing respondents' brief granted. Certiorari denied. Reported below: 427 F. 2d 476.

No. 520. CIMINI *v.* UNITED STATES; and

No. 521. O'MALLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 427 F. 2d 129.

No. 553. MARTIN, DBA SILKO NEW IMPROVED PRODUCTS CO. *v.* CROWN ZELLERBACH CORP. C. C. P. A. Motion for leave to supplement petition granted. Certiorari denied. Reported below: 57 C. C. P. A. (Pat.) 968, 422 F. 2d 918.

No. 346. BETO, CORRECTIONS DIRECTOR *v.* GALLOWAY. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 421 F. 2d 284.

No. 5321. HOWARD *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 5377. KAMSLER *v.* BELLOWS, BELLOWS & MAGIDSON. C. A. 7th Cir. Motion to strike brief for respondent and certiorari denied.

No. 5610. HILL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

Rehearing Denied

No. 2053, Misc., October Term, 1969. BOWMAN *v.* UNITED STATES, 398 U. S. 967. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

NOVEMBER 13, 1970

Miscellaneous Orders

No. 87. UNITED STATES *v.* DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE ET AL.; and

No. 812. UNITED STATES *v.* DISTRICT COURT IN AND FOR WATER DIVISION NO. 5 ET AL. Sup. Ct. Colo. Application of the Solicitor General, consented to by all parties concerned, for stay of Colorado state court proceedings before the District Court in and for Water Division No. 5, presented to MR. JUSTICE WHITE, and by him referred to the Court, granted insofar as such proceedings involve an adjudication of the rights of the United States, pending decision of this Court in No. 87 [certiorari granted, 397 U. S. 1005] and in No. 812 presently pending on petition for writ of certiorari.

No. —. FERRELL *v.* SELECTIVE SERVICE LOCAL BOARD No. 38 OF WALNUT RIDGE, ARKANSAS, ET AL. C. A. 2d Cir. Application for stay of induction and recall of mandate of the Court of Appeals for the Second Circuit, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 434 F. 2d 686.

NOVEMBER 16, 1970

Affirmed on Appeal

No. 5676. MACIAS ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Affirmed on appeal from D. C. N. D. Cal. Reported below: 324 F. Supp. 1252.

Appeals Dismissed

No. 584. PYE *v.* STATE HIGHWAY DEPARTMENT OF GEORGIA ET AL. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 226 Ga. 389, 175 S. E. 2d 510.

No. 592. MONTGOMERY WARD & CO., INC. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 6 Cal. App. 3d 149, 85 Cal. Rptr. 890.

Miscellaneous Orders

No. 336. NELSON, WARDEN *v.* O'NEIL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 901.] Application of respondent for release on personal recognizance and separate petition for writ of habeas corpus presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion of State of Florida for severance referred to Special Master. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion. [For earlier orders herein, see, *e. g.*, 398 U. S. 947.]

No. 28. SANKS ET AL. *v.* GEORGIA ET AL. Appeal from Sup. Ct. Ga. [Probable jurisdiction noted, 395 U. S. 974; restored to calendar, 399 U. S. 922.] Further consideration of appellees' suggestion of mootness postponed to hearing of case on the merits.

No. 89. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 397 U. S. 1034]; and

No. 153. TILTON ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. Conn. [Probable jurisdiction noted, *sub nom. Tilton* v. *Finch,* 399 U. S. 904.] Motion of National Jewish Commission on Law & Public Affairs et al. for leave to file a brief as *amici curiae* granted.

No. 128. IN RE BURRUS ET AL. Sup. Ct. N. C. [Certiorari granted, 397 U. S. 1036.] Motion for leave for two attorneys to participate in oral argument on behalf of respondent, State of North Carolina, granted.

No. 154. JAMES ET AL. *v.* VALTIERRA ET AL.; and

No. 226. SHAFFER *v.* VALTIERRA ET AL. Appeals from D. C. N. D. Cal. [Probable jurisdiction noted, No. 154, 398 U. S. 949, No. 226, 399 U. S. 925.] Motions of American Jewish Congress et al., NAACP Legal Defense & Educational Fund, Inc., et al., and National Urban Coalition et al. for leave to file briefs as *amici curiae* denied. MR. JUSTICE BLACK and MR. JUSTICE BRENNAN are of the opinion that the motions should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions.

No. 360. GROVE PRESS, INC., ET AL. *v.* FLASK ET AL. Appeal from D. C. N. D. Ohio. Motion of Eve Productions, Inc., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 5394. GRIZZELL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted.

No. 590. MUNCASTER *v.* DEMENT, U. S. ATTORNEY, ET AL.;

No. 5271. FLETCHER *v.* ROSENBERG, U. S. DISTRICT JUDGE;

No. 5506. WILEY *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS; and

No. 5647. KAMSLER *v.* KERNER, U. S. DISTRICT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 515. UNITED STATES *v.* SOUTHERN UTE TRIBE OR BAND OF INDIANS. Ct. Cl. Certiorari granted. Reported below: 191 Ct. Cl. 1, 423 F. 2d 346.

No. 600. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 426 F. 2d 1073.

Certiorari Denied. (See also No. 584, *supra.*)

No. 587. LUTTRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 1197.

No. 591. LEPRINO CHEESE CO., DBA LEPRINO CHEESE MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 424 F. 2d 184.

No. 589. PORT CONSTRUCTION CO. *v.* VIRGIN ISLANDS HOUSING AUTHORITY. C. A. 3d Cir. Certiorari denied. Reported below: 426 F. 2d 271.

No. 594. RASTELLI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 595. GRIMALDI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 597. BADA CO. *v.* MONTGOMERY WARD & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 426 F. 2d 8.

No. 598. SEXTON *v.* JACKSON READY-MIX CONCRETE. Sup. Ct. Miss. Certiorari denied. Reported below: 235 So. 2d 267.

No. 599. LUCKENBACH OVERSEAS CORP. *v.* COMPTON. C. A. 2d Cir. Certiorari denied. Reported below: 425 F. 2d 1130.

No. 605. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 557.

No. 607. DAVIS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 608. BAUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 215.

No. 613. SEVER-WILLIAMS CO., INC., ET AL. *v.* BOARD OF EDUCATION OF CHILLICOTHE CITY SCHOOL DISTRICT. Sup. Ct. Ohio. Certiorari denied. Reported below: 22 Ohio St. 2d 107, 258 N. E. 2d 605.

No. 616. STEINBRECHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 2d 530.

No. 879. BEAUCHAMP ET AL. *v.* CITY OF OKLAHOMA CITY ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 477 P. 2d 51.

No. 5162. COCKRELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 229 So. 2d 587.

No. 5166. WILLIAMS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 5190. FOX ET UX. *v.* LENNON. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 5224. DENMARK *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 232.

No. 5246. RITCHIE *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 46 Wis. 2d 47, 174 N. W. 2d 504.

No. 5290. SMITH *v.* ANDERSON ET AL. C. A. 3d Cir. Certiorari denied.

No. 5305. HENRY *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 5361. LEDENT *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 185 Neb. 380, 176 N. W. 2d 21.

No. 5373. DIDDLEMEYER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 234 So. 2d 292.

No. 5385. WARD *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 424 F. 2d 491.

No. 5399. CROOKS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 5501. BLAKE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 5630. ARZONICA *v.* CASSIDY ET AL. C. A. 3d Cir. Certiorari denied.

No. 5661. MARTIN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 356.

No. 5662. HENDRICKS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 5668. WINBUSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 357.

No. 5670. THOMPSON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 186 Ct. Cl. 615, 405 F. 2d 1239.

No. 5672. CARR *v.* SIMPSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 37.

No. 5673. LOUIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 426 F. 2d 1398.

No. 5677. YEE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5679. NEARIS, TRUSTEE *v.* CITY OF GLOUCESTER ET AL. Sup. Jud. Ct. Mass. Certiorari denied.

No. 5680. GILHART *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 5683. SMITH *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 5684. BAITY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 455 S. W. 2d 305.

No. 5685. BATTAGLIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 957.

No. 5686. HURD *v.* HURD. Sup. Jud. Ct. Mass. Certiorari denied.

No. 5688. KING *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 5689. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 429 F. 2d 409.

No. 5690. KIRBY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 258.

No. 5691. JACKSON *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 262. CRICHTON *v.* MCGEHEE ET AL. Ct. App. La., 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 232 So. 2d 109.

No. 493. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 426 F. 2d 765.

No. 5499. STRADER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 586. PENNSYLVANIA *v.* WHITING. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 439 Pa. 205, 266 A. 2d 738.

No. 596. FELDSTEIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE HARLAN are of the opinion that certiorari should be granted. Reported below: 429 F. 2d 1092.

No. 5633. DARGAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 27 N. Y. 2d 100, 261 N. E. 2d 633.

No. 5663. NAZARIO *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted.

No. 5671. CANTRELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 319. MOGULNICKI *v.* CONNECTICUT, *ante,* p. 826;

No. 477. RKO GENERAL, INC. *v.* NEWMARK, *ante,* p. 854;

No. 5148. BRASWELL *v.* FLORIDA, *ante,* p. 873;

No. 5213. LAMBRIGHT *v.* CRAVEN, WARDEN, *ante,* p. 837;

No. 5244. ALERS *v.* MUNICIPALITY OF SAN JUAN ET AL., *ante,* p. 839;

No. 5282. DVORSKY *v.* UNITED STATES, *ante,* p. 840;

No. 5322. GILL *v.* UNITED STATES, *ante,* p. 851; and

No. 5494. KAMSLER *v.* HOFFMAN, U. S. DISTRICT JUDGE, *ante,* p. 817. Petitions for rehearing denied.

No. 5354. RUDERER *v.* JOHNSON ET AL., *ante,* p. 860. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit during the week of January 18, 1971, 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.

NOVEMBER 19, 1970

Dismissal Under Rule 60

No. 890. ADKINS *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 431 F. 2d 859.

NOVEMBER 20, 1970

Miscellaneous Order

No. —. CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. *v.* VOLPE, SECRETARY, DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 6th Cir. Application for stay presented to MR. JUSTICE STEWART, and by him referred to the Court, set for argument on Monday, December 7. Typewritten briefs shall be filed by Thursday, December 3.

NOVEMBER 23, 1970

Affirmed on Appeal

No. 631. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Colo. Reported below: 312 F. Supp. 329.

No. 626. STERRETT, ADMINISTRATOR, DEPARTMENT OF PUBLIC WELFARE OF INDIANA, ET AL. *v.* GRUBB ET AL. Motion of appellee Grubb for leave to proceed *in forma pauperis* granted. Affirmed on appeal from D. C. N. D. Ind. MR. JUSTICE BLACK and MR. JUSTICE HARLAN dissent. They are of the opinion that probable jurisdiction should be noted and the case set for oral argument. Reported below: 315 F. Supp. 990.

Appeals Dismissed

No. 5697. HERRING *v.* R. L. MATHIS CERTIFIED DAIRY CO. ET AL. Appeal from Sup. Ct. Ga. dismissed for want of a substantial federal question.

No. 5724. PORTER ET AL. *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Reversed or Vacated, and Remanded on Appeal. (See Nos. 541 and 543, *ante,* p. 41; and No. 1385, October Term, 1969, *infra.*)

*Certiorari Granted—Affirmed**

No. 508. CALIFORNIA *v.* PINKUS. C. A. 9th Cir. Certiorari granted and judgment affirmed by an equally divided Court. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 429 F. 2d 416.

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*[REPORTER'S NOTE: This is a new category for summary dispositions. Cf. Reporter's Note, 398 U. S. 901.]

*Certiorari Granted—Reversed or Vacated, and Remanded.** (See also No. 602, *ante,* p. 45.)

No. 5398. HEMPHILL *v.* MOYNAHAN. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to United States Court of Appeals for the Sixth Circuit for further consideration in light of *Price* v. *Georgia,* 398 U. S. 323.

*Other Summary Disposition**

No. 1385, October Term, 1969. HUTCHERSON ET AL. *v.* LEHTIN ET AL., 399 U. S. 522. Petition for rehearing granted and order of June 29, 1970, vacated. Judgment recalled and a new judgment entered vacating the judgment of the United States District Court for the Northern District of California and case remanded to that court so that it may enter a fresh order dismissing the complaint, thus affording appellants an opportunity to take a timely appeal to the United States Court of Appeals for the Ninth Circuit.

Miscellaneous Orders

No. 256. FIRST MERCANTILE CONSUMER DISCOUNT CO. *v.* STEFANELLI ET AL. Treating the petition for rehearing as a motion to amend the order of this Court dated October 12, 1970 [*ante,* p. 808], motion granted. Order amended to read, "The appeal is dismissed for want of a final judgment."

No. 30. UNITED STATES *v.* HARRIS. C. A. 6th Cir. [Certiorari granted, 397 U. S. 905.] Motion of Americans for Effective Law Enforcement, Inc., for leave to file a brief as *amicus curiae* granted.

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*[REPORTER'S NOTE: This is a new category for summary dispositions. Cf. Reporter's Note, 398 U. S. 901.]

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. [Motion to file complaint granted, 398 U. S. 956.] Motion of State of California for leave to intervene as a party plaintiff referred to Special Master for his recommendation.

No. 43. FAIRCLOTH, ATTORNEY GENERAL OF FLORIDA, ET AL. *v.* LAZARUS. Appeal from D. C. S. D. Fla. Motion of Stephen Hillardt and Timothy Green for leave to proceed *in forma pauperis* granted and motions for leave to intervene as parties appellee and to expedite appeal denied. Reported below: 301 F. Supp. 266.

No. 59. NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. D. C. Cir. [Certiorari granted, 397 U. S. 986]; and

No. 61. INVESTMENT COMPANY INSTITUTE ET AL. *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL. C. A. D. C. Cir. [Certiorari granted, 397 U. S. 986.] Motion to reverse sequence of oral argument or alternative request that cases be consolidated denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 83. BYRNE, DISTRICT ATTORNEY OF SUFFOLK COUNTY, ET AL. *v.* KARALEXIS ET AL. Appeal from D. C. Mass. [Restored to calendar, 399 U. S. 922.] Motion of appellees for leave to file supplemental memorandum, after argument, granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 206. HARRIS *v.* NEW YORK. Ct. App. N. Y. [Certiorari granted, 398 U. S. 937.] Motion of Frank S. Hogan for leave to participate in oral argument as *amicus curiae* granted; counsel for respondent will cede 15 minutes of his time for that purpose.

No. 507. California Department of Human Resources Development et al. *v.* Java et al. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, *ante,* p. 877.] Motion of Southern California Edison Co. et al. for leave to intervene as parties appellant denied without prejudice to filing of brief as *amici curiae* with consents of the parties, or a motion for leave to file a brief as *amici curiae* if consents are not granted.

Certiorari Granted. (See Nos. 541 and 543, *ante,* p. 41; No. 602, *ante,* p. 45; and Nos. 508 and 5398, *supra.*)

Certiorari Denied. (See also No. 5724, *supra.*)

No. 246. Muir *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 232 So. 2d 225.

No. 377. Perati *v.* Superior Court of California, County of Alameda. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 567. Garber *v.* United States;
No. 574. Florea *v.* United States;
No. 576. Kaufman *v.* United States; and
No. 719. Burns *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 240.

No. 578. First National Realty Corp. *v.* Javins et al. C. A. D. C. Cir. Certiorari denied. Reported below: 138 U. S. App. D. C. 369, 428 F. 2d 1071.

No. 617. Chemithon Corp. *v.* Procter & Gamble Co. et al. C. A. 4th Cir. Certiorari denied. Reported below: See 287 F. Supp. 291.

No. 619. Consumers Power Co. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 78.

No. 618. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL–CIO *v.* CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 230.

No. 622. LYNCH, AS ATTORNEY GENERAL OF CALIFORNIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 2d 358.

No. 623. TEXACO INC. *v.* BEALMER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 885.

No. 625. BIRMELIN *v.* BOYMER ET UX. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 227 So. 2d 358.

No. 627. THRIFTIMART, INC., DBA SMART & FINAL IRIS CO., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 1006.

No. 628. KAZUBOWSKI *v.* KAZUBOWSKI. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 405, 259 N. E. 2d 282.

No. 629. GILDAY *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 428 F. 2d 1027.

No. 634. REYNOLDS *v.* GALBREATH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 427 F. 2d 719.

No. 635. P. F. COLLIER & SON CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 261.

No. 637. PROBST *v.* UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 428 F. 2d 491.

No. 642. MENGARELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 426 F. 2d 985.

No. 636. McCrea, Executrix, et al. *v.* Harris County Houston Ship Channel Navigation District et al. C. A. 5th Cir. Certiorari denied. Reported below: 423 F. 2d 605.

No. 638. Moosman, Administratrix *v.* Ute Indian Tribe of the Uintah and Ouray Reservation et al. C. A. 10th Cir. Certiorari denied. Reported below: 428 F. 2d 491.

No. 5205. Carpenter *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 449 S. W. 2d 584.

No. 5207. Bauer *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 3d 368, 461 P. 2d 637.

No. 5312. Rhodes *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 450 S. W. 2d 329.

No. 5334. Carter *v.* Alabama. Ct. App. Ala. Certiorari denied.

No. 5360. Walker *v.* Laxalt, Governor of Nevada. C. A. 9th Cir. Certiorari denied.

No. 5397. Shelhart *v.* Young, U. S. District Judge. C. A. 6th Cir. Certiorari denied.

No. 5429. Curtin *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 507, 255 N. E. 2d 916.

No. 5696. Evans *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 5698. Turner *v.* United States. C. A. D. C. Cir. Certiorari denied.

No. 5699. Phillips *v.* Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 5700. PORTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 5701. IVY *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied.

No. 5702. KIZERE *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 5705. ADAMS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 8 Md. App. 684, 262 A. 2d 69.

No. 5706. BASKERVILLE *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 714.

No. 5709. BOWLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 592.

No. 5710. SHOLE *v.* HOWARD ET AL., JUDGES. C. A. 4th Cir. Certiorari denied.

No. 5715. SWAN *v.* YOUNG, WARDEN. Sup. Ct. Minn. Certiorari denied.

No. 5718. MILLER *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 5719. DANIEL *v.* ZELKER, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5720. RAPP *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 5726. GONZALES *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 963.

No. 5723. CREIGHTON, AKA EVANS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 5728. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5729. PALMER *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5730. THOMPSON ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5733. JEWELL *v.* CITY OF COVINGTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 459.

No. 5734. KALDENBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 161.

No. 601. KERIAKOS ET AL. *v.* HUNT ET AL. C. A. 1st Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE BLACKMUN, for the reasons expressed in their separate opinions in *Cain* v. *Kentucky,* 397 U. S. 319 (1970), *Walker* v. *Ohio,* 398 U. S. 434 (1970) (THE CHIEF JUSTICE); *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) (MR. JUSTICE HARLAN); and *Hoyt* v. *Minnesota,* 399 U. S. 524 (1970) (MR. JUSTICE BLACKMUN), would grant certiorari and reverse the judgment below, and remand the case to the Court of Appeals for consideration of the other issues tendered by petitioners. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 428 F. 2d 606.

No. 620. HOOPER *v.* UNITED STATES;

No. 639. GROOMS *v.* UNITED STATES;

No. 640. HOOPER *v.* UNITED STATES; and

No. 5790. WHITLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 612. SCAGGS *v.* LARSEN ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 1224.

No. 621. INDIANAPOLIS NEWSPAPERS, INC. *v.* FIELDS. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: —— Ind. ——, 259 N. E. 2d 651.

No. 5365. SHAK *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 51 Haw. 612, 466 P. 2d 422.

No. 5366. SHAK *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 51 Haw. 626, 466 P. 2d 420.

No. 624. CLIFFORD *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 5727. WARNER *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: 428 F. 2d 730.

Rehearing Granted. (See No. 1385, October Term, 1969, *supra.*)

Rehearing Denied

No. 247. ST. MICHAEL & ARCHANGEL RUSSIAN ORTHODOX GREEK CATHOLIC CHURCH ET AL. *v.* UHNIAT ET AL., *ante,* p. 823; and

No. 305. SKEGA AKTIEBOLAG, FORMERLY SKELLEFTEA GUMMIFABRIKS A.–B., ET AL. *v.* B. F. GOODRICH CO., *ante,* p. 825. Petitions for rehearing denied.

No. 341. LAKEWOOD MANUFACTURING CO. *v.* HOME INSURANCE CO. OF NEW YORK ET AL., *ante,* p. 827;

No. 344. KILARJIAN ET AL. *v.* UNITED STATES, *ante,* p. 827;

No. 367. LYKES BROS. STEAMSHIP CO., INC. *v.* HESS SHIPPING CORP. ET AL., *ante,* p. 853;

No. 5200. RICE *v.* SCHMIDT, WARDEN, *ante,* p. 836;

No. 5202. JONES *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT, *ante,* p. 836;

No. 5211. LUSTER *v.* COOKSEY, *ante,* p. 854; and

No. 5379. WILLIAMSON *v.* CALIFORNIA, *ante,* p. 844. Petitions for rehearing denied.

DECEMBER 3, 1970

Miscellaneous Orders

No. —. CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. *v.* VOLPE, SECRETARY OF TRANSPORTATION, ET AL. C. A. 6th Cir. Motion of the Solicitor General for leave to Wm. Bradford Reynolds to present oral argument, *pro hac vice,* granted.

No. —. CONSOLIDATION COAL CO. *v.* SOUTH-EAST COAL CO. Motion to postpone oral argument in No. 88, *Ramsey* v. *United Mine Workers of America* [certiorari granted, 397 U. S. 1006], denied.

DECEMBER 7, 1970

Dismissals Under Rule 60

No. 897. ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. *v.* CATHOLIC MEDICAL CENTER OF BROOKLYN & QUEENS, INC., DIVISION OF ST. MARY'S HOSPITAL, ET AL. Appeal from C. A. 2d Cir. dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 430 F. 2d 1297.

No. 5540. TAYLOR *v.* ILLINOIS. Sup. Ct. Ill. Petition for certiorari dismissed pursuant to Rule 60 of the Rules of this Court.

Affirmed on Appeal

No. 593. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. S. D. Ohio. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, dissenting.

The Court today affirms the District Court in a case involving the relationship of various factors in determining a "just and reasonable" charge under § 15 (7) of the Interstate Commerce Act.[1] Because I think the court below was clearly in error, I would reverse and remand the case to the Interstate Commerce Commission for further consideration.

The appellants, various railroads operating in the southern United States, submitted to the ICC in 1967 a tariff proposing a $22-per-car transit charge for cotton and molasses.[2] The Commission, on protests from shippers, ordered appellants to refrain from imposing

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[1] "At any hearing involving a change in a . . . charge, . . . the burden of proof shall be upon the carrier to show that the proposed changed . . . charge . . . is just and reasonable . . . ." 49 U. S. C. § 15 (7).

[2] "Transit" consists of stopping a freight car en route to its ultimate destination for processing of its contents. There is no separate charge for transiting cotton at most points in the South, or for transiting molasses at Jacksonville, Florida, and in the instant proceedings the appellants sought to impose the separate charge on such commodities at these points. The original proposal included grain and grain products, but the appellants did not contest the Examiner's decision regarding charges on those items before the full Commission.

the new charge pending a hearing under § 15 (7) to determine if the new charge was "just and reasonable."

A hearing was held in 1968, and after receiving testimony from appellants and the protesting shippers, the Examiner concluded that (a) the appellants had the burden of proving the charge was just and reasonable by "clear and convincing" evidence, (b) the $22 charge was not shown to approximate the actual costs involved in transiting a freight car, (c) the existing line-haul rates returned more than out-of-pocket costs for all services performed, including transit, and made a contribution to overhead as well, (d) the likely effect of the charge would be to divert traffic to motor carriers and thus reduce the railroads' overall revenue. "All things considered," the Examiner concluded, appellants had failed to show that the charge was just and reasonable. The Commission adopted the findings and conclusions of the Examiner without change. *Transit Charges, Southern Territory,* 332 I. C. C. 664 (1969).

On review, the three-judge District Court [3] found that the Examiner and thus the Commission had misstated the law in holding that the carriers had the burden of showing the charge was just and reasonable by "clear and convincing evidence." Had the court stopped there and simply remanded the proceedings to the Commission with directions to apply what the court deemed to be the proper standard of proof, there would be no need to review this case. However, the court went on to discuss the Commission's findings on the merits. It concluded that the Commission had not justified its conclusions that (a) the $22 charge was not shown to approximate transit costs and (b) the line-haul rates were sufficient to cover the costs involved. The court then found that the Commission's conclusion that the new charge would

[3] Convened pursuant to 28 U. S. C. § 1336.

have diverted traffic to motor carriers was based on substantial evidence. On the basis of the last finding, the court upheld the ICC's action and entered an order denying relief to appellants.

It has been settled law since the first *Chenery* case that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943). Thus, when the reviewing court here determined that the agency applied an erroneous standard of proof in its determination, it was barred from going on to consider whether the agency's action was supported by substantial evidence. The court compounded the error by upsetting two of the agency's findings as to reasonableness and upholding the agency solely on the basis of the third finding. The Examiner's report, adopted by the Commission, explicitly states that the conclusion was based on "[a]ll things considered," not merely the finding of diversion. Finally, the applicable statute provides:

> "*In the exercise of its power to prescribe just and reasonable rates* the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed . . . ." [4]

It is apparent from a reading of the statute that the likelihood of diversion cannot be an independent ground if the court determines, as it took upon itself to determine here, that the other factors involved do not support the Commission's conclusion as to reasonableness. Thus, the court was in error not only in reviewing the evidence after it determined the standard to be erroneous, but also

[4] 49 U. S. C. § 15a (2) (emphasis added).

was in error in two respects when it did evaluate the evidence.

It may well be that, had the Commission acted in light of the District Court's findings as to the standard of proof, it would have found that the proposed charge was just and reasonable. We cannot assume, any more than the District Court could properly assume, that the finding of an unreasonable charge would have the support of substantial evidence. As the Court said in *Chenery, supra,*

> "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. There is no such finding here." 318 U. S., at 94 (citation omitted).

By affirming the District Court, this Court gives its tacit approval to a procedure that is not in accord with accepted procedures of judicial review of agency actions. I would reverse the judgment of the District Court and remand the proceedings to the ICC.

Appeals Dismissed

No. 778. Various Articles of "Obscene" Merchandise (Cherry, Claimant) *v.* United States et al. Appeal from D. C. S. D. N. Y. dismissed. Reported below: 315 F. Supp. 191.

No. 5753. Wadlington *v.* Mindes et al. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Mr. Justice Douglas, Mr. Justice White, and Mr. Justice Brennan are of the opinion that probable jurisdiction should be noted. Reported below: 45 Ill. 2d 447, 259 N. E. 2d 257.

Other Summary Disposition

No. 524. STANLEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari granted, insofar as it seeks review of affirmance by the Court of Appeals of count 5 (possession count) of convictions of petitioners Stanley, Thomas, and Massey. Judgment as to these three individuals vacated insofar as that count is concerned and case remanded to the Court of Appeals so that it may consider suggestions contained in the memorandum the Solicitor General filed here. By this remand this Court intimates no view as to merits of the Solicitor General's position. In all other respects the petition for writ of certiorari is denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN dissent and would deny certiorari. Reported below: 427 F. 2d 1066.

MR. JUSTICE DOUGLAS, dissenting.

The statute at the time of conviction made manufacture a crime, 21 U. S. C. § 360a (a) (1964 ed., Supp. I). It also made "possession" a crime in the following words—"No person . . . shall possess* any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household." 21 U. S. C. § 360a (c) (1964 ed., Supp. I).

As stated by the Court of Appeals, the law, which was enacted in 1965, did not make possession for personal use a crime but it did make possession for sale an offense; and here the evidence is clear that possession was for sale.

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*Amendments in 1968 made all possession criminal—possession for sale and "otherwise," 82 Stat. 1361. While petitioners were tried after the enactment of the 1968 amendments, their offenses were committed earlier. The 1968 amendments apply "only with respect to violations . . . committed after the date of the enactment of this Act."

Beginning in November 1966 government agents commenced an investigation into suspected illegal drug activities in the San Francisco Bay area. Petitioners and others were placed under extensive surveillance. During the period of surveillance one Krusko, a government undercover agent, became acquainted with petitioner Spires, twice purchased LSD from him (once for $3,400), and had frequent conversations with him. These conversations revealed that petitioner Stanley was engaged in manufacturing and distributing various drugs including LSD. A frequent topic of these conversations pertained to the purchase of LSD.

On November 15, 1967, during a conversation, Spires informed Krusko that "some of the boys" were going to set up a laboratory and had found a location "way out in the sticks." Spires also informed him that of the 100 grams of LSD which Stanley had previously possessed, 10 had been distributed in the form of tablets. Spires said that Stanley normally sold large quantities for $2,500 per gram.

On December 19 Spires stated he was going to the laboratory and would attempt to get some LSD for Krusko, saying that Stanley intended to produce 25 grams of LSD before Christmas.

The officers thereupon obtained a search warrant of the premises which was executed on December 21. They found a small factory for the manufacture of LSD. All occupants of the house were arrested and the officers made a room-by-room search of the house. In all, 125 or 126 pieces of evidence were taken from the house.

A large brown bottle was found on a table in one room. On analysis its 472 grams of white powder were found to be 5.3% LSD. On a shelf in a closet across from the bathroom was a plastic bottle containing 42 grams of 95% pure LSD. The 42 grams of 95% pure LSD at the

price quoted by Spires would bring in $105,000 and if sold in lesser quantities would bring in more.

The Government charged each petitioner with manufacture of LSD, *possession* of LSD, and conspiracy to manufacture, compound, process, sell, and deliver LSD. Petitioner Spires was also charged with two counts of selling LSD. All petitioners were found guilty on each count charged against them. The District Judge did not make a specific finding that the *possession* of LSD was for the purposes of sale, but the Court of Appeals concluded that the evidence was overwhelming that *the possession was for purposes of sale.* 427 F. 2d 1066, 1071.

We distort the record when we treat the case as "possession" of a drug for purposes of manufacture. We deal with a drug after it was manufactured and held for sale. The charge of "possession" made in the indictment was therefore "possession" as defined in the 1965 Act. The power to pardon is reserved for the Executive. Accordingly, I would deny certiorari and I dissent from a remand of the case.

Certiorari Granted—Vacated and Remanded. (See also No. 524, *supra.*)

No. 656. LICATA *v.* UNITED STATES. C. A. 9th Cir. Upon consideration of suggestion of mootness and examination of entire record, petition for writ of certiorari granted, judgment vacated, and case remanded to the United States District Court for the Central District of California with directions to dismiss case as moot. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and case set for oral argument. Reported below: 429 F. 2d 1177.

Miscellaneous Orders

No. 485. HAWTHORNE *v.* ILLINOIS, *ante,* p. 878. Application to stay effectiveness of order denying certiorari denied.

No. 1066. CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. *v.* VOLPE, SECRETARY OF TRANSPORTATION, ET AL. C. A. 6th Cir. Application for stay presented to MR. JUSTICE STEWART, and by him referred to the Court, granted pending issuance of judgment of this Court. Treating the application for stay and briefs in opposition as a petition for writ of certiorari and opposition thereto, certiorari granted and case set for oral argument on Monday, January 11, 1971. Briefs for petitioners shall be filed by December 21, 1970, and briefs for respondents shall be filed by January 4, 1971. Briefs may be typewritten if counsel are unable to file printed briefs by these dates. Motions of Committee of 100 on the Federal City, Inc., and City of Memphis et al. for leave to file briefs as *amici curiae* granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these matters. Reported below: 432 F. 2d 1307.

No. —. SAN ANTONIO CONSERVATION SOCIETY ET AL. *v.* TEXAS HIGHWAY DEPARTMENT ET AL. C. A. 5th Cir. Application for stay presented to MR. JUSTICE BLACK, and by him referred to the Court, granted provided petition for writ of certiorari, before judgment, is filed in this Court by December 14, 1970. Briefs opposing such petition shall be filed by December 17, 1970. Both the petition for writ of certiorari and briefs in opposition may be submitted in typewritten form.

No. 89. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 397 U. S. 1034.] Motions of appellees schools and Pennsylvania Association of Independent Schools for additional time for oral argument denied.

No. 5247. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 864.] Motion of petitioner for appointment of counsel granted. It is ordered that William J. Lippman, Esquire, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 673. LEE NATIONAL CORP. *v.* ATLANTIC RICHFIELD CO. ET AL. C. A. 3d Cir. Motion for leave to file petition for writ of certiorari denied.

No. 5774. SULLIVAN *v.* MICHIGAN;

No. 5803. COPELAND *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL.; and

No. 5810. FLETCHER *v.* SPEAKER, ATTORNEY GENERAL OF PENNSYLVANIA. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (See also No. 656, *supra.*)

No. 655. HODGSON, SECRETARY OF LABOR *v.* LOCAL UNION 6799, UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 426 F. 2d 969.

No. 812. UNITED STATES *v.* DISTRICT COURT IN AND FOR WATER DIVISION NO. 5 ET AL. Sup. Ct. Colo. Certiorari granted and case set for oral argument immediately following No. 87 [*United States* v. *District Court in and for the County of Eagle et al.*, certiorari granted, 397 U. S. 1005].

Certiorari Denied. (See also No. 524, *supra.*)

No. 233. MOHLAND *v.* MONTANA STATE BOARD OF EQUALIZATION ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 155 Mont. 49, 466 P. 2d 582.

No. 288. JOINER *v.* DECKARD. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 412, 255 N. E. 2d 900.

No. 291. MCVEAN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 227 So. 2d 535.

No. 302. FRENCH ET AL. *v.* BASHFUL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 182.

No. 470. GIANATASIO *v.* WHYTE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 908.

No. 643. ALEXANDER *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 644. LANSING BROADCASTING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 427 F. 2d 1014.

No. 645. STRICKLAND, EXECUTRIX *v.* E. W. SCRIPPS CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 421 F. 2d 555.

No. 646. ALLIED THEATRE OWNERS OF INDIANA, INC., DBA THEATRE OWNERS OF INDIANA, ET AL. *v.* VOLPE, SECRETARY OF TRANSPORTATION. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 2d 1002.

No. 647. LARSEN FORD, INC. *v.* GASPERINO, ADMINISTRATRIX, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 1151.

No. 649. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 428 F. 2d 1191.

No. 653. LEWES DAIRY, INC., ET AL. *v.* HARDIN, SECRETARY OF AGRICULTURE. C. A. 3d Cir. Certiorari denied.

No. 650. HAYNES *v.* JAMES H. CARR, INC. C. A. 4th Cir. Certiorari denied. Reported below: 427 F. 2d 700.

No. 657. HUNT *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 454 S. W. 2d 555.

No. 659. COMCET, INC. *v.* COMMUNICATIONS SATELLITE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 429 F. 2d 1245.

No. 662. C. H. GUENTHER & SON, INC., DBA PIONEER FLOUR MILLS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 983.

No. 663. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 480, AFL–CIO *v.* GULF COAST BUILDING & SUPPLY CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 121.

No. 664. CORNWELL ET AL. *v.* STATE BOARD OF EDUCATION OF MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 428 F. 2d 471.

No. 665. SCHOLDER ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 1123.

No. 666. ROCKET FREIGHT LINES CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 2d 202.

No. 667. BOWATERS SOUTHERN PAPER CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 799.

No. 668. FARINELLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 513.

No. 670. AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL. *v.* SAFIR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 432 F. 2d 137.

No. 672. TONAHILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 1042.

No. 675. COMMERCIAL SOLVENTS CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 192 Ct. Cl. 339, 427 F. 2d 749.

No. 687. COHEN *v.* NEAGLE ET AL. C. A. 7th Cir. Certiorari denied.

No. 689. FAIRBANK, DBA ARNOLD FAIRBANK CATTLE CO., ET AL. *v.* HARDIN, SECRETARY OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 264.

No. 690. THOMPSON *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 693. BRANIFF AIRWAYS, INC., ET AL. *v.* TEXAS AERONAUTICS COMMISSION ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 454 S. W. 2d 199.

No. 694. CLAY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 454 S. W. 2d 109.

No. 696. KUHNS BROTHERS CO. ET AL. *v.* DURIRON CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 387.

No. 697. UNIFLOW MANUFACTURING CO. ET AL. *v.* KING-SEELEY THERMOS CO. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 335.

No. 698. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 38, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 144.

No. 699. MAJURI ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 431 F. 2d 469.

No. 700. ESCAMBIA CHEMICAL CORP. *v.* STAMICARBON, N. V. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 920.

No. 702. MURPHY *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: —— Ore. ——, 465 P. 2d 900.

No. 5218. ORTEGA *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 230 So. 2d 177.

No. 5226. JONES *v.* PROCUNIER, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied.

No. 5309. ORTEGA *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 5326. WASHINGTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 33 App. Div. 2d 651, 306 N. Y. S. 2d 661.

No. 5344. COOK *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1066.

No. 5349. GENTILE *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 426 F. 2d 238.

No. 5406. HILL *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 1195.

No. 5409. JACKSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 5432. ALI *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5439. MENEWEATHER *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 5435. RYBAR *v.* NELSON, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 5447. BAUMGART *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 5457. PRINCIPE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 5459. JONES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 33 App. Div. 2d 1104, 309 N. Y. S. 2d 573.

No. 5476. HARVEY *v.* ERICKSON, WARDEN. Sup. Ct. S. D. Certiorari denied.

No. 5477. PAM *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 1 Wash. App. 723, 463 P. 2d 200.

No. 5491. MARNIN *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 5731. JOHNSON *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 5735. ALEXANDER *v.* SUPERIOR COURT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 5737. WILBUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 947.

No. 5738. MURATORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5739. MOREHEAD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 326, 259 N. E. 2d 8.

No. 5740. GARCIA ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 1231.

No. 5743. GOMORI *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 5744. OZUNA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 5747. FELDMAN *v.* WHIPKEY'S DRUG SHOP ET AL. Ct. App. Ga. Certiorari denied. Reported below: 121 Ga. App. 580, 174 S. E. 2d 474.

No. 5748. CRISWELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: —— Nev. ——, 472 P. 2d 342.

No. 5751. MCLEOD *v.* SILLS, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 5752. HAVELOCK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 2d 987.

No. 5754. DAWSON ET UX. *v.* SHENANDOAH RETREAT LAND CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 422 F. 2d 402.

No. 5755. JORDAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 7.

No. 5757. BLACKWELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 276 N. C. 714, 174 S. E. 2d 534.

No. 5759. OHMER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 5760. PANCZKO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 5762. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 5764. MCCLEARY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5766. CORKRAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 5767. WIMBERLY *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 5771. STEPHENS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5772. BADGER *v.* LAVALLEE, WARDEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 5773. SPANN *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 5775. CURTIS *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 5776. ROSENBERG *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 5777. DEJARNETTE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 429 F. 2d 571.

No. 5779. ANGELICO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 2d 288.

No. 5780. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 429 F. 2d 158.

No. 5782. FOUR STAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 1406.

No. 5783. SWINICK *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 5967. SWINICK *v.* CITY OF NEW YORK DEPARTMENT OF SOCIAL SERVICES ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 5784. LEPISCOPO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 258.

No. 5785. SHAKUR ET AL. *v.* MURTAGH, JUDGE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 33 App. Div. 2d 901, 307 N. Y. S. 2d 817.

No. 5786. HOWARD *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 426 F. 2d 277.

No. 5789. VEACH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: —— Tenn. ——, 456 S. W. 2d 650.

No. 5792. SMITH *v.* LASH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 5793. HYDE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5799. GARDNER *v.* SUPERIOR COURT OF NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 5801. FARESE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5804. ESSER *v.* LION MATCH CORPORATION OF AMERICA. C. A. 3d Cir. Certiorari denied.

No. 5806. ROLLINS *v.* FITZBERGER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 5807. LEWIS *v.* FITZHARRIS, TRAINING FACILITY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 5809. REMALEY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 26 N. Y. 2d 427, 259 N. E. 2d 901.

No. 5812. O'NEAL *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 5813. HAUSHALTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 427 F. 2d 1366.

No. 5814. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 139 U. S. App. D. C. 193, 432 F. 2d 626.

No. 5815. TYLER *v.* PETERSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 5816. ADAMS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5818. ORANGIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 430 F. 2d 613.

No. 5819. BARTON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 1295.

No. 5821. JONES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 5824. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 2d 32.

No. 269. SMITH *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 55 N. J. 476, 262 A. 2d 868.

No. 614. PARKER, COMMISSIONER OF DEPARTMENT OF TRANSPORTATION OF NEW YORK *v.* CITIZENS COMMITTEE FOR THE HUDSON VALLEY ET AL.; and

No. 615. VOLPE, SECRETARY OF TRANSPORTATION, ET AL. *v.* CITIZENS COMMITTEE FOR THE HUDSON VALLEY ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 425 F. 2d 97.

No. 654. TIIDEE PRODUCTS, INC. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 138 U. S. App. D. C. 249, 426 F. 2d 1243.

No. 658. BAREFOOT ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. C. A. 10th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. Reported below: 424 F. 2d 1001.

No. 669. MUNICIPAL DISTRIBUTOR GROUP *v.* FEDERAL POWER COMMISSION ET AL.;

No. 680. CONTINENTAL OIL CO. ET AL. *v.* FEDERAL POWER COMMISSION;

No. 681. TEXACO INC. ET AL. *v.* FEDERAL POWER COMMISSION;

No. 682. CALIFORNIA CO., A DIVISION OF CHEVRON OIL CO. *v.* FEDERAL POWER COMMISSION;

No. 683. BRADCO PROPERTIES, INC., ET AL. *v.* FEDERAL POWER COMMISSION;

No. 684. COCKRELL *v.* FEDERAL POWER COMMISSION;

No. 685. SUPERIOR OIL CO. *v.* FEDERAL POWER COMMISSON;

No. 691. ASSOCIATED GAS DISTRIBUTORS *v.* AUSTRAL OIL CO. ET AL.; and

No. 692. PUBLIC SERVICE COMMISSION OF NEW YORK *v.* AMERADA HESS CORP. ET AL. C. A. 5th Cir. Motion of United Distribution Companies for leave to file a brief as *amicus curiae* in these cases, except No. 681, granted. Certiorari denied. Reported below: 428 F. 2d 407 and —— F. 2d ——.

No. 660. SMITH, TRUSTEE IN BANKRUPTCY *v.* MERRITT, REFEREE IN BANKRUPTCY. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 678. HOHENSEE *v.* SCIENTIFIC LIVING, INC. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 671. CONOCO PLASTICS, INC. *v.* CARR ET AL. C. A. 5th Cir. Motion to dispense with printing respondents' brief granted. Certiorari denied. Reported below: 423 F. 2d 57.

No. 674. UNITED STATES *v.* GARRETT CORP. Ct. Cl. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 190 Ct. Cl. 858, 422 F. 2d 874.

No. 677. UNITED STATES *v.* PALMER ET AL. Ct. Cl. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 191 Ct. Cl. 346, 423 F. 2d 316.

No. 676. DUDLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 428 F. 2d 970.

No. 5185. SANDERS *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5388. HOOKER ET AL. *v.* BROOKHAVEN HOUSING AUTHORITY. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 231 So. 2d 774.

No. 5736. HAIRSTON *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 8 Cal. App. 3d Supp. 19, 87 Cal. Rptr. 470.

No. 686. MOLKENBUR *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: 430 F. 2d 563.

No. 701. STIMPEL *v.* STATE PERSONNEL BOARD OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion of National Jewish Commission on Law & Public Affairs for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 6 Cal. App. 3d 206, 85 Cal. Rptr. 797.

No. 5749. ROZENFELD *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted.

No. 5756. TORRES *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 427 F. 2d 168.

No. 5768. CALVERT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE is of the opinion that certiorari should be granted.

No. 5787. WARK *v.* MAINE ET AL. Sup. Jud. Ct. Me. Certiorari denied. MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 266 A. 2d 62.

No. 5797. GRISHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 427 F. 2d 157.

Rehearing Denied

No. 178. DEVERS *v.* DISTRICT OF COLUMBIA NATIONAL BANK, *ante,* p. 820;

No. 385. PUERTO RICO TELEPHONE CO. *v.* FIGUEROA DE ARROYO ET AL., *ante,* p. 877;

No. 386. UNITED STATES ET AL. *v.* CITY OF CHICAGO ET AL., *ante,* p. 8;

No. 387. UNITED STATES ET AL. *v.* TENNESSEE PUBLIC SERVICE COMMISSION ET AL., *ante,* p. 8;

No. 396. LOUISVILLE & NASHVILLE RAILROAD CO. *v.* TENNESSEE PUBLIC SERVICE COMMISSION ET AL., *ante,* p. 8;

No. 410. CHICAGO & EASTERN ILLINOIS RAILROAD ET AL. *v.* CITY OF CHICAGO ET AL., *ante,* p. 8;

No. 427. DAWSON *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante,* p. 830;

No. 449. TAGLIA *v.* LAIRD, SECRETARY OF DEFENSE, *ante,* p. 831;

No. 451. JOHNSON *v.* STATE BAR OF CALIFORNIA ET AL., *ante,* p. 859;

No. 5466. STURM *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *ante,* p. 863;

No. 5475. GAY *v.* UNITED STATES, *ante,* p. 867; and

No. 5517. ORME *v.* FIELD, MEN'S COLONY SUPERINTENDENT, ET AL., *ante,* p. 879. Petitions for rehearing denied.

No. 450. SMITH *v.* TENNESSEE, *ante,* p. 831. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 621, October Term, 1969. WISEMAN ET AL. *v.* MASSACHUSETTS ET AL., 398 U. S. 960. Motion of National Educational Television for leave to file a brief as *amicus curiae* in support of petition for rehearing granted. Petition for rehearing denied. MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, and MR. JUSTICE BLACKMUN are of the opinion that the petition should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion and petition.

No. 395. LAZARUS *v.* UNITED STATES, *ante,* p. 869. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 5220. GILMORE *v.* GORDON ET AL., MEMBERS OF CALIFORNIA ADULT AUTHORITY, *ante,* p. 837. Motion for leave to file petition for rehearing denied.

DECEMBER 14, 1970

Affirmed on Appeal

No. 733. RAFFERTY ET AL. *v.* MACKAY ET AL. Affirmed on appeal from D. C. N. D. Cal. *Baggett* v. *Bullitt,* 377 U. S. 360. MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and the case set for oral argument.

Appeals Dismissed

No. 732. ALABAMA ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. S. D. Ala. dismissed for want of jurisdiction. Reported below: 314 F. Supp. 1319.

No. 5854. CHAMPS *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 14th Sup. Jud. Dist., dismissed for want of substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE MARSHALL are of the opinion that probable jurisdiction should be noted and the case set for oral argument. Reported below: 452 S. W. 2d 55.

Miscellaneous Orders

No. 41, Orig. OHIO *v.* WYANDOTTE CHEMICALS CORP. ET AL. Motion of the Solicitor General for allotment of time for oral argument granted and 20 minutes allotted for that purpose. Defendant allotted 20 additional minutes for oral argument. [For earlier order herein, see *ante,* p. 810.]

No. 30. UNITED STATES *v.* HARRIS. C. A. 6th Cir. [Certiorari granted, 397 U. S. 905.] Motion of respondent for appointment of counsel granted. It is ordered that Steven M. Umin, Esquire, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 85. GILLETTE *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, 399 U. S. 925]; and

No. 325. NEGRE *v.* LARSEN ET AL. C. A. 9th Cir. [Certiorari granted, 399 U. S. 925.] Motion of George T. Altman for leave to file a brief as *amicus curiae* granted.

No. 113. DECKER, U. S. DISTRICT JUDGE, ET AL. *v.* HARPER & ROW PUBLISHERS, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 397 U. S. 1073.] Motion of Northampton County, Pennsylvania, Bar Assn. for leave to join brief of American Bar Assn. as *amicus curiae* granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 336. NELSON, WARDEN *v.* O'NEIL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 901.] Motion of respondent for appointment of counsel granted. It is ordered that James S. Campbell, Esquire, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 281. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. C. A. 4th Cir. [Certiorari granted, 399 U. S. 926.] Motion of Jackson Urban League for leave to strike its name from *amici curiae* brief granted.

No. 5858. DAUGHERTY *v.* CRAVEN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 609. GRAHAM, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF ARIZONA *v.* RICHARDSON ET AL. Appeal from D. C. Ariz. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 313 F. Supp. 34.

No. 727. SAILER ET AL. *v.* LEGER ET AL. Appeal from D. C. E. D. Pa. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 321 F. Supp. 250.

Certiorari Denied

No. 209. KAY *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 232 So. 2d 378.

No. 705. CHEMTRONICS, INC., ET AL. *v.* BECKMAN INSTRUMENTS, INC., ET AL.; and

No. 711. BECKMAN INSTRUMENTS, INC., ET AL. *v.* CHEMTRONICS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 1369.

No. 708. TOWNSEND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: See 430 F. 2d 1222, 1224 n. 5.

No. 709. LONG ISLAND VIETNAM MORATORIUM COMMITTEE ET AL. *v.* CAHN, DISTRICT ATTORNEY OF NASSAU COUNTY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 713. PAYTON ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1324.

No. 714. ZEZOFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 428 F. 2d 580.

No. 716. ELLINGSON TIMBER CO. *v.* GREAT NORTHERN RAILWAY CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 424 F. 2d 497.

No. 717. DERBY FOODS, INC. *v.* FOOD AND DRUG ADMINISTRATION, U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 427 F. 2d 511.

No. 718. DELAWARE VALLEY ARMAMENTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 431 F. 2d 494.

No. 723. BAKER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 1278.

No. 725. STEVENSON ET AL. *v.* BOARD OF EDUCATION OF WHEELER COUNTY, GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 1154.

No. 726. RISSER ET UX. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 438 Pa. 544, 264 A. 2d 407.

No. 735. BUSINESS DEVELOPMENT CORPORATION OF NORTH CAROLINA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 428 F. 2d 451.

No. 736. KELLERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 431 F. 2d 319.

No. 737. NATIONAL LABOR RELATIONS BOARD *v.* AMERICAN CABLE SYSTEMS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 446.

No. 5249. BUTLER *v.* CADY, WARDEN. Sup. Ct. Wis. Certiorari denied.

No. 5353. JUAREZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 5411. JOHNSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 463, 256 N. E. 2d 343.

No. 5482. RUARK *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 5490. SMITH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 5514. STROZIER *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 226 Ga. 283, 174 S. E. 2d 417.

No. 5565. HAMPTON *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 5675. PETERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 2d 1357.

No. 5694. FURTAK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 5746. PEGRAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 423 F. 2d 904.

No. 5761. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 5770. FRYE *v.* PATTEN. C. A. 2d Cir. Certiorari denied.

No. 5825. GRANTHAM *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 5826. WASHINGTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 5827. BAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 428 F. 2d 508.

No. 5829. WADDELL *v.* BOUNDS ET AL. C. A. 4th Cir. Certiorari denied.

No. 5832. HALL *v.* CASSCLES, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5833. RANCIGLIO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 429 F. 2d 228.

No. 5836. DIXON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5840. PRICE *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 93 Idaho 615, 469 P. 2d 544.

No. 5841. OLBROT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 5842. MCCLAIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 5845. LEWIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 22 Ohio St. 2d 125, 258 N. E. 2d 445.

No. 5846. LEWIS *v.* ROBINSON, U. S. DISTRICT JUDGE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 5847. DAVIS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5851. POINTER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 248 Ark. 710, 454 S. W. 2d 91.

No. 5857. MCLAUGHLIN *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied.

No. 5852. CHAPMAN, AKA CRONIN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 423 F. 2d 682.

No. 5859. SCHELTER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 5860. GRAVES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 196.

No. 5861. PORTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 7.

No. 5862. BROWN *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 5863. GRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 429 F. 2d 1323.

No. 5864. MARTIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 428 F. 2d 1140.

No. 536. BETO, CORRECTIONS DIRECTOR *v.* GRAVES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 424 F. 2d 524.

No. 579. GOLDSMITH *v.* SUTHERLAND. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 426 F. 2d 1395.

No. 5543. MACK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BRENNAN is of the opinion that certiorari should be granted. Reported below: 26 N. Y. 2d 311, 258 N. E. 2d 703.

Rehearing Denied

No. 180. ZEMLER *v.* UNITED STATES, *ante,* p. 820; and

No. 5556. CAMPBELL *v.* UNITED STATES, *ante,* p. 881. Motions for leave to file petitions for rehearing denied.

No. 201. McConney *v.* United States, *ante,* p. 821;

No. 5317. McConney *v.* United States Court of Appeals for the Ninth Circuit et al., *ante,* p. 817;

No. 465. Sayles *v.* Wiegand et al., *ante,* p. 876;

No. 485. Hawthorne *v.* Illinois, *ante,* p. 878; and

No. 5811. Anderson *v.* American Broadcasting Co. et al., *ante,* p. 875. Petitions for rehearing denied.

December 18, 1970

Miscellaneous Order

No. 1101. Named Individual Members of the San Antonio Conservation Society *v.* Texas Highway Department et al. C. A. 5th Cir. Stay heretofore granted by the Court on December 7, 1970 [*ante,* p. 939], vacated. Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall dissent from the entry of this order.

December 21, 1970

Appeals Dismissed

No. 741. Chase Brass & Copper Co. *v.* Franchise Tax Board of California. Appeal from Ct. App. Cal., 1st App. Dist. Motions of Tax Executives Institute, Inc., Financial Executives Institute, and National Association of Manufacturers of the United States et al. for leave to file briefs as *amici curiae* 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: 10 Cal. App. 3d 496, 95 Cal. Rptr. 805.

No. 5874. Snoddy *v.* McNair, Governor of South Carolina, et al. Appeal from D. C. S. C. dismissed for want of jurisdiction. Mr. Justice Stewart is of the opinion that the judgment should be affirmed.

No. 744. YOUNG *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 238 So. 2d 589.

No. 754. 8200 REALTY CORP. ET AL. *v.* LINDSAY, MAYOR OF THE CITY OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 27 N. Y. 2d 124, 261 N. E. 2d 647.

No. 762. JOHNSON *v.* GOODYEAR TIRE & RUBBER CO. ET AL. Appeal from Ct. App. Cal., 2d App. 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 BLACKMUN took no part in the consideration or decision of this case. Reported below: 9 Cal. App. 3d 304, 88 Cal. Rptr. 221.

No. 5875. ANDERSON *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction.

Miscellaneous Orders

No. 31, Orig. UTAH *v.* UNITED STATES. Motion of the Solicitor General for an extension of time to file exceptions and brief on Report of Special Master granted, and time extended to and including January 8, 1971. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For previous actions herein, see, *e. g., ante,* p. 875.]

No. 338. BLONDER-TONGUE LABORATORIES, INC. *v.* UNIVERSITY OF ILLINOIS FOUNDATION ET AL. C. A. 7th Cir. [Certiorari granted, *ante,* p. 864.] Motion of Finney Co. for leave to file a brief as *amicus curiae* granted, and motion for leave to participate in oral argument as *amicus curiae* denied. Motion of respondent University of Illinois Foundation to allow additional time for oral argument denied.

No. 41, Orig. OHIO *v.* WYANDOTTE CHEMICALS CORP. ET AL. Motion to permit three attorneys to participate in oral argument on behalf of defendants granted. [For earlier order herein, see *ante,* p. 810.]

No. 5175. PEREZ ET UX. *v.* CAMPBELL ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 818.] Motion of Women's Center Legal Program et al. for leave to file a brief as *amici curiae* granted.

No. 5257. LABINE, TUTRIX *v.* VINCENT, ADMINISTRATOR. Appeal from Sup. Ct. La. [Probable jurisdiction noted, *ante,* p. 817.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 5483. WALKER *v.* PATE, WARDEN, ET AL.;

No. 5865. SZIJARTO *v.* NELSON, WARDEN;

No. 5883. STAMPER *v.* HASKINS, CORRECTIONAL SUPERINTENDENT; and

No. 5975. HAWLEY *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 548. ELY *v.* KLAHR ET AL. Appeal from D. C. Ariz. Probable jurisdiction noted. Reported below: 313 F. Supp. 148.

Certiorari Granted

No. 712. TRIANGLE IMPROVEMENT COUNCIL ET AL. *v.* RITCHIE, COMMISSIONER, STATE ROAD COMMISSION OF WEST VIRGINIA, ET AL. C. A. 4th Cir. Certiorari granted. [For earlier order herein, see, *ante,* p. 876.]

No. 5586. BELL *v.* BURSON, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF GEORGIA. Ct. App. Ga. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 121 Ga. App. 418, 174 S. E. 2d 235.

Certiorari Denied. (See also Nos. 741 and 762, *supra.*)

No. 242. SAMADJOPOULOS *v.* NATIONAL WESTERN LIFE INSURANCE CO. C. A. 1st Cir. Certiorari denied. [For earlier order herein, see, *ante,* p. 815.]

No. 276. PARIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 216 Pa. Super. 803, 264 A. 2d 170.

No. 738. CRAIG ET AL. *v.* OLIN MATHIESON CHEMICAL CORP. C. A. 7th Cir. Certiorari denied. Reported below: 427 F. 2d 962.

No. 739. B'NAI B'RITH, INC. *v.* JOFTES. C. A. D. C. Cir. Certiorari denied.

No. 742. TRANSAMERICAN FREIGHT LINES, INC. *v.* LOCUST CARTAGE CO., INC. C. A. 1st Cir. Certiorari denied. Reported below: 430 F. 2d 334.

No. 743. STEWART, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 319.

No. 746. LITTLE *v.* GREEN. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 1061.

No. 747. MARSHALL, ADMINISTRATOR *v.* HOLLYWOOD, INC., ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 236 So. 2d 114.

No. 748. BAKEWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 721.

No. 750. BONANNO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 2d 1060.

No. 753. KRISEL *v.* PHILLIPS PETROLEUM CO. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 1367.

No. 751. MARJORIE WEBSTER JUNIOR COLLEGE, INC. *v.* MIDDLE STATES ASSOCIATION OF COLLEGES & SECONDARY SCHOOLS, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 139 U. S. App. D. C. 217, 432 F. 2d 650.

No. 755. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 38.

No. 757. BAKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 139 U. S. App. D. C. 126, 430 F. 2d 499.

No. 5518. HARDIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 453 S. W. 2d 156.

No. 5522. GUZIEC, AKA HAILE *v.* CREDIT BUREAU OF SANTA MONICA BAY DISTRICT, INC. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 5529. LYONS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Francisco. Certiorari denied.

No. 5553. BOYD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 5574. CONKLIN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 424 F. 2d 516.

No. 5587. MOORE *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5796. GREENE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 423 F. 2d 1068.

No. 5830. QUINTANAR-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 425.

No. 5869. DORSEY *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 5870. BROWN *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied. Reported below: 426 F. 2d 677.

No. 5871. CRUZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 6 Cal. App. 3d 384, 85 Cal. Rptr. 918.

No. 5876. CASSIDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 383.

No. 5878. VITORATOS *v.* YACOBUCCI. Sup. Ct. Ohio. Certiorari denied. Reported below: 22 Ohio St. 2d 206, 259 N. E. 2d 120.

No. 5882. WILLIAMS *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 5885. BRISCOE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 428 F. 2d 954.

No. 5886. TWITTY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 5889. HART *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 5890. MYLES *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 5891. STRATER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 5893. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5894. TRIGG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 372.

No. 5896. BENDELOW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 418 F. 2d 42.

No. 5898. MCCRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 5901. FRANKLIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 429 F. 2d 274.

No. 5903. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 422 F. 2d 1043.

No. 5904. HARTMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5909. SKOLNICK *v.* WILL, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied.

No. 5974. WASHINGTON *v.* SUPERIOR COURT OF LOS ANGELES COUNTY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 5976. WELLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 2d 432.

No. 286. ALASKA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 423 F. 2d 764. [For earlier order herein, see, *ante,* p. 815.]

No. 721. TRANSIT HOMES, INC. *v.* MASTROPOLE ET UX. Sup. Ct. S. C. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted and the judgment of the Supreme Court of South Carolina reversed. Reported below: 254 S. C. 332, 175 S. E. 2d 465.

No. 1101. NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY *v.* TEXAS HIGHWAY DEPARTMENT ET AL. Petition for certiorari before judgment to C. A. 5th Cir. Certiorari denied.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

This case disturbs me greatly. On December 7, 1970, this Court stayed the construction of two federally funded highways in order to save two public parks, *ante,* p. 939. One park serves the people of Memphis, Tennessee.[1] The park in this case is for the rest and recreation of the people of San Antonio, Texas. Both cases involve important and timely problems of interpretation of § 18 (a) of the Federal-Aid Highway Act of 1968, 23 U. S. C. § 138 (1964 ed., Supp. V), passed by Congress to stem the destruction of our Nation's parks by highway builders. These cases give this Court an opportunity to insure that lower courts and certain federal agencies administer this vital environment-saving legislation in the way that Congress intended. The Tennessee case is still scheduled for oral argument at the earliest possible date—January 11, 1971. Yet, the Court now dissolves the stay previously entered in the San Antonio case by denying certiorari. I respectfully dissent from such action.

The San Antonio park has two golf courses, a zoo, a sunken garden, an open-air theater and many acres of open space, covered with trees, flowers, and running brooks. It is a lovely place for people to retreat from the frantic pace of bustling urban life to enjoy the simple pleasures of open space, quiet solitude, and clean air. It is a refuge for young and old alike—the kind of a park where a family man can take his wife and children or lovers can while away a sunny Sunday afternoon to-

[1] See No. 1066, *Citizens to Preserve Overton Park, Inc.* v. *Volpe.*

gether. After today's decision, the people of San Antonio and the birds and animals that make their home in the park will share their quiet retreat with an ugly, smelly stream of traffic pouring down a super six-lane "North Expressway." Trees, shrubs, and flowers will be mown down. The cars will spew forth air and noise pollution contaminating those acres not buried under concrete. Mothers will grow anxious and desert the park lest their children be crushed beneath the massive wheels of interstate trucks.

The San Antonio Conservation Society and its individual members filed suit to block federal approval and funding of this expressway. The United States District Court held that the Secretary of Transportation and state officials were free to proceed with federal funding and construction of two segments of the road coming into the park from north and south. It retained jurisdiction to review any later decision on the design and routing of the connecting middle section, which had not been formally approved by the Secretary.

In addition to substantial questions under the Federal-Aid Highway Act, this case involves the newly enacted National Environmental Policy Act of 1969, Pub. L. 91–190, 83 Stat. 852. The latter requires a detailed study of the probable effects before approval of "major Federal actions significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (C) (1964 ed., Supp. V). Even respondent Secretary of Transportation appears to concede that the decision to fund this expressway is a "major federal action" requiring careful study because he has promised that a study will be made before the middle section is approved. However, the approval of the two end segments took place in August 1970, eight months *after* the effective date of the Act. It is undisputed that no environmental study has been made with respect to these two segments,

which themselves desecrate parklands and which make the destruction of further parkland inevitable.

Section 18 (a) of the Federal-Aid Highway Act provides:

> "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands . . . . [*T*]*he Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park,* recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof . . . as so determined by such officials *unless* (*1*) *there is no feasible and prudent alternative to the use of such land,* and (2) such program includes all possible planning to minimize harm to such park . . . ." (Emphasis added.)

Even the Secretary admits that he has failed to make formal findings about feasible and prudent alternative routes. Respondents have argued that formal findings are unnecessary. This seems an unlikely reading of the Act because without findings it will be difficult for courts to review the Secretary's determinations, and the intent of Congress to protect parklands is likely to be frustrated.[2] Furthermore, it is simply not realistic to consider the construction of this expressway "section by section" as the District Court and the Secretary of

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[2] Ironically, the Secretary of Transportation now appears to recognize that written findings should be made for highway grant-in-aid approvals and such findings are now provided for by his own regulation, Dept. of Transportation Order 5610.1, issued Oct. 7, 1970. But the Secretary has not been willing to apply his regulation to this case. In my view the regulation alone is sufficient reason to reverse and remand for findings of fact. Cf. *Thorpe* v. *Housing Authority,* 393 U. S. 268 (1969).

Transportation have done here. Once construction is begun and heavy investment made on the two end segments, the available options for routing the middle segment are severely limited. In the words of the Act alternatives for the middle segment which were "feasible and prudent" will no longer be "feasible" once the two end segments are constructed.

In the last several years, Congress has enacted coordinated legislation designed to protect our Nation's environment from destruction by water pollution, air pollution, and noise pollution. This legislation has come about in response to aroused citizens who have awakened to the importance of a decent environment for our Nation's well-being and our very survival. Section 18 (a) of the Federal-Aid Highway Act and the National Environmental Policy Act are two major parts of this broad plan. The former was designed to prevent the systematic and thoughtless burial of public parks under the concrete of federally funded highways. The implementation of this legislation by the Department of Transportation is disheartening. The Act prohibits the Secretary from approving highway construction through parklands unless there is no "feasible and prudent" alternative. Congress has assigned a high value to parks, trees, and clean air. Parks are not to be condemned and taken in order to try to save a few dollars on a multimillion-dollar highway project. Congress was willing to sacrifice parks only when there is "no feasible alternative." Yet the Secretary has proceeded without formal findings to approve two segments of a highway which devour parkland. And the two segments now approved stand like gun barrels pointing into the heartland of the park. The Secretary and his staff are not wholly inexperienced in highway construction. They know full well the difficulty of preserving the park's heartland once the barrels have been loaded and the guns cocked. The efforts of our citizens and the

Congress to save our parklands and to preserve our environment deserve a more hospitable reception and more faithful observance than they have apparently found either in the Executive Branch or, thus far, in the courts.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur, dissenting.

This case is here on a stay presented to MR. JUSTICE BLACK and by him referred to the Court. We granted a stay pending consideration of a petition for certiorari before judgment of the Court of Appeals for the Fifth Circuit, *ante,* p. 939, which has now been filed. The Court dissolves the stay and denies certiorari, without any opinion. I dissent. This is an important case that involves the construction of 9.6 miles of an expressway through 250 acres of the Brackenridge-Olmos Basin parklands situated at the headwaters of the San Antonio River within the city of San Antonio. It involves the application of a new law—the National Environmental Policy Act of 1969, 42 U. S. C. § 4331 (1964 ed., Supp. V), which was signed by the President on January 1, 1970. The new Act applies by § 102 (2) to "all agencies of the Federal Government" and provides that such agencies shall include in every recommendation for

> "major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." § 102 (2)(C).

There can be no doubt that federal funding of a state highway project is covered by the 1969 Act. The most controversial aspect of the highway design and location is that it proposes to run a massive elevated eight- and six-lane expressway through a park in San Antonio. The Brackenridge-Olmos Basin parklands is a unique park, recreational, and open-spaces area. Specific land uses include the original Brackenridge Park grant, the Sunken Gardens, and adjacent outdoor amphitheater, the San Jacinto Park, the Alamo Stadium, the San Antonio Zoo, the Olmos Basin picnic area, the Franklin Fields, and numerous other parks, public, and open-space areas.

Many, including Senator Metcalf of Montana, had sounded the alarm over the devastation caused by federal highways: [1]

> "Today the land is being covered by four and six lane highways, supermarket parking lots, suburban

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[1] Speech, Stanford University, April 9, 1969.

Senator Metcalf on January 24, 1963, spoke of the great need for consideration of ecological factors before highway construction was launched:

"When Congress adjourned last fall, I decided to determine the extent to which highway construction was threatening our streams and rivers. I sent questionnaires to fish and game management officials in each of our 50 States. To date, Mr. President, I have received responses from 46 States.

"The questionnaire consisted of 10 questions, one of which was: 'Are trout streams or other important fishing streams or lakes adversely affected by highway construction in your State?' Thirty-two of the forty-six States which have responded to the questionnaire answered affirmatively, although damage varies in seriousness from State to State.

"Perhaps more significant were the responses to the question: 'Do you feel that additional legislation at the Federal or State levels is necessary to bring about a satisfactory degree of coordination of highway and wildlife conservation interests and objectives in your State?' To this question, Mr. President, fish and game management men in 37 States replied, 'Yes.' Two States were undecided about

high rise apartment buildings and lost to itself and to the people alike."

Parks—the breathing space of urban centers—were part of the concern of Congress, not only wilderness areas, rivers, lakes, and other aspects of the biosphere.[2] The Senate Committee stated in its report:

> "The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life. We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion, and *conditions within our central cities* which result in civil unrest and detract from man's social and psychological well-being; *the loss of valuable open spaces;* inconsistent and, often, incoherent rural and urban land-use policies; critical air and water pollution problems; *diminishing recreational opportunity;* continuing soil erosion; *the degradation of unique ecosystems;* needless deforestation; the decline and extinction of fish and wildlife species; *faltering and poorly de-*

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the necessity for legislation, and only seven see no need for action in this area.

"Mr. President, my questionnaire revealed general agreement, among those most qualified to know, that there is a need for legislation. This is not a partisan, political issue; it is a conservation problem cutting across party lines, as shown by responses to my questionnaire. Fish and game officials working for Republican and Democratic State administrations agreed that there is a need for legislation to protect fish, wildlife, and recreation resources from damage due to highway construction.

"Our bill, Mr. President, provides a method of meeting that need. I urge my colleagues to study this problem as it relates to their own States. I hope this matter will receive the attention of the Congress this year." 109 Cong. Rec. 871.

[2] For the legislative history see the Appendix to this opinion.

> *signed transportation systems;* poor architectural design and ugliness in public and private structures; *rising levels of noise;* the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards; and many, many other environmental quality problems." S. Rep. No. 91–296, p. 4. (Italics added.)

The report noted that environmental programs were administered by 63 federal agencies located within 10 of the 13 departments, as well as in 16 independent agencies. *Id.*, at 6.

"[P]oor land-use policies and urban decay" can no longer be deferred, the report stated. *Id.*, at 5.

> "We no longer have the margins for error that we once enjoyed. The ultimate issue posed by shortsighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are clear." *Ibid.*

And so the Act was drafted "to assure that all Federal agencies plan and work toward meeting the chalenge of a better environment." *Id.*, at 9.

Yet in spite of this mandate embodied in § 102 (2)(C) the Department of Transportation has made no findings on the impact of this massive elevated freeway on the environment of San Antonio. The Court does not tell us why none need be made.

On August 4, 1970, the State, after revising its plans, agreed to the federal plan for the end segments of the projects. But we are advised that it was not until August 13, 1970, that the Secretary of Transportation approved the construction by Texas of the two end seg-

ments; and he has not yet approved the middle section. It is said:

> "The Secretary expressly reserved final approval on the middle section because there is much parkland contained in the middle section.
>
> "As a matter of fact, one of the primary reasons the Secretary has not approved the middle section is due to the consideration of the views expressed by plaintiffs in opposition to the proposed route the middle section will take through the parklands."

We were told on November 16, 1970, that there are "at least four (4) possible alternative routes on which the middle section could be constructed to connect the two ends which the District Court has approved."

That is to say, 11 months after the Environmental Policy Act became effective, the gist of the location problem so far as the park is concerned had not been resolved.

The Solicitor General contends that the two end segments were approved in 1969. But the facts are that while Secretary Volpe gave preliminary approval of these segments on December 23, 1969, he withheld authorization of federal funds pending an agreement by the State to study further the middle segment. As already stated, Texas agreed to the end segments on August 4, 1970, and the Secretary gave his "unqualified approval" and authorization of them on August 13, 1970, long after the new Act became effective. Yet no findings under the 1969 Act were made.

It seems obvious, moreover, that approval of the two end segments has some effect on the alternatives for the middle section. For, once the expressway is split into segments and each segment considered separately, the environmental impact of the entire project will turn, at least in part, on the fact that the two ends are already built.

The Solicitor General states: "The Secretary could well approve a route in the middle segment that would involve little or no use of parklands, or substantially less than the proposed route location now contemplates."

Thus we have a fair indication that some of the park is going to be a freeway regardless. Yet as I read the Act a federal highway project "significantly affecting" even an acre of parkland cannot be launched without a finding on the environmental consequences.

The legal questions posed by § 102 (2)(C) include at least the following:

Should any piece of the park be destroyed to accommodate the freeway?

How can end segments of a highway aimed at the heart of a park be approved without appraising the dangers of drawing a dotted line between the two segments?

How important is the park to the people of San Antonio? How many use it? For what purposes? What wildlife does it embrace? To what extent will a massive eight- and six-lane highway decrease the value of the park as a place of solitude or recreation?

What are the alternatives that would save the park completely? Could a passage by way of tunnels be devised? Could the freeway be rerouted so as to avoid the parklands completely and leave it as a sanctuary?

Is not the ruination of a sanctuary created for urban people an "irreversible and irretrievable" loss within the meaning of § 102 (2)(C)?

I do not think we will have a more important case this Term. Congress has been moving with alarm against the perils of the environment. One need not be an expert to realize how awful the consequences are when urban sanctuaries are filled with structures, paved with concrete or asphalt, and converted into thoroughfares of high-speed modern traffic.

Those are some of the things with which Congress was concerned in the 1969 Act.

No federal question would, of course, be presented if Texas or San Antonio decided to turn these parklands into a biological desert. But when Congress helps finance a project like this freeway,[3] it becomes a federal project. See *Wickard* v. *Filburn,* 317 U. S. 111, 131; *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275, 295; *Simkins* v. *Memorial Hosp.,* 323 F. 2d 959. And if one thing is clear from the legislative history of this 1969 Act, it is that Congress has resolved that it will not allow federal agencies or federal funds to be used in a predatory manner so far as the environment is concerned. Congress has, indeed, gone further and said that the Department of Transportation, like other federal agencies, may no longer act as engineers alone and design and construct freeways solely by engineering standards. Congress has said that ecology has become paramount and that nothing must be done by federal agencies which does ecological harm when there are alternative, albeit more expensive, ways of achieving the result.

I would continue the stay, grant the petition for certiorari before judgment, 28 U. S. C. § 1254 (1), and let the bureaucracy know that § 102 (2)(C) is the law of the land to be observed meticulously.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Much of the legislative history of the Act is a discussion of air pollution, water pollution, and solid waste disposal. But when specifics are mentioned highway problems are present. And the mention of highway problems at every stage in the legislative history leaves

[3] The Federal Government is providing the funds for 50% of the cost of this expressway.

no doubt that the Department of Transportation's highway programs are subject to the Act.

At the Senate Hearing on the Act, the Department was represented by the Assistant Secretary for Urban Systems and Environment. He immediately recognized the reason he was present.

> "I think that perhaps the reason that the Department of Transportation was asked to have a representative here before your committee was because within the purview of the Department of Transportation has lain in the past and will continue to lie in the future many of the activities that, at least, are most apparent to the people of the country in the field of environmental impact."

He talked about the views of those people who live in metropolitan areas of the country. They have, he stated:

> "a growing concern, though in most instances it is not a deep knowledge perhaps of scientific implications . . . as to what might happen to life itself in some of the areas of which we are destroying our environment, it is concerned with the things that they see about them in their daily lives. And in this area, I think, transportation and the activities of transportation organizations have been one of those which they have observed and which has created perhaps as much controversy and concern as any other area of the State and Federal operations." Hearing on S. 1075, S. 237, and S. 1752, before the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess., 76.

Included in the House Hearings is a letter from the Chairman of the House Subcommittee considering the 1969 Act to the Chairman of the President's Council on Environmental Quality which notes that neither the De-

partment of Transportation nor the Department of the Interior has promulgated the procedures it will use under the Act. "The fact that there has not been full compliance by these Departments disturbs me greatly." Hearings before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, Ser. No. 91–32, p. 69. And before the House Hearings were printed the Department of Transportation had complied with the request and the Department's procedures under the Act were printed with the House Hearings. *Id.*, at 153–159.

The debates on the Act on the floors of both Houses were relatively short, attesting in some measure to the popularity of enacting an extensive environmental bill. Yet just as the Senate and House Hearings had demonstrated that the Department of Transportation was an integral part of the Federal Government's creation of environmental problems, so, too, did the debates alert one to the fact that highways caused environmental problems when not approached from an ecological perspective. In the House only a handful of speakers discussed the bill for any length of time and all spoke in broad generalities. Representative Pelly, a member of the subcommittee which considered the Act, provided the focus on the problems of highways.

> "We have experts in the field of transportation coping with the problem of moving people from one city to another in the least possible time with the greatest degree of safety. We have constructed a vast system of interstate highways to accomplish this. Yet at the same time, we have created serious problems of soil erosion, stream pollution and urban displacement. . . .
>
> ". . . The experts have, by and large, done their job well, but we must remember that their job is

> building highways, increasing our food production, preventing floods, and so on. Their primary concern is not the quality of our environment considered as a totality." 115 Cong. Rec. 26573.

The Senate debates were also brief and again often dealt largely with the generalities of air and water pollution. Senator Allott, a member of the committee which considered the Act, recognized this and reminded his colleagues that more was involved.

> "I think there is a little too much of a tendency, probably not in the committees involved here, but on the part of the public, to regard environment as involving only air pollution and water pollution. . . .
>
> ". . . [T]he environment does not involve only water and air; . . . it involves noise—and we are all becoming acutely conscious of this factor. More and more as time goes on—environmental questions will also involve land distribution, land planning for the future, what kind of future cities we will plan, and what we will do about the ghettos—for the ghettos are a part of the environmental picture . . . ." *Id.*, at 29061.

Senator Jackson, chairman of the committee which considered the Act, reviewed the legislative history of the Act for the benefit of the other Senators. He stated that concepts and ideas were drawn from the many other bills before Congress when the Senate Committee considered the Act. These bills

> "were directly concerned with environmental issues, covering a broad area of interest—cleaning up the Nation's rivers and better approaches to smog control, improving the use of open space and prevention of disorderly encroachment by super-highways, factories and other developments . . . and the control

of urban sprawl, unsightly junkyards, billboards, and power facilities that lower the amenities of landscape." *Id.*, at 29068.

Thus there can be no doubt but that Congress intended the Act to apply to federally funded highways and the Department of Transportation.

Rehearing Denied

No. 1109, October Term, 1968. WEED *v.* BILBREY ET AL., 394 U. S. 1018, 395 U. S. 971, and 397 U. S. 930. Motion for leave to file third petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

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

This suit grows out of the death of Mrs. Weed's husband in Florida. He was killed while on navigable waters within the State. She recovered nothing in her action for wrongful death because the trial court found her husband had been negligent and applied the Florida doctrine of contributory negligence. She contended that the maritime rule of comparative negligence should apply. She lost. Meanwhile a similar suit was progressing through the federal courts in Florida. Mrs. Moragne had also lost her husband on the navigable waters of that State. She contended that the maritime principle of unseaworthiness should apply. The Florida Supreme Court, asked whether the state law incorporated the principle, ruled that it did not, and that she was not entitled to recover under Florida law. 211 So. 2d 161 (1968).

The District Court of Appeal of Florida ruled, in the *Weed* case, that Florida law did incorporate the federal maritime doctrine of comparative negligence. 201 So.

2d 771 (1967). The defendants appealed to the Florida Supreme Court. That court, considering the claim of Mrs. Weed indistinguishable from that of Mrs. Moragne, denied three weeks earlier, reversed the appellate court. 215 So. 2d 479 (1968).

Mrs. Weed preceded Mrs. Moragne to this Court. She claimed that she had a cause of action under federal maritime law even though it was not statutorily authorized. She asked this Court to overrule its decision in *The Harrisburg,* 119 U. S. 199, that maritime law did not afford a cause of action for wrongful death. Her petition for certiorari was denied in May 1969, over three dissents. 394 U. S. 1018. Three weeks later, Mrs. Moragne filed a petition for certiorari in this Court, raising the same claim. Mrs. Weed filed a petition for rehearing, asking that her claim be heard with that of Mrs. Moragne. Mrs. Weed's request was denied in June 1969. 395 U. S. 971. In November 1969, certiorari was granted in the *Moragne* case. 396 U. S. 900.

Mrs. Weed again asked that her case be considered with that of Mrs. Moragne. This request was also denied. 397 U. S. 930.

In June 1970, this Court vindicated the claim of Mrs. Moragne.* 398 U. S. 375. Mrs. Weed now presents a compelling argument. She is one of two widows from the State of Florida who lost their husbands on navigable waters. One has recovered and one has not, because a different law was ultimately applied. Though both parties challenged the same rule, at nearly the

*This Court overruled *The Harrisburg,* 119 U. S. 199, and held that an action does lie under general maritime law for death caused by violation of maritime duties. Had Mrs. Weed's petition been granted, or had she been allowed to join with Mrs. Moragne before this Court, this holding would have meant that she was entitled to recovery, diminished by the doctrine of comparative negligence, rather than barred by the doctrine of contributory negligence.

same time, this Court has favored one and ignored the other.

Every plaintiff who loses his claim cannot reinstate his action when a rule of law favorable to him is declared, either by the legislature or the court. But that is not what is attempted here. This action had hardly come to rest when the Moragne petition was filed, and Mrs. Weed had continually asked this Court to be considered with that case. The facts of this case are even more compelling than those in *Gondeck* v. *Pan American World Airways, Inc.*, 382 U. S. 25, in which this Court confirmed that, " 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.' " *Id.*, at 26–27. Moreover, had Mrs. Weed proceeded through the federal courts, or had she instituted her suit later, she might have arrived in this Court after Mrs. Moragne. She did reach the Court three weeks before Mrs. Moragne; but her petition was denied. Had she followed Mrs. Moragne to this Court, the result in her case would have been different. All she asks is that the Court apply the law in her case that was applied in the one following hers.

No. 300. ODOM *v.* UNITED STATES, *ante*, p. 23;

No. 339. SLAKMAN *v.* FLORIDA, *ante*, p. 901;

No. 520. CIMINI *v.* UNITED STATES, *ante*, p. 911;

No. 521. O'MALLEY *v.* UNITED STATES, *ante*, p. 911;

No. 553. MARTIN, DBA SILKO NEW IMPROVED PRODUCTS CO. *v.* CROWN ZELLERBACH CORP., *ante*, p. 911;

No. 572. COUSINS *v.* UNITED STATES, *ante*, p. 904;

No. 5255. SHOLE *v.* O'FERRALL, ASSISTANT ATTORNEY GENERAL OF MARYLAND, ET AL., *ante*, p. 839;

No. 5377. KAMSLER *v.* BELLOWS, BELLOWS & MAGIDSON, *ante*, p. 912; and

No. 5710. SHOLE *v.* HOWARD ET AL., JUDGES, *ante*, p. 928. Petitions for rehearing denied.

No. 481. BUSH *v.* ALLSTATE INSURANCE CO., *ante,* p. 833;

No. 5212. NIX *v.* ILLINOIS, *ante,* p. 836; and

No. 5508. MCKINNON *v.* UNITED STATES, *ante,* p. 868. Motions for leave to file petitions for rehearing denied.

No. 5671. CANTRELL *v.* UNITED STATES, *ante,* p. 920. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

JANUARY 8, 1971

Miscellaneous Orders

No. —. IN RE HOGAN. Sup. Ct. Minn. Motion for leave to file petition for writ of mandamus and stay presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. 6295. ST. CLAIR *v.* SELECTIVE SERVICE LOCAL BOARD NO. 35, BROOKLYN, NEW YORK, ET AL. C. A. 2d Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

JANUARY 11, 1971

Affirmed on Appeal. (See also No. 789, *infra.*)

No. 463. SEA PAK, A DIVISION OF W. R. GRACE & CO. *v.* INDUSTRIAL, TECHNICAL & PROFESSIONAL EMPLOYEES, DIVISION OF NATIONAL MARITIME UNION, AFL–CIO. Affirmed on appeal from C. A. 5th Cir. MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 423 F. 2d 1229.

No. 836. HENKES ET AL. *v.* FISHER ET AL. Affirmed on appeal from D. C. Mass. Reported below: 314 F. Supp. 101.

Appeals Dismissed

No. 809. ATTIC CLUB, INC. *v.* TEXAS LIQUOR CONTROL BOARD. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 457 S. W. 2d 41.

No. 813. TIMMONS *v.* SOUTH CAROLINA TRICENTENNIAL COMMISSION ET AL. Appeal from Sup. Ct. S. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 254 S. C. 378, 175 S. E. 2d 805.

No. 820. COIT ET AL. *v.* GREEN ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction. Reported below: 309 F. Supp. 1127.

No. 828. WASHINGTON TELEPHONE CO. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 77 Wash. 2d 923, 468 P. 2d 687.

No. 5978. WASHINGTON *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question.

No. 6011. FOWLER *v.* ADAMS, SECRETARY OF STATE OF FLORIDA. Appeal from D. C. M. D. Fla. dismissed for want of jurisdiction. Reported below: 315 F. Supp. 592.

Vacated and Remanded on Appeal. (See also Nos. 793, 794, and 797, *infra.*)

No. 115. JIMENEZ ET AL. *v.* NAFF, YAKIMA COUNTY AUDITOR, ET AL. Appeal from D. C. E. D. Wash. [Probable jurisdiction noted, 397 U. S. 1005.] Judgment vacated and case remanded to the United States District Court for the Eastern District of Washington for further consideration in light of *Oregon* v. *Mitchell, ante,* p. 112.

No. 137. UNITED STATES ET AL. *v.* CHICAGO & EASTERN ILLINOIS RAILROAD CO.; and

No. 138. ILLINOIS COMMERCE COMMISSION ET AL. *v.* CHICAGO & EASTERN ILLINOIS RAILROAD CO. Appeals from D. C. N. D. Ill. [Probable jurisdiction noted, 398 U. S. 957.] Judgment vacated and cases remanded to the United States District Court for the Northern District of Illinois with directions to remand to the Interstate Commerce Commission for a determination as to whether the trains involved constitute an "intercity" service within the meaning of § 102 (5) of the Rail Passenger Service Act of 1970, Pub. L. 91–518, 84 Stat. 1328. Reported below: 308 F. Supp. 645.

No. 768. MESSER ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeal from D. C. E. D. Ky. Upon consideration of suggestion of mootness and examination of entire record, judgment vacated and case remanded to the United States District Court for the Eastern District of Kentucky with directions to dismiss case as moot. Reported below: 314 F. Supp. 511.

Other Summary Dispositions

No. 789. CITY OF CHICAGO ET AL. *v.* UNITED STATES ET AL.;

No. 793. WESTERN PACIFIC RAILROAD CO. *v.* CITY OF CHICAGO ET AL.;

No. 794. BURLINGTON NORTHERN, INC., ET AL. *v.* CITY OF CHICAGO ET AL.; and

No. 797. UNITED STATES ET AL. *v.* CITY OF CHICAGO ET AL. Appeals from D. C. N. D. Ill. That portion of judgment appealed from in No. 789 affirmed. Those portions of judgment appealed from in Nos. 793, 794, and 797 reversed and cases remanded to the United States District Court for the Northern District of Illinois for further proceedings. *United States* v. *City of Chicago, ante,* p. 8. Reported below: 314 F. Supp. 886.

Certiorari Granted—Vacated and Remanded

No. 5561. LILLY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States Court of Appeals for the Third Circuit with directions to reinstate appeal in conformity with suggestions filed by respondent.

*Certiorari Dismissed**

No. 5958. IRVIN *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed. Case and record referred to the United States Court of Appeals for the Ninth Circuit for further consideration in accordance with suggestion contained in the memorandum filed by the Solicitor General.

Miscellaneous Orders

No. 338. BLONDER-TONGUE LABORATORIES, INC. *v.* UNIVERSITY OF ILLINOIS FOUNDATION ET AL. C. A. 7th Cir. [Certiorari granted, *ante,* p. 864.] Motion of Automatic Electric Co. for leave to file a brief as *amicus curiae* granted. Motions of Automatic Electric Co. and American Patent Law Assn. for leave to participate in oral argument as *amici curiae* denied. Motion of petitioner for additional time for oral argument denied.

No. 5257. LABINE, TUTRIX *v.* VINCENT, ADMINISTRATOR. Appeal from Sup. Ct. La. [Probable jurisdiction noted, *ante,* p. 817.] Motion of Center on Social Welfare Policy & Law for leave to file a brief as *amicus curiae* granted. Joint motion to substitute Wilbur Vincent in place of Simon Vincent, deceased, as party appellee granted.

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*[REPORTER'S NOTE: This is a new category for summary dispositions. Cf. Reporter's Note, 398 U. S. 901.]

No. 360. GROVE PRESS, INC., ET AL. *v.* FLASK ET AL. Appeal from D. C. N. D. Ohio. Motion of Charles H. Keating, Jr., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 362. MCGEE *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, *ante,* p. 864.] Motion of the Solicitor General for leave to Wm. Bradford Reynolds to present oral argument *pro hac vice* granted.

No. 464. GAINESVILLE UTILITIES DEPARTMENT ET AL. *v.* FLORIDA POWER CORP.; and

No. 469. FEDERAL POWER COMMISSION *v.* FLORIDA POWER CORP. C. A. 5th Cir. [Certiorari granted, *ante,* p. 877.] Motion of American Public Power Assn. for leave to file a brief as *amicus curiae* granted.

No. 5175. PEREZ ET UX. *v.* CAMPBELL ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 818.] Motion of National Organization for Women for leave to file a brief as *amicus curiae* granted.

No. 5949. BRINLEE *v.* HENDERSON, WARDEN;

No. 5957. JACKSON *v.* CRAVEN, WARDEN;

No. 6005. JOHNSON *v.* KERR, U. S. DISTRICT JUDGE, ET AL.; and

No. 6013. WALLACE *v.* WINGO, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 5959. GINGER *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL.;

No. 5970. GARVIE *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL.; and

No. 5991. PAIDE *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. Motions for leave to file petitions for writs of mandamus and/or prohibition denied.

No. 5938. WELTY *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 557. UNITED STATES *v.* INTERNATIONAL MINERALS & CHEMICAL CORP. Certified appeal from D. C. S. D. Ohio. Probable jurisdiction noted.

No. 821. UNITED STATES *v.* GREATER BUFFALO PRESS, INC., ET AL. Appeal from D. C. W. D. N. Y. Probable jurisdiction noted. Reported below: 327 F. Supp. 305.

Certiorari Granted. (See also No. 5561, *supra.*)

No. 577. UNITED STATES *v.* JOHNSON. C. A. 9th Cir. Certiorari granted. Reported below: 425 F. 2d 630.

No. 740. GREEN *v.* KENTUCKY. Ct. App. Ky. Certiorari granted. Reported below: 454 S. W. 2d 336.

No. 785. NATIONAL LABOR RELATIONS BOARD *v.* NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE. C. A. 6th Cir. Certiorari granted. Reported below: 427 F. 2d 312.

No. 783. CLAY, AKA ALI *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted limited to Question 4 presented by the petition which reads as follows:

"4. Whether petitioner's conviction should be vacated in light of this Court's decision in *Welsh* v. *United States,* 398 U. S. 333 (1970), because the denial to petitioner of a conscientious objector exemption may have been based upon the Department of Justice's erroneous characterization of his objections to participation in war as 'political and racial' rather than 'religious'?"

MR. JUSTICE BRENNAN is of the opinion that certiorari should be granted limited to Questions 1, 2, and 4 presented by the petition. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 430 F. 2d 165.

No. 5250. BOSTIC *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 424 F. 2d 951.

No. 5485. JOHNSON *v.* MISSISSIPPI. Sup. Ct. Miss. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 233 So. 2d 116.

Certiorari Denied. (See also No. 813, *supra.*)

No. 93. LITTMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 421 F. 2d 981.

No. 383. HAYNEY *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 417. SANTOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 2d 244.

No. 561. SWEENY INDEPENDENT SCHOOL DISTRICT ET AL. *v.* HARKLESS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 427 F. 2d 319.

No. 604. LEIMBACH CONSTRUCTION CO. *v.* MAYOR OF BALTIMORE ET AL. Ct. App. Md. Certiorari denied. Reported below: 257 Md. 635, 264 A. 2d 109.

No. 606. MISSOURI EX INF. DANFORTH, ATTORNEY GENERAL *v.* BANKS. Sup. Ct. Mo. Certiorari denied. Reported below: 454 S. W. 2d 498.

No. 763. NATIONAL SCREEN SERVICE CORP. ET AL. *v.* EXHIBITORS POSTER EXCHANGE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 421 F. 2d 1313.

No. 764. ABERDEEN CABLE TV SERVICE, INC., ET AL. *v.* CITY OF ABERDEEN ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: —— S. D. ——, 176 N. W. 2d 738.

No. 770. PULAKOS *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF ERIE. Sup. Ct. Pa. Certiorari denied. Reported below: 439 Pa. 157, 267 A. 2d 873.

No. 771. BENEDEK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 41.

No. 777. HOLIDAY INNS OF AMERICA, INC. *v.* ZIMMERMAN ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 438 Pa. 528, 266 A. 2d 87.

No. 779. LEWIS ET UX. *v.* HICKEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 427 F. 2d 673.

No. 781. SEARS, ROEBUCK & CO. ET AL. *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. Petition for certiorari before judgment to C. A. 8th Cir. Certiorari denied.

No. 782. NATIONAL AIRLINES INC. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 145, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 957.

No. 791. MCDONOUGH *v.* BERSHAD. C. A. 7th Cir. Certiorari denied. Reported below: 428 F. 2d 693.

No. 792. SULLIVAN *v.* RAZA. C. A. D. C. Cir. Certiorari denied. Reported below: 139 U. S. App. D. C. 184, 432 F. 2d 617.

No. 802. BUTCHER ET AL. *v.* FLORIDA INDUSTRIAL COMMISSION ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 231 So. 2d 47.

No. 806. UNITED SERVICES AUTOMOBILE ASSN. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 735.

No. 807. DONALD *v.* ZACK MEYER'S T. V. SALES & SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 1027.

No. 816. ZERVOS *v.* MONEYMAKER, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 1203.

No. 818. D. H. OVERMYER CO., INC., ET AL. *v.* WOODWARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 880.

No. 827. HORTON & HORTON, INC. *v.* VAUGHAN MARINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 1131.

No. 829. ADLER CONSTRUCTION CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 191 Ct. Cl. 607, 423 F. 2d 1362.

No. 830. CLARK *v.* GULESIAN. C. A. 1st Cir. Certiorari denied. Reported below: 429 F. 2d 405.

No. 5046. MASON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 408 F. 2d 903.

No. 5123. BAKER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 1 Cal. 3d 277, 461 P. 2d 361.

No. 5260. NEWKIRK *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 5418. ETHRIDGE *v.* UNITED STATES;

No. 5427. BEARD *v.* UNITED STATES; and

No. 5428. COLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 424 F. 2d 951.

No. 5478. WAINMAN *v.* CLARK, SHERIFF, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 5532. PINCUS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 25 N. Y. 2d 990 and 26 N. Y. 2d 973; 259 N. E. 2d 486.

No. 5519. BRADLEY *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 423 F. 2d 656.

No. 5533. ARAUJO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 5537. FURGISON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 175 N. W. 2d 383.

No. 5560. SATTERLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5577. CHEEKS *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 424 F. 2d 647.

No. 5589. NALL *v.* CHOCTAW CONSTRUCTION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1296.

No. 5594. JONES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 5616. HAMRICK *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 235 So. 2d 360.

No. 5618. GREY *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: —— Vt. ——, 266 A. 2d 447.

No. 5634. LILLIE *v.* BRANTLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 5666. WINGATE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 232 So. 2d 44.

No. 5681. SMALLEY *v.* CIRCUIT COURT FOR BROWARD COUNTY. Sup. Ct. Fla. Certiorari denied. Reported below: 241 So. 2d 162.

No. 5725. CASH *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 5781. ARNOLD *v.* GEORGIA BOARD OF PARDONS AND PAROLES. C. A. 5th Cir. Certiorari denied.

No. 5843. CHAPMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 426 F. 2d 303.

No. 5879. ARNOLD *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 5892. TSERMENGAS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 5895. SMITH *v.* CADY. C. A. 7th Cir. Certiorari denied.

No. 5899. BEVERLY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 47 Wis. 2d 725, 177 N. W. 2d 870.

No. 5902. SKINNER *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 5906. HUSSEY *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 457.

No. 5907. LOHMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 6 Cal. App. 3d 760, 86 Cal. Rptr. 221.

No. 5914. HALL *v.* REA ET AL. C. A. 2d Cir. Certiorari denied.

No. 5915. VISCONTI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 34 App. Div. 2d 619, 313 N. Y. S. 2d 639.

No. 5919. DURSO ET AL. *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 426 F. 2d 1083.

No. 5916. CRENSHAW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5917. MELLER *v.* MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 2d 120.

No. 5920. OLSON *v.* CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 1228.

No. 5921. CASTELLANO *v.* NEW YORK; and
No. 5929. GONZALEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 27 N. Y. 2d 53, 261 N. E. 2d 605.

No. 5922. ORTEGA *v.* BENNETT, JUDGE. C. A. 9th Cir. Certiorari denied.

No. 5923. HENDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 5930. SCHEER *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 429 F. 2d 907.

No. 5931. GRANT *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 5932. BOLTON *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 426 F. 2d 807.

No. 5933. WIGGINS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 5935. SHAFFNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 5937. MORGAN *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 5939. BROCK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 431 F. 2d 204.

No. 5945. Woodbury *v.* Beto, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 426 F. 2d 923.

No. 5947. Fletcher *v.* Brierley, Correctional Superintendent. C. A. 3d Cir. Certiorari denied.

No. 5948. Hayes *v.* Cannizzaro et al. C. A. 4th Cir. Certiorari denied.

No. 5950. Hayes *v.* Nixon, President of the United States, et al. C. A. 4th Cir. Certiorari denied.

No. 5951. Davis *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 693.

No. 5955. Briggs *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 5956. Wroblewski *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 422.

No. 5963. Missler *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 427 F. 2d 1369.

No. 5966. Green *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 137 U. S. App. D. C. 424, 424 F. 2d 912.

No. 5968. Jones *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 478.

No. 5973. Johnson *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied.

No. 5977. Lujan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 871.

No. 5979. Slaton *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 1109.

No. 5984. Wells *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 431 F. 2d 434.

No. 5989. SCHLETTE *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 5990. STEVENSON *v.* WALDRON ET AL. C. A. 2d Cir. Certiorari denied.

No. 5992. ARNOLD *v.* BRANTLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 5994. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 5995. JELKEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 5996. KELLY *v.* BOCKHOLD ET AL. C. A. 2d Cir. Certiorari denied.

No. 5998. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 84.

No. 6009. ODOM *v.* CITY OF PENSACOLA. Cir. Ct. Fla., Escambia County. Certiorari denied.

No. 6010. ACARINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 6012. GARZA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: —— S. W. 2d ——.

No. 6014. GAYTON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 6016. KILBORN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 7 Cal. App. 3d 998, and 8 Cal. App. 3d 760a, 87 Cal. Rptr. 189.

No. 603. TABASKO *v.* OHIO. Sup. Ct. Ohio. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 22 Ohio St. 2d 36, 257 N. E. 2d 744.

No. 6020. HAWKINS ET AL. *v.* SMITH ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 254 S. C. 423, 175 S. E. 2d 824.

No. 6017. WARREN *v.* COX, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 6022. WALKER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 936.

No. 6023. WASHINGTON *v.* SUPERIOR COURT FOR LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 760. MOORING ET AL. *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS. Sup. Ct. La. Motion to dispense with printing petition granted. Certiorari denied.

No. 633. RAY, TRADING AS CANDIS O. RAY AGENCY *v.* KANSAS CITY STOCKYARDS COMPANY OF MAINE, TRADING AS GOLDEN OX RESTAURANT, ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 695. COUNTY OF SANTA BARBARA ET AL. *v.* MALLEY ET AL. C. A. 9th Cir. Motion to defer consideration denied. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN took no part in the consideration or decision of this motion and petition. Reported below: 426 F. 2d 164 and 171.

No. 756. NEWS SYNDICATE CO., INC. *v.* SHILES. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 27 N. Y. 2d 9, 261 N. E. 2d 251.

No. 801. SIMMONS ET AL. *v.* WOLFSON ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 428 F. 2d 455.

No. 765. HOFFA ET AL. *v.* UNITED STATES; and

No. 788. DRANOW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. Reported below: 436 F. 2d 1243.

No. 772. ALDRIDGE ET AL. *v.* CARR ET AL. C. A. 5th Cir. Motion of respondents to dispense with printing brief granted. Certiorari denied. Reported below: 431 F. 2d 384.

No. 773. LARSEN *v.* AIR CALIFORNIA. C. A. 9th Cir. Motion of petitioner for leave to proceed as a veteran granted. Certiorari denied.

No. 780. HARRIS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to supplement petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 427 F. 2d 1368.

No. 800. WEINGARTNER ET AL. *v.* UNION OIL CO. OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 26.

No. 817. EXPORT LIQUOR SALES, INC. *v.* AMMEX WAREHOUSE CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 426 F. 2d 251.

No. 825. NEW YORK *v.* COOPER, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 5437. ETHRIDGE *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to amend petition granted. Certiorari denied. Reported below: 424 F. 2d 951.

No. 831. GRAY *v.* GULF MOBILE & OHIO RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 429 F. 2d 1064.

No. 832. SALERNO ET AL. *v.* KUHN ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 429 F. 2d 1003.

No. 5997. ACOSTA *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion for leave to amend petition granted. Certiorari denied. Reported below: 425 F. 2d 963.

No. 5941. JENKINS *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 430 F. 2d 243.

No. 5981. SNYDER ET AL. *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 12 Ariz. App. 142, 468 P. 2d 593.

No. 6019. SULLIVAN *v.* SCAFATI, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACKMUN is of the opinion that certiorari should be granted. Reported below: 428 F. 2d 1023.

Rehearing Denied

No. 5630. ARZONICA *v.* CASSIDY ET AL., *ante*, p. 918. Motion for leave to file petition for rehearing denied.

No. 262. CRICHTON *v.* MCGEHEE ET AL., *ante,* p. 919;

No. 425. SCHIEFFELIN & CO. ET AL. *v.* UNITED STATES, *ante,* p. 869;

No. 493. COLLINS *v.* UNITED STATES, *ante,* p. 919;

No. 589. PORT CONSTRUCTION CO. *v.* VIRGIN ISLANDS HOUSING AUTHORITY, *ante,* p. 916;

No. 596. FELDSTEIN *v.* UNITED STATES, *ante,* p. 920;

No. 605. GREEN *v.* UNITED STATES, *ante,* p. 916;

No. 618. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL–CIO *v.* CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS ET AL., *ante,* p. 926;

No. 625. BIRMELIN *v.* BOYMER ET UX., *ante,* p. 926;

No. 627. THRIFTIMART, INC., DBA SMART & FINAL IRIS CO., ET AL. *v.* UNITED STATES, *ante,* p. 926;

No. 628. KAZUBOWSKI *v.* KAZUBOWSKI, *ante,* p. 926;

No. 642. MENGARELLI *v.* UNITED STATES, *ante,* p. 926;

No. 660. SMITH, TRUSTEE IN BANKRUPTCY *v.* MERRITT, REFEREE IN BANKRUPTCY, *ante,* p. 951;

No. 5261. HIGGINS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante,* p. 905;

No. 5385. WARD *v.* PAGE, WARDEN, *ante,* p. 917;

No. 5458. CHIPLEY *v.* ROBERTS ET AL., *ante,* p. 905;

No. 5633. DARGAN *v.* NEW YORK, *ante,* p. 920;

No. 5663. NAZARIO *v.* NEW YORK, *ante,* p. 920;

No. 5680. GILHART *v.* UNITED STATES, *ante,* p. 918;

No. 5730. THOMPSON ET AL. *v.* UNITED STATES, *ante,* p. 929;

No. 5792. SMITH *v.* LASH, WARDEN, *ante,* p. 948; and

No. 5812. O'NEAL *v.* CROUSE, WARDEN, *ante,* p. 948. Petitions for rehearing denied.

No. 106. ALABAMA POWER CO. ET AL. *v.* UNITED STATES ET AL., *ante,* p. 73. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

JANUARY 15, 1971

Miscellaneous Order

No. —. HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Motion of the State of Texas to terminate petitioner's stay of execution denied. Motion of petitioner that the Court consider his motion for stay of execution as a petition for writ of certiorari granted and case placed on docket as No. 6458.

Certiorari Granted. (See *Harris* v. *Texas, supra.*)

JANUARY 18, 1971

Affirmed on Appeal

No. 5912. RAMOS ET AL. *v.* MONTGOMERY, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE OF CALIFORNIA, ET AL. Affirmed on appeal from D. C. S. D. Cal. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 313 F. Supp. 1179.

No. 5993. CONNER ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Affirmed on appeal from D. C. N. D. Ill. Reported below: 314 F. Supp. 364.

Appeals Dismissed

No. 843. LUZAITIS ET AL. *v.* MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 5745. BATES *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER OF NEW YORK. 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.

No. 851. STRAZZULA *v.* BUILDING INSPECTOR OF WELLESLEY ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Mass. ——, 260 N. E. 2d 163.

Certiorari Granted—Vacated and Remanded

No. 326. CROSSLIN ET VIR *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. C. A. 9th Cir. Motion of National Association for Advancement of Colored People for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded to the United States District Court for the District of Arizona for reconsideration in light of suggestions contained in brief of the Solicitor General as *amicus curiae* filed November 19, 1970. By this remand this Court intimates no view as to the merits of the Solicitor General's position. Reported below: 422 F. 2d 1028.

MR. JUSTICE DOUGLAS, dissenting.

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*, establishes methods of securing relief for individuals complaining of discrimination in employment. An individual may bring court action to enforce his rights under Title VII only after he has filed a timely charge with the Equal Employment Opportunity Commission (EEOC). Section 706 (b), 42 U. S. C. § 2000e–5 (b), of the Act provides no charge may be filed with the EEOC until 60 days after the commencement of proceedings (unless they are terminated earlier) before a state or local agency, if one exists, which has power "to grant or seek relief" or to "institute criminal proceedings" with respect to the complaint. The EEOC has interpreted § 706 (b) as requiring initial submission of the complaint to state agencies only where the agency can provide adequate relief. At present Arizona and six

other States* have agencies with remedial powers which the EEOC finds inadequate.

This case arose in Arizona. Petitioners brought a complaint of racial discrimination in employment to the EEOC without first going to the Arizona Civil Rights Commission. The EEOC found there was reasonable cause to believe the charge was true and sent a statutory Notice-of-Right-To-Sue-Within-Thirty-Days and the action was timely filed. The Court of Appeals held that the District Court should have dismissed the complaint for lack of jurisdiction because the Arizona Civil Rights Commission should have been given the initial opportunity to consider the complaint. The court found that a state agency empowered "to grant and seek relief" included an agency that could only attempt to settle the dispute by conciliation and persuasion.

The proper functioning of the various Civil Rights Acts is of critical importance. This Court has recently re-emphasized the importance of deference to an administrative interpretation by the agency charged with the initial interpretation of a new law. *United States* v. *City of Chicago, ante,* p. 8; *Udall* v. *Tallman,* 380 U. S. 1, 16. The court below rejected the administrative interpretation of § 706 (b). In so doing it requires pursuing a state remedy classified as inadequate by the EEOC.

The various Civil Rights Acts represent a national commitment to achieve an end to racial discrimination. Forcing an alleged victim of racial discrimination—usually an indigent—first to seek a state remedy prior to vindication of his federal rights when that state remedy is palpably inadequate presents an issue of considerable importance. See *Glover* v. *St. Louis-San Francisco R. Co.,* 393 U. S. 324. I would grant certiorari to decide the question presented in this case.

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*Idaho, Maine, Montana, Oklahoma, Tennessee, and Vermont.

No. 5788. SMITH *v.* UNITED STATES. C. A. 6th Cir. Motions for leave to amend petition for writ of certiorari and for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded to United States District Court for the Northern District of Ohio for reconsideration in light of suggestion contained in the Solicitor General's memorandum filed December 16, 1970.

Miscellaneous Orders

No. 1112, October Term, 1968. LEIGHTON *v.* ONE WILLIAM STREET FUND, INC., ET AL., 394 U. S. 988, 395 U. S. 942. Motion for relief *pendente lite* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. Motion for leave to file second petition for rehearing denied. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN took no part in the consideration or decision of the latter motion.

No. —. ANDERSON *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Sup. Ct. N. Y. Application for stay presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied.

No. 144. GRIFFIN ET AL. *v.* BRECKENRIDGE ET AL. C. A. 5th Cir. [Certiorari granted, 397 U. S. 1074.] Motion of respondents for appointment of counsel granted. It is ordered that W. D. Moore, Esquire, of Philadelphia, Mississippi, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondents in this case.

No. 338. BLONDER-TONGUE LABORATORIES, INC. *v.* UNIVERSITY OF ILLINOIS FOUNDATION ET AL. C. A. 7th Cir. [Certiorari granted, *ante,* p. 864.] Motion of Kawneer Co., Inc., for leave to file a brief as *amicus curiae* granted.

No. 507. California Department of Human Resources Development et al. *v.* Java et al. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, *ante,* p. 877.] Motion of Southern California Edison Co. et al. for leave to participate in oral argument as *amici curiae* denied. Motion of State of Tennessee for leave to join in the *amicus curiae* brief of State of New Hampshire granted. Motion of State of Illinois for leave to join in the *amicus curiae* brief of State of Maryland granted.

No. 853. In re Disbarment of Wolden. It having been reported to this Court that Russell L. Wolden, of San Francisco, State of California, has been disbarred from the practice of law in all of the courts of the State of California, and this Court by order of October 12, 1970 [*ante,* p. 809], having suspended the said Russell L. Wolden 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 Russell L. Wolden 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. 6028. Shivers *v.* Wainwright, Corrections Director. Motion for leave to file petition for writ of habeas corpus denied.

No. 6008. Young *v.* United States. Motion for leave to file petition for writ of mandamus denied. Mr. Justice Black and Mr. Justice White are of the opinion that the motion should be granted.

No. 5682. PICKENS *v.* CALIFORNIA SUPREME COURT. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (See also No. 5370, *ante,* p. 423; and Nos. 326 and 5788, *supra.*)

No. 758. UNITED STATES *v.* RYAN. C. A. 9th Cir. Certiorari granted. Reported below: 430 F. 2d 658.

No. 798. UNITED STATES ET AL. *v.* MITCHELL ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 430 F. 2d 1 and 7.

No. 840. ASTRUP *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. Reported below: 432 F. 2d 438.

No. 835. DEWEY *v.* REYNOLDS METALS CO. C. A. 6th Cir. Certiorari granted. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. Reported below: 429 F. 2d 324.

Certiorari Denied. (See also Nos. 843, 851, and 5745, *supra.*)

No. 833. UNITED STATES FIDELITY & GUARANTY CO. *v.* HILL. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 112.

No. 837. CRESTA CORP., S. A. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 1209.

No. 841. GENTILE ET AL. *v.* IVES, STATE HIGHWAY COMMISSIONER. Sup. Ct. Conn. Certiorari denied. Reported below: 159 Conn. 443, 270 A. 2d 680.

No. 848. WARD ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 192 Ct. Cl. 710, 428 F. 2d 1288.

No. 842. WING *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 455 S. W. 2d 457.

No. 845. STUBBS ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 2d 885.

No. 849. FIELDING ET AL. *v.* FEDERAL SAVINGS & LOAN INSURANCE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: See 309 F. Supp. 1146.

No. 854. LUCKENBACH STEAMSHIP CO. *v.* ZIM ISRAEL NAVIGATION CO., LTD., ET AL.; and

No. 855. TELFAIR *v.* ZIM ISRAEL NAVIGATION CO., LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 127.

No. 856. GREENSPUN *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 1327.

No. 857. GWYTHER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 431 F. 2d 1142.

No. 859. HARDIN, SECRETARY OF AGRICULTURE *v.* HARRY H. PRICE & SONS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 425 F. 2d 1137.

No. 860. ARIZONA *v.* SHAW. Sup. Ct. Ariz. Certiorari denied. Reported below: 106 Ariz. 103, 471 P. 2d 715.

No. 863. MIDDLEBROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 299.

No. 864. DADE COUNTY CLASSROOM TEACHERS' ASSN., INC. *v.* RUBIN ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 238 So. 2d 284.

No. 5245. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 33 App. Div. 2d 906, 307 N. Y. S. 2d 842.

No. 1182. BRUNSWICK CORP. *v.* CLEMENTS, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied.

No. 5332. KEEBY ET AL. *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 159 Conn. 201, 268 A. 2d 652.

No. 5648. WHALEY *v.* GRIMM ET AL. C. A. 9th Cir. Certiorari denied.

No. 5678. DAEGELE *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 429 F. 2d 503.

No. 5692. WILLIAMS ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 319, 260 N. E. 2d 1.

No. 5713. THIBADOUX *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 5732. WILLIAMS *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 5741. MCKIRDIE ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 45 Ill. 2d 300, 259 N. E. 2d 16.

No. 5758. BRUFFET *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 205 Kan. 863, 472 P. 2d 206.

No. 5763. JONES *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 5765. SMITH *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied.

No. 5778. OLNEY *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 5972. HAHN *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 5985. ESTRELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 397.

No. 6003. HUDSON *v.* UNITED STATES; and
No. 6190. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 2d 468.

No. 6026. BROWN *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 6027. BURKE *v.* ERICKSON. C. A. 8th Cir. Certiorari denied.

No. 6029. HENRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 114.

No. 6030. COLLINS, AKA COTTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 432 F. 2d 1136.

No. 6032. WILLIAMS *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 6033. VENNARD *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 159 Conn. 385, 270 A. 2d 837.

No. 6034. WALKER *v.* STADER ET AL. C. A. 7th Cir. Certiorari denied.

No. 6035. LYTLE *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 6038. REESE *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 6040. WELLS *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 6044. POLESE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 6385. WALLS *v.* CALIFORNIA. Ct. App. Cal. Certiorari denied.

No. 776. RODICKER *v.* ILLINOIS CENTRAL RAILROAD Co. Sup. Ct. Miss. Certiorari denied. Reported below: 236 So. 2d 414.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

This is a tragic case in which a 23-year-old railroad worker was permanently and totally disabled while performing his duties. He has been denied his right to recover damages by what I believe was the gross error of the Mississippi Supreme Court in depriving him of his constitutional right to a jury trial.

Petitioner Robert Rodicker, a man with an eighth-grade education, has earned his living doing manual labor for respondent Illinois Central Railroad since the age of 18. On September 16, 1964, Rodicker was working a switch engine with two other Illinois Central Railroad employees coupling an Illinois Central car to a train at the Union Passenger Terminal in New Orleans. As the engine backed up, it spewed out a shower of sparks, covering Rodicker with fire and burning his back and neck. He leaned away from the engine's steps to save himself from the sparks and smashed into a negligently placed steel garbage container that knocked him to the tracks unconscious. He brought suit against respondent under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, urging that his injury was negligently caused by the engine's excessive sparks and the dangerous placement of the steel garbage container. The Mississippi Supreme Court affirmed a judgment directing a verdict for the railroad. That court held that as a matter of law petitioner was an employee of the Union Passenger Terminal and not the Illinois Central at the time of this terrible accident. I cannot understand the Court's refusal to grant certiorari.

Respondent had made an agreement with the Union Passenger Terminal whereby the latter used Illinois Central employees and those of other railroads as crews to switch the railroad's cars when they entered the terminal. Petitioner was working on such a crew when he was injured. He had an Illinois Central employee number and was being paid by check drawn on the Illinois Central. He regularly applied to the Illinois Central for vacation time and received vacation pay from it. And, of course, he was actually coupling an Illinois Central car at the time of the injury.

On this record petitioner was entitled to have a jury determine whether he should recover from the Illinois Central. See, *e. g., Sinkler* v. *Missouri Pacific R. Co.,* 356 U. S. 326 (1958); *Wilkerson* v. *McCarthy,* 336 U. S. 53 (1949); *Terminal R. Assn. of St. Louis* v. *Fitzjohn,* 165 F. 2d 473 (CA8 1948). Today the Court deprives petitioner of his right to a jury trial and frustrates the plan of Congress to provide a remedy for railroad employees injured by their employers' negligence.

I think it is of paramount importance that the purpose of Congress to protect people like petitioner should not be frustrated by the will of judges. I would grant certiorari and reverse the judgment of the court below.

No. 815. Brunswick Corp. *v.* Clements, Trustee in Bankruptcy. C. A. 6th Cir. Motion to dispense with printing respondent's brief granted. Certiorari denied. Reported below: 424 F. 2d 673.

No. 838. Montana Power Co. *v.* Federal Power Commission et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice Harlan is of the opinion that certiorari should be granted. The Chief Justice took no part in the consideration or decision of this petition. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 5987. KAMSLER *v.* ATTORNEY GENERAL OF THE UNITED STATES. C. A. 7th Cir. Motion to strike respondent's brief denied. Certiorari denied. Reported below: 430 F. 2d 635.

No. 5961. WEINTRAUB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 658.

MR. JUSTICE DOUGLAS, dissenting.

I dissent from a denial of certiorari in this case.

The Selective Service Regulations [1] provide the sequence in which registrants shall be ordered to report for induction. Petitioner was in the group of nonvolunteers who are to be inducted "in the order of their dates of birth with the oldest being selected first." [2]

It seems clear that the order-of-call provisions are mandatory and that the local board's failure to observe them is a defense to an indictment.[3] On the trial of

[1] 32 CFR § 1631.7 (a)(3) (1967) provided:

"Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order: . . . (3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years . . . in the order of their dates of birth with the oldest being selected first."

[2] *Ibid.*

[3] One case holds that a local board's failure to observe the order-of-call regulations does not prevent a conviction for either refusal to report for civilian work, refusal to submit to induction, or refusal to report for induction. That case, *Schutz* v. *United States*, 422 F. 2d 991 (CA5), stands apart from the great weight of authority.

Two district court decisions expressly held that the Government had the burden of proof on the regularity of the order of call. *United States* v. *Rhodes*, Cr. No. 41112 (ND Cal. 1967) (unreported); *United States* v. *Lybrand*, 279 F. Supp. 74 (EDNY 1967). No other court has subsequently adopted that position and all circuit courts which have faced the issue have rejected the *Rhodes-Lybrand* position.

The Second Circuit rejected *Lybrand* in *United States* v. *Sandbank*, 403 F. 2d 38 (1968). In a footnote that court stated: "An analogy

petitioner for failure to submit to induction, his counsel proffered evidence that some 18 registrants older than this petitioner and classified as I–A were available for in-

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may be drawn to a defense of insanity; although it is an essential element of criminality that the perpetrator must have acted with a sane mind, the government need not establish sanity as part of its case in chief in every prosecution." *Id.*, at 40 n. The Tenth Circuit has expressly adopted *Sandbank*. *Little* v. *United States,* 409 F. 2d 1343 (1969).

The First Circuit accepts a presumption of regularity within the Selective Service System, but has announced: "There is no difficulty in the perhaps rare case where a defendant can produce evidence of a person who should have been called before him but was not. In such a case, the government cannot disprove a leak in a bucket simply by showing most of it was tight. But where the defendant lacks any such proof, his only recourse is to examine the clerk of the local board. This may not conclusively establish the absence of any violation of the regulation but, since the clerk must testify in any case to the validity of the order to report, there is little extra burden on the government to have him prepared to testify on order of call." *Yates* v. *United States,* 404 F. 2d 462, 466 (1968). In a case involving failure to report pursuant to an order for induction the Ninth Circuit held that where the defendant adduces proof showing the order of call was not regular then the burden shifts to the Government "to justify by affirmative evidence the by-passing" of the older individuals. *United States* v. *Baker,* 416 F. 2d 202, 205 (1969).

In two cases involving failure to report for civilian work the Fifth Circuit announced it followed a rule presuming regularity but did not state the consequences of overcoming the presumption. *Greer* v. *United States,* 378 F. 2d 931 (1967); *Lowe* v. *United States,* 389 F. 2d 51 (1968). Subsequently that circuit has refused to even allow evidence of irregularity in the order of call where the defendant refused to report for induction. *Schutz* v. *United States, supra.* The decision is unclear although the court rests on the distinction between refusal to report and refusal to submit: "This appellant was convicted of failing to report for induction as ordered, not for refusing to be inducted after arrival at the induction center. Therefore, we do not discuss the cases which have dealt with the latter situation, other than to say that wilful refusal to report for induction is a separate offense." *Id.*, at 994. The court felt every "registrant is required to report for induction as ordered even

duction on the day he was ordered to report but were not sent notices of induction. The District Judge indicated he probably would grant a motion for a judgment of acquittal unless the Government rebutted the evidence of violation of the regulations. The Government thereupon called the clerk of the board who advised the court that the Selective Service records of other registrants were confidential and could not be released except with the permission of the Director.[4] The court suggested that permission of the Director be sought.[5] It was so sought

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though he may have valid legal grounds for refusing to submit to induction." *Ibid.* Besides being the only case rejecting the defense it would appear to conflict with the Ninth Circuit's *Baker* decision which also involved failure to report for induction.

The Eighth Circuit has only passed on regularity of call in a case involving an attempt to get pre-induction review. *Green* v. *Local Board No. 87,* 419 F. 2d 813. It held that showing older I–A registrants were not called was not "facially unlawful" for purposes of pre-induction review.

The Maryland district court has adopted the presumption of regularity that the Fifth Circuit announced in *Greer* and *Lowe. United States* v. *Shacter,* 293 F. Supp. 1057 (D. C. Md. 1968). A district court in Wisconsin, without indicating what test it would apply, cited *Sandbank, Yates,* and *Lybrand* and appears to indicate it would at least hold if the defendant could establish irregularities that there would be acquittal. *United States* v. *Ball,* 49 F. R. D. 153 (ED Wis. 1969). Another district court noted the defendant failed to prove irregularities without stating what it would do if he had. *United States* v. *Noonan,* 2 S. S. L. R. 3595 (WD Pa. 1969). In a footnote that court noted three registrants older than the defendant and in his category had not been called for physicals. It was this local board's policy to defer a physical when appearances or appeals were pending. The court noted this violated the regulations, but in each instance the other person was deferred. "Since the deferments precluded these registrants' inductions, the failure to administer a physical examination in no way hastened defendant's induction." *Id.,* at 3596 n. 4.

[4] 32 CFR § 1606.32.

[5] 32 CFR § 1606.32 (c).

but refused. The court thereupon examined the files *in camera,* reading into the record some of their contents but refusing to let counsel examine all of them. Petitioner was convicted and appealed.

The Court of Appeals disagreed with the District Court, saying:

> "The principal contention of the appellant is that counsel for the defense should have been allowed to see the files and determine for himself whether any material therein could have based an attack on cross-examination on the board's determination which might have demonstrated a lack of basis in fact for the determination. We think this contention well founded. A defendant is entitled to such an inspection, subject to protective order by the court to mask the names or by other means prevent public disclosure of the content of the files, so that without violating the confidentiality of the files he may properly determine for himself whether there is a proper foundation for the board's apparent deviation from the order of call suggested by the Form 102, see *Alderman* v. *United States,* 394 U. S. 165 . . . (1969), and so that a proper record may be preserved for appeal." 429 F. 2d 658, 661.

It held, however, that the error was harmless.

One of the summaries concerned E. S. and the Court of Appeals made the following statement concerning him:

> "E. S. was not available for induction on June 8, 1967. He was a registrant who had already signed up for the Reserves. While his request for an appeal or personal appearance may have been untimely because it was made 12 days after the mailing of his notice of classification, rather than the required 10 days, he was still unavailable for induction

because he had not had a pre-induction physical or mental examination. He was finally classified I–D, which means he was a member of a Reserve Unit or the National Guard." *Id.*, at 662 n. 4.

If "signed up" means application for the Reserves, then the enlistment requirement of Rule 1622.13 (f)[6] would not be satisfied and E. S. should have been called before petitioner. The error could not be "harmless" if petitioner was called up ahead of his time; and there is no way of determining whether E. S. had enlisted without probing the facts and cross-examining the Board's witness. The test we used in *Alderman* v. *United States*, 394 U. S. 165, 181, for determining what wiretap records should be turned over by the judge who makes his *in camera* investigation of them is whether the record is "arguably relevant" to the question whether "tainted evidence" had been used to convict. Application of such a test would make at least the file of E. S. available to counsel for petitioner.

I dissent from a denial of certiorari on the issue so posed.

No. 6043. ROGERS *v.* CALIFORNIA. C. A. 9th Cir. Motion for leave to amend petition granted. Certiorari denied.

Rehearing Denied. (See also No. 1112, October Term, 1968, *supra.*)

No. 5754. DAWSON ET UX. *v.* SHENANDOAH RETREAT LAND CORP. ET AL., *ante*, p. 946; and

No. 5768. CALVERT *v.* UNITED STATES, *ante*, p. 952. Petitions for rehearing denied.

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[6] This regulation puts in Class I–D a registrant who "enlists or accepts appointment," before attaining the age of 26 years, in the Reserves.

JANUARY 21, 1971

Dismissal Under Rule 60

No. 6069. HARRIS *v.* CONNECTICUT. Sup. Ct. Conn. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 159 Conn. 521, 271 A. 2d 74.

JANUARY 25, 1971

Appeal Dismissed

No. 6098. WARD ET AL. *v.* WINSTEAD, COMMISSIONER OF PUBLIC WELFARE, ET AL. Appeal from D. C. N. D. Miss. dismissed for the reason that the notice of appeal was not timely filed pursuant to 28 U. S. C. § 2101 (b). Reported below: 314 F. Supp. 1225.

Certiorari Granted—Vacated and Remanded

No. 846. FIRST NATIONAL CITY BANK *v.* BANCO NACIONAL DE CUBA. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case. Reported below: 431 F. 2d 394.

Miscellaneous Orders

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. Motion of State of Arizona for leave to intervene as a party defendant, and motion of State of Indiana for leave to intervene as a party plaintiff referred to Special Master. [For earlier orders herein, see, *e. g.*, *ante*, p. 924.]

No. 48, Orig. MISSISSIPPI *v.* ARKANSAS. Motion for leave to file bill of complaint granted. Defendant allowed 60 days to answer or otherwise respond to complaint.

No. 5338. APODACA ET AL. *v.* OREGON. Ct. App. Ore. [Certiorari granted, *ante*, p. 901.] Motion to dispense with printing *amicus curiae* brief of National Legal Aid & Defender Assn. granted.

No. 688. LYONS *v.* MURRAY, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 759. UNITED STATES *v.* ARMOUR & CO. ET AL. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. MR. JUSTICE BLACK and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this matter.

Certiorari Granted. (See also No. 846, *supra.*)

No. 5750. STANLEY *v.* ILLINOIS. Sup. Ct. Ill. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 45 Ill. 2d 132, 256 N. E. 2d 814.

Certiorari Denied

No. 861. BURTMAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 865.

No. 865. MARINE CARRIERS CORP. *v.* FOWLER, SECRETARY OF THE TREASURY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 429 F. 2d 702.

No. 870. MCGEE *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Cruz. Certiorari denied.

No. 871. DAY-GLO COLOR CORP. (FORMERLY SWITZER BROTHERS, INC.) ET AL. *v.* LOCKLIN ET AL., DBA RADIANT COLOR CO.; and

No. 923. LOCKLIN ET AL., DBA RADIANT COLOR CO. *v.* DAY-GLO COLOR CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 429 F. 2d 873.

No. 872. Railway Labor Executives' Assn. et al. *v.* Atchison, Topeka & Santa Fe Railway Co. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 994.

No. 873. Hawkins *v.* General Motors Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 427 F. 2d 148.

No. 875. Heyward-Robinson Co., Inc., et al. *v.* United States for the use and benefit of D'Agostino Excavators, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 2d 1077.

No. 884. Jaskiewicz *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 433 F. 2d 415.

No. 885. Snyder Tank Corp. *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. Reported below: 428 F. 2d 1348.

No. 886. Evans *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 889. Bear Manufacturing Co. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 152.

No. 893. Cooper *v.* Beto, Corrections Director. Ct. Crim. App. Tex. Certiorari denied.

No. 894. Roth *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 2d 1137.

No. 896. Alamo Express, Inc., et al. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 430 F. 2d 1032.

No. 899. Ricci *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 6053. Harrison *v.* Clark County School District et al. C. A. 9th Cir. Certiorari denied.

No. 6057. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 431 F. 2d 1118.

No. 6059. SILVERTHORNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 675.

No. 6063. THOMAS, AKA TOOHEY *v.* NITZE, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 429 F. 2d 1332.

No. 6065. BORK *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 6066. MASSIMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 432 F. 2d 324.

No. 6067. TYCZKOWSKI *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 6070. MIXEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 428 F. 2d 746.

No. 6072. LOGAN *v.* CASSCLES, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6078. GILBOY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 431 F. 2d 1391.

No. 6079. ENGEL *v.* CITY OF MADISON, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 6086. HOLMES *v.* ZELKER, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6092. ROBINSON *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6093. WARBURTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 7 Cal. App. 3d 815, 86 Cal. Rptr. 894.

No. 6094. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 432 F. 2d 120.

No. 6095. AKERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 6097. PARKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 429 F. 2d 1240.

No. 6100. JOLLY ET AL. *v.* GORMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 428 F. 2d 960.

No. 6101. WALKER *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 6102. MANN ET AL. *v.* SUPERIOR COURT OF SAN BERNARDINO COUNTY ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 3d 1, 472 P. 2d 468.

No. 6103. STEVENSON *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 6104. WALKER *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6112. MENECHINO *v.* OSWALD ET AL., NEW YORK STATE BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 430 F. 2d 403.

No. 6116. VITORATOS *v.* EMMONS, JUDGE. Sup. Ct. Ohio. Certiorari denied.

No. 6121. MILLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 430 F. 2d 526.

No. 6124. WARFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 430 F. 2d 1181.

No. 6126. YBARRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 1230.

No. 6132. RICHARDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 2d 1240.

No. 6133. WILMOT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 6136. ALLEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 433 F. 2d 846.

No. 6137. ADAMS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 6138. WATKINS *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 2d 1311.

No. 6140. FRENCH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 104, 262 N. E. 2d 901.

No. 868. HARPER *v.* UNITED STATES. C. A. 1st Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 881. BARNES *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 431 F. 2d 878.

No. 895. FOWLER *v.* BOARD OF SUPERVISORS OF ELECTIONS OF PRINCE GEORGES COUNTY. Ct. App. Md. Motion to dispense with printing petition granted. Certiorari denied.

No. 869. CHRISTOPHER ET AL. *v.* E. I. DUPONT DE NEMOURS & CO., INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE HARLAN and MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 431 F. 2d 1012.

No. 5867. MITCHELL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 226 Ga. 450, 175 S. E. 2d 545.

Rehearing Denied

No. 288. JOINER *v.* DECKARD, *ante,* p. 941;

No. 291. MCVEAN *v.* FLORIDA, *ante,* p. 941;

No. 414. DUNN *v.* NEWSPAPERS, INC., *ante,* p. 830;

No. 711. BECKMAN INSTRUMENTS, INC., ET AL. *v.* CHEMTRONICS, INC., ET AL., *ante,* p. 956;

No. 5789. VEACH *v.* TENNESSEE, *ante,* p. 948; and

No. 5893. HARRIS *v.* UNITED STATES, *ante,* p. 966. Petitions for rehearing denied.

No. 78. ATLANTIC CITY ELECTRIC CO. ET AL. *v.* UNITED STATES ET AL., *ante,* p. 73. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 421. TREFINA, A. G. *v.* UNITED STATES, *ante,* p. 878. Motion for leave to file petition for rehearing denied.

No. 673. LEE NATIONAL CORP. *v.* ATLANTIC RICHFIELD CO. ET AL., *ante,* p. 940. Petition for rehearing and/or to amend order denied.

JANUARY 26, 1971

Dismissal Under Rule 60

No. 5602. MITCHELL *v.* BISHOP, PENITENTIARY SUPERINTENDENT. Sup. Ct. Ark. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 248 Ark. 427, 452 S. W. 2d 340.

JANUARY 27, 1971

Miscellaneous Order. (For Court's order prescribing the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, see *post,* p. 1031.)

February 1, 1971

Dismissal Under Rule 60

No. 1219. Confederation Life Assn. *v.* Vega y Arminan. Dist. Ct. App. Fla., 3d Dist. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 237 So. 2d 839.

February 3, 1971

Miscellaneous Order

No. 89. Lemon et al. *v.* Kurtzman, Superintendent of Public Instruction of Pennsylvania, et al. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 397 U. S. 1034];

No. 153. Tilton et al. *v.* Richardson, Secretary of Health, Education, and Welfare, et al. Appeal from D. C. Conn. [Probable jurisdiction noted, *sub nom. Tilton* v. *Finch,* 399 U. S. 904];

No. 569. Earley *v.* DiCenso et al.; and

No. 570. Robinson, Commissioner of Education of Rhode Island, et al. *v.* DiCenso et al. Appeals from D. C. R. I. [Probable jurisdiction noted, *ante,* p. 901.] Motion to postpone oral argument denied. Mr. Justice Marshall took no part in the consideration or decision of this motion.

AMENDMENT OF RULES OF THE SUPREME COURT OF THE UNITED STATES

ORDER

IT IS ORDERED that the Rules of the Supreme Court of the United States be and the same are hereby amended by deleting Rule 5, entitled "Admission to the Bar," and substituting in its place the following:

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. 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 endorsed by two members of the bar of this court who are not related to the applicant.

3. If the documents submitted by the applicant demonstrate that he possesses the necessary qualifications, the clerk shall so notify the applicant and he may be admitted without appearing in court. Upon the applicant's signing the oath or affirmation and paying the fee required under Rule 52 (d), the clerk shall issue a certificate of admission to the applicant. However, if the applicant so elects he may be admitted on oral motion by a member of the bar in open court, provided the applicant has satisfied the requirements for admission.

4. Each applicant shall take or subscribe the following oath or affirmation, viz.:

I, ..., do solemnly swear (or affirm) that as an attorney and as a counsellor of this court I will conduct myself uprightly, and according to law, and that I will support the Constitution of the United States.

OCTOBER 12, 1970.

RULES OF PROCEDURE FOR THE TRIAL OF MINOR OFFENSES BEFORE UNITED STATES MAGISTRATES

Effective January 27, 1971

The Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates were prescribed by the Supreme Court of the United States pursuant to 18 U. S. C. § 3402. (References herein to Title 18 of the United States Code (except for § 1) are to Supplement V of the 1964 edition.)

These rules, which supersede the rules prescribed by the Court on May 19, 1969 (see 395 U. S. 991), became effective as of the date of the Court's order, *post*, p. 1031.

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JANUARY 27, 1971

ORDERED that the following Rules, to be known as the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, be and they are prescribed pursuant to § 302 (b) of the Federal Magistrates Act, which amends § 3402 of Title 18, United States Code. These Rules shall take effect as of the date of this order and supersede the rules heretofore promulgated by this Court on May 19, 1969.

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

I dissent from the Court's adoption of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates. Almost all these Rules, except those which I think infringe constitutional rights to jury trial and assignment of counsel, are covered either by the Constitution, statutes, the existing Federal Rules of Criminal Procedure or the common, everyday practice of courts all over the country. It seems to me to be an utter waste of time to require Justices to consider "new" and unnecessary rules at a period when we have the heaviest caseload in our history. I believe the magistrates could perform their functions far more satisfactorily if they were not encumbered with so-called "rules" like these. Moreover, as I read the Rules, their main result is to cast doubt on the constitutional guarantees of jury trial and assignment of counsel for indigents. These two subjects merit discussion in some detail.

Under these Rules, the constitutional rights of trial by jury and appointment of counsel for indigents appear to depend upon whether a defendant is charged with a "minor offense" or a "petty offense." Yet the Rules do not even purport to define these vague terms "minor

offense" and "petty offense" that determine whether a defendant will be accorded these basic constitutional protections. In my view, the Court's action impairs the constitutional rights to jury trial and counsel and hence it is both unwise and unconstitutional.

Rule 2 provides that the magistrate shall inform a defendant charged with a minor offense *other than a petty offense* "of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel." And that Rule requires that such defendants must waive "trial before a judge of the district court and a jury" before the magistrate can conduct the trial. The provisions for trial of "petty offenses" are strikingly different. Rule 3 provides that a defendant charged with a petty offense shall be informed simply of his "right to counsel." And it requires waiver only of trial before "a judge of the district court." Thus these Rules appear to safeguard the rights of trial by jury and assignment of counsel for "minor offenses," but not for "petty offenses." By strong negative pregnant they suggest there exists no right to jury trial or assigned counsel for "petty offenses." This is especially disturbing since the Rules nowhere define the term "petty offense."

Even though the Rules themselves do not suggest it, we may be expected to look to the United States Code to ferret out what the authors mean by a "petty offense." Title 18 U. S. C. § 1 (3) provides:

> "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

If this definition is taken as a guide, the Rules present serious constitutional problems under the previous decisions of this Court. Title 18 defines "petty offense" solely in terms of the maximum punishment. But this Court has held that even when a statute provides only light sanctions a defendant is entitled to a jury trial when the offense is regarded as serious by the community.

In *District of Columbia* v. *Colts*, 282 U. S. 63 (1930), a defendant was convicted of driving recklessly "so as to endanger property and individuals." The relevant statute provided for punishment by not more than a $100 fine or 30 days' imprisonment. Despite this light penalty, the Court concluded that a jury trial was required because the offense was *malum in se* and one of "obvious depravity." *Id.*, at 73. It is true that the Court held last year in *Baldwin* v. *New York*, 399 U. S. 66 (1970), that offenses punishable by more than six months' imprisonment required jury trials irrespective of other criteria of seriousness. But *Baldwin* did not overrule *Colts*. The plurality opinion there noted:

> "In this case, we decide only that a potential sentence in excess of six months' imprisonment *is sufficiently severe by itself* to take the offense out of the category of 'petty.'" 399 U. S., at 69 n. 6. (Emphasis added.)

Nor do our previous decisions justify restricting an indigent's right to assignment of counsel to the class of misdemeanors defined as "petty" in 18 U. S. C. § 1 (3). We held in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), that the Sixth Amendment right to the assistance of counsel in criminal prosecutions was binding on the States. Gideon had been convicted of a felony, but no subsequent decision of this Court has held that the right to court-appointed counsel is not applicable to certain misdemeanors.

Of course some of these constitutional problems might be avoided if we look to previous decisions of this Court rather than the United States Code to define "petty offense." Unfortunately, even our decisions provide no clear guidelines. The Court has sometimes looked to the seriousness of an offense to determine whether a jury trial is required. See *District of Columbia* v. *Colts*, *supra*. On other occasions it has looked principally to the length of the maximum possible sentence. See *Baldwin* v. *New York*, *supra*. Other times a majority of the Court has

ignored the maximum possible sentence and adopted the sentence actually imposed as its guideline. See *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966). Taken together, these cases do not provide a clear, definite meaning of "petty offense." Furthermore, the cases cited above all concerned the right to jury trial, not the issue of when an indigent defendant accused of a misdemeanor is entitled to assignment of counsel. On this issue, previous opinions provide almost no guidance. See *Winters* v. *Beck,* 385 U. S. 907 (1966) (STEWART, J., dissenting from denial of certiorari).

Even if the meaning of "petty offense" is to be taken from previous decisions, I could never suggest or imply, even by silence, that these Rules are consistent with the Sixth Amendment. It provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence."

By its own terms, the Amendment makes no exception for so-called "petty offenses." Despite previous decisions engrafting a petty-offense exception onto the Amendment, I cannot see where this Court derives the power to so alter the Constitution. *Baldwin* v. *New York, supra,* at 74–75 (BLACK, J., concurring in judgment). Cf. *Dyke* v. *Taylor Implement Co.,* 391 U. S. 216, 223 (1968) (BLACK, J., dissenting); *Frank* v. *United States,* 395 U. S. 147, 159 (1969) (BLACK, J., dissenting). Today's action diluting the straightforward and fundamental Sixth Amendment guarantee of trial by jury is ironic and puzzling indeed when only several days ago a majority used that Amendment to create a new constitutional right to a change of venue. That was done in a "minor" misdemeanor case where the defendant was only fined and placed on probation. *Groppi* v. *Wisconsin, ante,* p. 505.

Wholly aside from the dilution of specific Sixth Amendment guarantees, I doubt the Court has the power to

prescribe the kind of rules it does today, as I have made clear on previous occasions when the Court approved amendments to the Federal Rules of Civil and Criminal Procedure. See 383 U. S. 1032 (1966); 374 U. S. 865 (1963); 368 U. S. 1012 (1961). Whatever one thinks of the Sixth Amendment problems, these Rules unquestionably determine substantial rights when they prescribe that the guarantees of jury trial and assigned counsel need not be enforced for "petty offenses," whatever those may be. This kind of judicial lawmaking is wholly at odds with the philosophy of separation of powers contained in our Constitution. Art. I, § 1, provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The Congress, not this Court, should exercise its constitutional power to define the offenses for which federal defendants are to receive jury trials. In doing so, any legislation impairing Sixth Amendment rights would of course be unconstitutional.

Assuming that the judiciary will continue to enact "procedural" rules under congressional delegations of power, it is essential that these rules be truly procedural and not affect the substantial rights of defendants. The Court's promulgation of the Magistrates Rules today inevitably has the appearance of an advisory opinion. A very plausible reading of today's action is that we have prescribed that defendants in the federal system have no right to jury trial or assigned counsel where the maximum possible penalty does not exceed six months. But both of these issues have occasioned lively controversy in previous cases. See, *e. g., Baldwin* v. *New York, supra; Cheff* v. *Schnackenberg, supra; Frank* v. *United States, supra; Dyke* v. *Taylor Implement Co., supra; Winters* v. *Beck, supra; DeJoseph* v. *Connecticut,* 385 U. S. 982 (1966). I consider it entirely inappropriate for the Court to indirectly suggest answers to these

serious constitutional issues when it is acting in a "rule making" capacity and has no case or controversy before it. Such action is likely to lead to embarrassment and confusion when the same issues are presented to us in an adversary context and we must pass directly upon the validity of these Rules.

Finally, I regret that the Court today once again chooses to indulge in what I can only consider a fiction by "prescribing" these Rules as though we had written them. The Rules were written by a committee, not by this Court. With our heavy caseload and the most crowded docket in history there is no use pretending that such rules can or do receive the careful, thoughtful attention of this Court. It seems to me an empty, formal gesture for us to "prescribe" them. In my view, Congress, not the Court, should adopt legislation altering substantial rights. But if the present kind of judicial rulemaking is to continue despite my views, I adhere to the previous position that MR. JUSTICE DOUGLAS and I set forth on another occasion when the Court adopted rules to govern district courts:

> "If the rule-making . . . is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid." 374 U. S., at 870.

I dissent from the promulgation of these Rules.

RULES OF PROCEDURE FOR THE TRIAL OF MINOR OFFENSES BEFORE UNITED STATES MAGISTRATES

Rule 1. Scope

These rules govern the procedure and practice for the trial of minor offenses (including petty offenses) before United States magistrates under 18 U. S. C. § 3401, and for appeals in such cases to judges of the district courts. To the extent that pretrial and trial procedure and practice are not specifically covered by these rules, the Federal Rules of Criminal Procedure apply as to minor offenses other than petty offenses. All other proceedings in criminal matters, other than petty offenses, before United States magistrates are governed by the Federal Rules of Criminal Procedure.

Rule 2. Minor offenses other than petty offenses

(*a*) *Complaint or information.*—The trial of a minor offense, other than a petty offense, may proceed on a complaint filed with the magistrate or on an information filed with the clerk of the district court. The district court, by order or local rule, may make provision for the reference of such information to a magistrate.

(*b*) *Appearance.*—Upon the defendant's appearance, the magistrate shall inform him of the complaint or information against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and the general circumstances under which he may secure pretrial release. The magistrate shall also explain to the defendant that he has a right to trial before a judge of the district court and a jury and, if the prosecution is on a complaint, that he has a right to have a preliminary examination before the magistrate unless he consents to be tried before the magistrate.

(*c*) *Consent; arraignment.*—If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court and a jury, the magistrate shall take the defendant's plea to the charge set forth in the complaint or information. The defendant may plead not guilty, guilty or, with the consent of the magistrate, *nolo contendere.* If the defendant indicates a desire to plead guilty or *nolo contendere,* the magistrate shall proceed in accordance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure. If the defendant pleads not guilty, the magistrate shall either conduct the trial immediately or fix a time for the trial.

(*d*) *Trial*

(*1*) *Date of trial.*—The date of trial shall be fixed at such time as will afford the defendant a reasonable opportunity for preparation and for representation by counsel if desired.

(*2*) *Procedure.*—The trial shall be conducted as are trials of criminal cases in the district court by a district judge without a jury.

(*3*) *Record.*—Proceedings under this rule shall be taken down by a reporter or recorded by suitable sound recording equipment.

Rule 3. Petty offenses

(*a*) *Complaint or citation.*—The trial of a petty offense may proceed on an information filed with the clerk of the district court or on a complaint, citation, or violation notice filed with the magistrate.

(*b*) *Consent; arraignment.*—The magistrate shall state to the defendant the charge against him and shall inform the defendant of his right to counsel and to a trial in the district court. If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the

charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate, *nolo contendere.* If the defendant pleads not guilty, the magistrate shall either conduct the trial immediately or fix a time for the trial, giving due regard to the needs of the parties to consult with counsel and to prepare for the trial.

(*c*) *Trial*

(*1*) *Procedure.*—The trial shall be conducted as are trials of petty offenses in the district court by a district judge without a jury.

(*2*) *Record.*—Unless the defendant waives in writing the keeping of a verbatim record, proceedings under this rule shall be taken down by a reporter or recorded by suitable sound recording equipment.

Rule 4. Warrant or summons

(*a*) *Citation or violation notice.*—If a defendant fails to appear in response to a citation or violation notice, a summons or a warrant for his arrest may be issued by the magistrate. No warrant may issue unless the essential facts of the offense charged in the citation or violation notice establish probable cause and are supported by oath.

(*b*) *Failure to appear.*—If a defendant fails to appear before the magistrate when summoned or otherwise ordered by the magistrate to appear, the magistrate may summarily issue a warrant for his immediate arrest and appearance before the magistrate.

Rule 5. Orders subject to rehearing by district judges

A decision or order by a magistrate which, if made by a judge of the district court, could be appealed by the government under any provision of law, shall be subject to rehearing *de novo* by a judge of the district court upon motion for such rehearing filed with the magistrate by the attorney for the government within 10 days after the

entry of the order. Upon the filing of such a motion, the magistrate shall promptly transmit the motion and all records in the case to the clerk of the district court. The magistrate shall not proceed further with the case until the matter to be reheard, including any available appeal, has been determined.

Rule 6. Transfer of cases

(*a*) *Minor offenses other than petty offenses.*—Cases of minor offenses, other than petty offenses, may, upon transfer under Rule 20 of the Federal Rules of Criminal Procedure, be referred to a magistrate for plea and sentence, if authorized by rule or order of the district court.

(*b*) *Petty offenses.*—A defendant charged with a petty offense who is arrested, held, or present in a district other than that in which an information, complaint, citation, or violation notice is pending against him may state in writing before a magistrate that he wishes to plead guilty or *nolo contendere,* to waive trial in the district in which the proceeding against him is pending, and to consent to disposition of the case in the district in which he was arrested, is held, or is present. The magistrate shall thereupon transmit the statement to the magistrate before whom the proceeding is pending. Upon receipt of the defendant's statement, the magistrate before whom the proceeding is pending shall transmit the papers, or certified copies thereof, to the clerk of the district court for the district in which the defendant was arrested, is held, or is present for reference to a magistrate and the proceeding shall continue in that district.

(*c*) *Not guilty plea after transfer.*—If, after the proceeding has been transferred pursuant to this rule, the defendant pleads not guilty, the magistrate shall send the papers to the clerk of the district court for return to the magistrate in the district where the proceeding was originally commenced for restoration to the docket. The defendant's statement that he wishes to plead guilty or *nolo contendere* shall not be used against him.

Rule 7. New trial

The magistrate, on motion of a defendant, may grant a new trial if required in the interest of justice. The magistrate may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within 180 days after final judgment, but if an appeal is pending the magistrate may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after a finding of guilty or within such further time as the magistrate may fix during the 7-day period.

Rule 8. Appeal

(*a*) *Notice of appeal.*—An appeal from a judgment of conviction by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the magistrate a notice stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney, personally or by mail.

(*b*) *Record.*—The magistrate shall forward to the clerk of the district court the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings, and a certified copy of the docket entries. These shall constitute the record on appeal. Any expense in connection therewith shall be borne by the government.

(*c*) *Stay of execution; release pending appeal.*—The provisions of Rule 38 (a) of the Federal Rules of Criminal Procedure relating to stay of execution shall be applicable to a judgment of conviction entered by a magistrate. The defendant may be released pending appeal by the magistrate or a district judge in accordance with the provisions of law relating to release pending appeal from a judgment of conviction of a district court.

(*d*) *Scope of appeal.*—The defendant shall not be entitled to a trial *de novo* by the judge of the district court. The scope of appeal shall be the same as on an appeal from a judgment of a district court to a court of appeals.

Rule 9. Payment of fixed sum in lieu of appearance

When authorized by local rules of the district courts in cases of petty offenses as defined in 18 U. S. C. § 1 (3), payment of a fixed sum may be accepted in lieu of appearance and as authorizing the termination of the proceeding.

Rule 10. Records

The magistrate shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe.

Rule 11. Rules of court

(*a*) *Local rules by district courts.*—Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsistent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

(*b*) *Procedure not otherwise specified.*—If no procedure is especially prescribed by rule, the magistrate may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

REPORTER'S NOTE

The next page is purposely numbered 1201. The numbers between 1042 and 1201 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS FROM END OF OCTOBER TERM, 1969, THROUGH OCTOBER 10, 1970

ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. *v.* SOCIALIST WORKERS PARTY ET AL.

ON APPLICATION FOR STAY AND ON MOTION FOR VACATION THEREOF

Decided July 11 and 22, 1970

Stay granted to preserve *status quo ante* to enable Court, at its first Conference in October, to determine disposition of appeal. Motion for reconsideration and vacation of stay denied on basis of appellants' representation that appellee parties' candidates can be placed on ballot for November 1970 election.

See: 314 F. Supp. 984.

Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

I consider the issues in this case are such as to entitle the State of New York to have them put to the Court itself before the judgment of the three-judge District Court is implemented. To that end I shall issue an order preserving the *status quo ante* upon terms which will enable the Court to determine, at its first Conference in October, what disposition should be made of the State's appeal, and whether the stay, which I am now granting, should be continued.

Supplemental Memorandum of MR. JUSTICE HARLAN, Circuit Justice.

The day following the announcement of the order of July 11, 1970, the appellees moved by telegram for reconsideration and vacation of that order. Among other things, they suggested that the Court might not, under

the course envisioned by my order, be able to take action relating to the State's appeal and the limited stay granted by me in time to enable the appellee parties' candidates to appear on the ballot for the November 1970 election in compliance with the judgment of the three-judge District Court, if this Court should determine that the operative effect of that judgment should be left undisturbed.

Considering that this suggestion, if it proved to be true, might require me to reconsider my order of July 11, I called on the parties to file memoranda and also set the matter for a hearing before me at the Federal Courthouse in Bridgeport, Connecticut, on July 20, 1970.

At the hearing it developed that these fears of the appellees were unfounded, so far as the State was concerned, and I have today received from the New York State Attorney General's Office the following telegram:

> "Re Rockefeller v. Socialist Workers Party, confirming representations made at July 20 hearing, in event stay not continued by full Court not later than October 27 appellees will be placed on ballot provided they have complied with election law as modified by District Court decree. Appellees will appear on absentee ballots subject to their votes being voided if full Court continues stay. Respectfully, Louis J. Lefkowitz, Attorney General of New York, attorney for appellants."

In light of the foregoing, the motion for reconsideration is denied, with leave to renew if the course of events contemplated by this memorandum turns out to be impossible of realization. In short, my purpose is to afford both sides an opportunity to have the District Court's decision considered by this Court before final preparation for the November 1970 election.

Motion to vacate stay denied.

DAVIS *v.* ADAMS, SECRETARY OF STATE OF FLORIDA

ON APPLICATION FOR STAY

Decided August 5, 1970*

Applicants, would-be candidates for Congress, seek to stay a judgment of the Florida Supreme Court upholding a state law that requires state officials to resign before becoming candidates for another office. Since the constitutional issues cannot be finally resolved before the September 8, 1970, primary election, and the risk of injury to the applicants outweighs that to Florida, the applications for stays are granted.

See: 238 So. 2d 415.

MR. JUSTICE BLACK, Circuit Justice.

The State of Florida has enacted a law that requires the incumbent of a state elective office to resign before he can become a candidate for another office. Fla. Laws 1970, c. 70–80. The validity of this enactment is challenged because the Florida Secretary of State has applied it to bar the candidacies for the United States House of Representatives of William E. Davis, currently sheriff of Escambia County, Florida, and James J. Ward, Jr., currently mayor of the city of Plantation, Florida. The Supreme Court of Florida has upheld the actions of the Secretary of State.[1] On the other hand, a three-judge federal district court in the Northern District of Florida has invalidated Florida's law as applied to another sheriff seeking to qualify as a candidate for Congress.[2] Ulti-

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*Together with *Ward* v. *Adams, Secretary of State of Florida,* also on application for stay.

[1] *Florida ex rel. Davis* v. *Adams,* 238 So. 2d 415 (Fla. 1970), aff'd on rehearing, *id.,* at 418.

[2] *Stack* v. *Adams,* 315 F. Supp. 1295 (ND Fla. 1970).

mately, the question presented by these disputes is whether Florida can constitutionally add to or subtract from the qualifications established by federal law for candidates for federal office. Because the primary election in these cases will be held on September 8, 1970, however, time will not permit a final resolution of these constitutional controversies before the voters go to the polls.

I must decide, then, whether these two candidates must be permitted to run for the United States House of Representatives. The decision necessarily requires a forecast of this Court's decision on the constitutionality of the Florida statute, should the Court decide to hear these cases. On balance, I am inclined to think the Court would hold that Florida has exceeded its constitutional powers. Beyond that judgment, these applications require me to consider the possibility of injury to one of the parties should my forecast on the merits be wrong. If I were to deny these applications and the Court were later to invalidate the Florida statutes, these men would have been unconstitutionally deprived of their right to run for office. If, on the other hand, I grant relief and the Court should later sustain the Florida statute, little damage would have been done. The applicants might lose at the polls, and even if they were to be elected, Florida could challenge them as having failed to qualify. The risk of injury to the applicants from striking their names from the ballot outweighs the risk of injury to Florida from permitting them to run.

The applications for stays are granted.

FOWLER *v.* ADAMS, SECRETARY OF STATE OF FLORIDA

ON APPLICATION FOR INJUNCTIVE RELIEF

Decided August 11, 1970

Applicant, who was denied a ballot place as a congressional candidate in the September 8, 1970, primary election in Florida because of his refusal to pay the filing fee required by state law, has applied for injunctive relief against a three-judge Federal District Court judgment rejecting his contentions that the law is unconstitutional. Since the equities of granting the requested relief favor the applicant, Florida is directed to have his name placed on the ballot without payment of the filing fee.

See: 315 F. Supp. 592.

MR. JUSTICE BLACK, Circuit Justice.

Mr. William V. Fowler made a timely application to the Florida Secretary of State to become a candidate for the United States House of Representatives and was denied a place on the ballot because he refused to pay the $2,125 filing fee required by state statutes, Florida Stat. Ann. §§ 99.021 and 99.092. The applicant challenged the constitutionality of these Florida laws on the ground that since a Congressman is a federal officer a State cannot impose such a fee as a condition for candidacy. The applicant also asserted that the fee requirement was a denial of equal protection of the laws. A three-judge Federal District Court in the Middle District of Florida rejected these contentions.[1] The State claims the right to impose such a fee under Art. 1, § 4, cl. 1, of the United States Constitution, which provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

[1] 315 F. Supp. 592 (MD Fla. 1970).

> prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Florida asserts that since Congress has not exercised its power to "make or alter" filing regulations for conducting congressional elections, the State retains the power to impose the fee in question.

The case raises questions which make it impossible for me to predict with certainty what the majority of this Court would decide.[2] The full Court in all likelihood will not meet until October, after the primary on September 8, 1970. Under these circumstances my decision on this application could settle this controversy on a basis which the Court might not later accept. The record presents no facts that would show an imposition of irreparable damage upon the State should it be required to place the applicant's name on the ballot, and should the law later be upheld by this Court, the State might then collect the fee from the candidate. Furthermore, even if the law is held valid after the applicant's name has been submitted to the voters, neither he nor the public would have suffered irreparable damage. If, on the other hand, the applicant is denied an opportunity to run for office and the Florida law is later invalidated, this candidate would have been unconstitutionally barred from the ballot. In this situation, I think the equities are with the applicant.[3]

The State is therefore directed to take the steps necessary to place the applicant's name on the ballot without the payment of the filing fee.

It is so ordered.

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[2] Compare *Fowler* v. *Adams, supra,* with *Georgia Socialist Workers Party* v. *Fortson,* 315 F. Supp. 1035 (ND Ga. 1970). See also my opinion in *Matthews* v. *Little,* 396 U. S. 1223 (1969).

[3] See my opinion in *Davis* v. *Adams, ante,* p. 1203.

DEXTER ET AL. *v.* SCHRUNK ET AL.

ON APPLICATION FOR RESTRAINING ORDER

Decided August 29, 1970

Restraining order requested by applicants, who rely on *Dombrowski* v. *Pfister,* 380 U. S. 479, denied since re-examination of holding in that case is involved in cases to be argued in fall.

MR. JUSTICE DOUGLAS, Circuit Justice.

Under *Dombrowski* v. *Pfister,* 380 U. S. 479, applicants make out a strong case for federal protection of their First Amendment rights. But *Dombrowski,* a five-to-two decision rendered in 1965, is up for re-examination in cases set for reargument this fall. If the present case were before the Conference of this Court, I am confident it would be held pending the cases to be reargued. Hence, as Circuit Justice, I do not feel warranted in taking action contrary to what I feel the Conference would do. Accordingly, I deny the restraining order requested.

MARCELLO *v.* UNITED STATES

ON APPLICATION FOR BAIL PENDING APPEAL

Decided September 18, 1970

Since MR. JUSTICE BLACK is not sure that three of his Brethren will agree with his view that the Government's conduct in this case raises questions worthy of review, he will take no action on the application for bail but will refer it to the full Court at its first meeting in October.

MR. JUSTICE BLACK, Circuit Justice.

This bail application by Carlos Marcello is the latest event in a long series of prosecutions of Marcello by federal authorities. See, *e. g., Marcello* v. *United States,* 196 F. 2d 437 (CA5 1952). All these prosecutions ended in dismissal of charges by the Government or acquittal except a conviction of illegal transfer of marihuana in 1938 and the present case in which Marcello was convicted in 1968 of assaulting an FBI agent in violation of 18 U. S. C. § 111. This conviction was affirmed on appeal, 423 F. 2d 993 (CA5 1970), and this Court denied certiorari. 398 U. S. 959. In June 1970, Marcello filed a motion for a new trial, alleging that the Government suppressed evidence which he was entitled to present to the jury that convicted him. In August 1970, Marcello sought a hearing under 28 U. S. C. § 2255 alleging that the chief Government witness had perjured himself. Both motions were denied, and Marcello's appeals from these orders are now pending in the Court of Appeals for the Fifth Circuit. The Court of Appeals declined to continue Marcello on bail pending a final disposition of his appeals. Marcello's claims rest on the following facts summarized from the record.

Shortly before the alleged assault in 1966 Marcello was in New York preparing to return to his home in New Orleans. FBI agents in New York advised agents in New Orleans that Marcello was scheduled to arrive at the New Orleans airport on Delta Airlines at 8:30 p. m. on September 30.[1] After the receipt of this message, a New Orleans FBI agent telephoned the Associated Press, the local newspapers, and a local television station and inquired whether they intended to cover the arrival of a "prominent person" at the airport that evening.[2] When the Delta plane arrived, the press swarmed around Marcello. With them were FBI Agent Collins, who according to the Government's brief and the Court of Appeals was "posing as a passenger," and FBI Agent Avignone, carrying a camera. According to the Court of Appeals:

> "This crowd followed Marcello through the airport and onto the upper ramp outside where Marcello, angrily and with some profanity, inquired whether the photographers had taken enough pictures. Collins, with arms folded, answered in the negative, and Marcello retorted: 'Are you looking for trouble?' which elicited the not unexpected reply from Collins that 'I can handle trouble.'" *United States* v. *Marcello,* 423 F. 2d 993, 997.

Marcello's version was that Collins said "I'm always looking for trouble."[3] The Court of Appeals continued: "This exchange had an unsettling effect on Marcello who took a couple of short jabs at Collins and attempted to mow him down with a haymaker, which never really got off the ground because of his brother Joseph's re-

[1] *United States* v. *Marcello,* Trial Transcript 1126.

[2] *United States* v. *Marcello,* Transcript of Motion for New Trial and for Reduction of Sentence 206, 213, 221.

[3] *United States* v. *Marcello,* Trial Transcript 1209.

straint." Collins himself testified that if Marcello touched his body at all, "it was so slight, I did not feel it." [4] For this "technical assault," which Collins swore he did not feel, Marcello was fined $5,000 and sentenced to two years in prison.

The entire case and circumstances shown by the record are highly disturbing. At Marcello's trial in 1968 his counsel suggested that Government agents were themselves responsible for the crowd of newsmen surrounding Marcello and photographing him at the airport.[5] Counsel prosecuting Marcello expressed resentment at the suggestion that the Government had entrapped or provoked him. The Government then denied that it had any evidence favorable to Marcello. This denial seems incredible to me in view of the now admitted facts that an agent called the press telling them of the arrival of a "prominent person" and that prosecuting counsel were informed before trial of these FBI contacts with the press.[6] I have no doubt of the relevancy of this evidence in the eyes of the jury considering Marcello's defense that the FBI was after him and had provoked the incident. I have no doubt that the Government's conduct in this case raises questions worthy of review. I am not sure, however, that three of my Brethren will agree. Under these circumstances, I shall take no action at all on this application but shall refer it to the full Court at its first meeting October 5.

So ordered.

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[4] *Id.*, at 941.

[5] *Id.*, at 345.

[6] *United States* v. *Marcello*, Transcript of Motion for New Trial and for Reduction of Sentence 220.

HARRIS ET AL. *v.* UNITED STATES

ON APPLICATION FOR STAY

No. 780. Decided October 10, 1970

Stay of Court of Appeals' judgment pending disposition of a petition for certiorari granted in view of substantial nature of questions presented, not previously decided by this Court, concerning (1) the propriety of the Government's appeal under 18 U. S. C. § 1404, and the petitioners' right to appeal from an adverse Court of Appeals' ruling, and (2) the validity of the Court of Appeals' rule that "probable cause" is not necessary for an extended border search.

MR. JUSTICE DOUGLAS, Circuit Justice.

This is an application for a stay of a judgment of the Court of Appeals pending disposition of a petition for certiorari which has been filed here. The United States has filed its opposition. The stay has been denied by the Court of Appeals and I am reluctant to take action contrary to what it has done. There are, however, two questions in the case not heretofore decided by this Court which are of considerable importance.

First is a question of the propriety of petitioners seeking relief here. The District Court suppressed evidence seized on a so-called "border" search and the United States appealed. Its appeal apparently was under 18 U. S. C. § 1404 which creates an exception to the ban against appeals which are not "final" within the meaning of 28 U. S. C. § 1291, a ban to which we gave full enforcement in *DiBella* v. *United States,* 369 U. S. 121. Under that decision petitioners could not appeal to the Court of Appeals from an adverse decision in the District Court. Whether they could appeal from an adverse ruling of the Court of Appeals is a question we have not adjudicated.

Beyond that may be a question concerning the propriety of the Government's appeal, though the question does not seem to be raised by petitioners. Title 18 U. S. C. § 1404 provides in part:

> "[T]he United States shall have the right to appeal from an order granting a motion for the return of seized property *and* to suppress evidence made before the trial of a person charged with a violation of—
>
> . . . . . .
>
> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174) . . . ." (Emphasis supplied.)

The order of the District Court apparently did not provide for the return of the property. The statute does not *in haec verba* grant an appeal if there was "suppression" alone. In light of *DiBella,* the question is whether the statute will be strictly construed against appealability.*

Second is a question under the Fourth Amendment. The Court of Appeals has adopted the rule that "probable cause" is not necessary for "a lawful border search." *Castillo-Garcia* v. *United States,* 424 F. 2d 482, 484. In that case the "border search" took place 105 miles from the border and seven hours after the entry of the car from Mexico, the vehicle having been followed and kept under constant surveillance by Customs agents. In the present case the truck entered this country from Mexico at San Ysidro, California, and was seized and searched

*While § 1404 (2) refers to a section dealing with marihuana, § 174 is also cited in § 1404 (2) and § 174 covers narcotics rather than marihuana. So a related question is whether that ambiguity will be resolved in favor of the rather strict policy reflected in *DiBella.*

when it was parked in Los Angeles, some 150 miles distant. The statute, 19 U. S. C. § 482, allows searches by Customs agents where they have "a reasonable cause to suspect" that there is merchandise being imported contrary to law. While the test in the Ninth Circuit of the legality of the extended border search is constant surveillance of the vehicle or person after entry, the Fifth Circuit rests on "reasonable cause to suspect." See *Stassi* v. *United States,* 410 F. 2d 946, 951. The difference between these two approaches has been noted in the Second Circuit. *United States* v. *Glaziou,* 402 F. 2d 8, 13–14, n. 3; *United States* v. *Pedersen,* 300 F. Supp. 669. The rather old dictum of this Court in *Carroll* v. *United States,* 267 U. S. 132, 154, hardly meets the refinements of these new distinctions.

I indicate no view of the merits on either of the two questions but have said only enough to illustrate the substantial nature of the questions presented. For these reasons I have concluded to grant the stay requested.

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FRAUDULENT TAX RETURNS. See **Constitutional Law,** II; **Procedure,** 4.

FREEDOM OF EXPRESSION. See **Constitutional Law,** V; **Obscenity.**

FREEDOM OF SPEECH. See **Procedure,** 1.

FREEDOM TO CHANGE RESIDENCE. See **Voting Rights Act Amendments of 1970.**

FREEDOM TO TRAVEL. See **Voting Rights Act Amendments of 1970.**

FREE TIME. See **Federal Maritime Commission; Judicial Review; Procedure,** 3.

GENERAL MINING ACT OF 1872. See **Mineral Leasing Act of 1920.**

GEORGIA. See **Constitutional Law,** I.

"GEORGIAN." See **Interstate Commerce Act.**

GIFTS OF LIQUOR. See **Abstention,** 2; **Constitutional Law,** III, 4.

GOVERNMENT AGENTS. See **Bail.**

GOVERNMENT LANDS. See **Mineral Leasing Act of 1920.**

GRANDFATHER CLAUSES. See **Constitutional Law,** III, 3; **Taxes.**

GRAND JURIES. See **Constitutional Law,** VII; **Procedure,** 2.

GRIEVANCE PROCEDURES. See **Labor Management Relations Act; Remedies; Seamen.**

GUILTY PLEAS. See **Pleas,** 1–3.

HABEAS CORPUS. See also **Constitutional Law,** I; **Procedure,** 5.

Voluntariness of statement—Shortcomings of state procedure.—Applicant for federal habeas corpus relief is not entitled to new hearing on voluntariness of statement introduced at his trial merely because of shortcomings in state procedure used to decide voluntariness issue, as he must also show that his version of the events, if true, would require conclusion that statement was involuntary. Procunier v. Atchley, p. 446.

HARTFORD, WISCONSIN. See **Abstention,** 2; **Constitutional Law,** III, 4.

HEARINGS. See **Abstention,** 2; **Aid to Families With Dependent Children; Constitutional Law,** III, 4; IV–V; **Obscenity.**

HEARSAY. See **Constitutional Law,** I.

HIRING POLICY. See **Civil Rights Act of 1964; Sex Discrimination.**

HOME VISITS. See **Aid to Families With Dependent Children; Constitutional Law,** IV.

"HUMMINGBIRD." See **Interstate Commerce Act.**

IDAHO. See **Voting Rights Act Amendments of 1970.**

IMMUNITY. See **Constitutional Law,** VII; **Procedure,** 2.

IMPANELING OF JURY. See **Constitutional Law,** II; **Procedure,** 4.

IMPARTIAL JURY. See **Constitutional Law,** III, 1; **Venue.**

IMPROVEMENTS. See **Mineral Leasing Act of 1920.**

INCOME TAXES. See **Constitutional Law,** III, 3; **Taxes.**

INCOME TAX RETURNS. See **Constitutional Law,** II; **Internal Revenue Service,** 1–2; **Intervention; Procedure,** 4.

INCREASED SENTENCES. See **Certiorari; Sentences.**

INDIANS. See also **Jurisdiction.**

State court jurisdiction—Action of Tribal Council—Civil Rights Act of 1968.—Blackfeet Indians Tribal Council's unilateral action adopting provision for concurrent civil jurisdiction of Tribal Court and Montana courts was insufficient to vest jurisdiction in state courts either under 1953 Act, which required affirmative state legislative action, or under 1968 Civil Rights Act, which calls for majority vote of all enrolled Indians. Kennerly v. District Court of Montana, p. 423.

INDICIA OF RELIABILITY. See **Constitutional Law,** I.

INJUNCTIONS. See **Elections,** 1.

INJURIES. See **Admiralty.**

INJURY. See **Elections,** 1–2; **Standing to Sue; Stay,** 1.

INNOCENCE. See **Pleas,** 1–3.

INSULTING THE COURT. See **Constitutional Law,** III, 2; **Contempt; Trials.**

INSURANCE. See **Constitutional Law,** III, 3; **Taxes.**

INSURANCE AGENTS. See **Habeas Corpus; Procedure,** 5.

INTERNAL REVENUE CODE. See **Constitutional Law,** III, 3; **Taxes.**

INTERNAL REVENUE SERVICE. See also **Constitutional Law,** II; **Intervention; Procedure,** 4.

1. *Summons enforcement proceeding—Records of taxpayer's employer—Intervention.*—Petitioner has no proprietary interest in his former employer's records (his sole interest therein being that they presumably contain details of payments to him), and since he has no other protectable interest by way of privilege or otherwise, he has no absolute right under Fed. Rule Civ. Proc. 24 (a)(2) to intervene in IRS summons enforcement proceeding. Donaldson v. United States, p. 517.

2. *Tax investigation—Summons.*—Under 26 U. S. C. § 7602 an IRS summons may be used in connection with a tax investigation if it is issued in good faith and prior to a recommendation for prosecution. Donaldson v. United States, p. 517.

INTERSTATE COMMERCE ACT.

Discontinuance of rail service—Connecting lines—Notice.—Section 13a (1) of the Act does not require a railroad seeking to discontinue its segment of a through passenger train that is operated in conjunction with another railroad to give notice of the proposed discontinuance in States served only by the connecting line. United States v. City of Chicago, p. 8.

INTERVENTION. See also **Internal Revenue Service,** 1–2.

Internal Revenue summons enforcement proceeding—Fed. Rule Civ. Proc. 24 (a)(2).—Petitioner has no proprietary interest in his former employer's records (his sole interest therein being that they presumably contain details of payments to him), and since he has no other protectable interest by way of privilege or otherwise, he has no absolute right under Fed. Rule Civ. Proc. 24 (a)(2) to intervene in the IRS summons enforcement proceeding. Donaldson v. United States, p. 517.

INTOXICATING LIQUORS. See **Abstention,** 2; **Constitutional Law,** III, 4.

INVESTIGATIONS OF TAXES. See **Internal Revenue Service,** 1–2; **Intervention.**

INVOLUNTARY PLEAS. See **Pleas,** 1–3.

INVOLUNTARY STATEMENTS. See **Habeas Corpus; Procedure,** 5.

IRONWORKERS. See **National Labor Relations Act,** 1–2.

JEOPARDY. See **Constitutional Law,** II; **Procedure,** 4.

JOB ASSIGNMENTS. See **National Labor Relations Act,** 1–2.

JOB DISCRIMINATION. See **Civil Rights Act of 1964; Sex Discrimination.**

JUDGES. See **Constitutional Law,** II; III, 2; **Contempt; Pleas,** 1–3; **Procedure,** 4; **Trials.**

JUDICIAL DISCRETION. See **Constitutional Law,** II; **Procedure,** 4.

JUDICIAL REVIEW. See also **Constitutional Law,** V; **Federal Maritime Commission; Obscenity; Procedure,** 3; **Voting Rights Act of 1965,** 1–2.

Federal Maritime Commission order—Administrative Orders Review Act—Timeliness.—District Court correctly concluded that it had no authority to review FMC's decision, which constituted a final order and as such, under the Act, was exclusively reviewable by the Court of Appeals. When the case returned to the District Court, time for review by Court of Appeals had expired, precluding any judicial review on the merits of the FMC decision. Marine Terminal v. Rederi. Transatlantic, p. 62.

JURIES. See **Constitutional Law,** II; **Procedure,** 4.

JURISDICTION. See also **Federal Maritime Commission; Indians; Judicial Review; Labor Management Relations Act; Mineral Leasing Act of 1920; Procedure,** 3; **Remedies; Seamen.**

State court jurisdiction—Action of Blackfeet Tribal Council—Civil Rights Act of 1968.—Blackfeet Indians Tribal Council's unilateral action adopting provision for concurrent civil jurisdiction of Tribal Court and Montana courts was insufficient to vest jurisdiction in state courts either under 1953 Act, which required affirmative state legislative action, or under 1968 Civil Rights Act, which calls for majority vote of all enrolled Indians. Kennerly v. District Court of Montana, p. 423.

JURISDICTIONAL DISPUTES. See **National Labor Relations Act,** 1–2.

JURY TRIALS. See **Constitutional Law,** III, 1; **Venue.**

"JUST CAUSE." See **Abstention,** 1; **Appeals,** 2.

LABOR. See **National Labor Relations Act,** 1–2.

LABOR AND IMPROVEMENTS. See **Mineral Leasing Act of 1920.**

LABOR MANAGEMENT RELATIONS ACT. See also **Remedies; Seamen.**

Seamen's wage claims—Optional remedy.—Enactment of § 301 of the Act, which provides for enforcement of grievance and arbitration provisions of collective-bargaining agreements in industries affecting commerce, did not abrogate, but merely added an optional remedy to, the remedy of 46 U. S. C. § 596, which permits seamen to sue for wages in federal court. U. S. Bulk Carriers v. Arguelles, p. 351.

LAND CLAIMS. See **Mineral Leasing Act of 1920.**

LAND OFFICE. See **Mineral Leasing Act of 1920.**

LEGISLATIVE CLASSIFICATIONS. See **Constitutional Law,** III, 3; **Taxes.**

LESSER INCLUDED OFFENSES. See **Pleas,** 1–3.

LIQUOR PURCHASES. See **Abstention,** 2; **Constitutional Law,** III, 4.

LITERACY TESTS. See **Voting Rights Act Amendments of 1970.**

LOADING CARGO. See **Admiralty.**

LOCAL PREJUDICE. See **Constitutional Law,** III, 1; **Venue.**

LOCATION OF POLLS. See **Voting Rights Act of 1965**, 1–2.

LONGSHOREMEN. See **Admiralty.**

LONGSHOREMEN'S STRIKE. See **Federal Maritime Commission; Judicial Review; Procedure**, 3.

MAGAZINE DISTRIBUTORS. See **Constitutional Law**, V; **Obscenity.**

MAILS. See **Constitutional Law**, V; **Obscenity.**

"MANIFEST NECESSITY" DOCTRINE. See **Constitutional Law**, II; **Procedure**, 4.

MARIHUANA. See **Appeals**, 1; **Constitutional Law**, VI.

MARINE TERMINAL ASSOCIATIONS. See **Federal Maritime Commission; Judicial Review; Procedure**, 3.

MARITIME CLAIMS. See **Labor Management Relations Act; Remedies; Seamen.**

MARYLAND. See **Constitutional Law**, III, 3; **Taxes.**

MERCHANT SEAMEN. See **Admiralty; Labor Management Relations Act; Remedies; Seamen.**

MEXICO. See **Appeals**, 1; **Constitutional Law**, VI.

MINERAL LANDS. See **Mineral Leasing Act of 1920.**

MINERAL LEASING ACT OF 1920.

Oil shale claims—Assessment work—Jurisdiction.—The Act's Saving Clause makes the United States the beneficiary of all claims that are invalid for lack of assessment work or otherwise, and the Interior Department had subject matter jurisdiction to determine whether respondents' claims were "maintained" within the meaning of that clause, including the performance of adequate assessment work. Hickel v. Oil Shale Corp., p. 48.

MINIMUM AGE FOR VOTING. See **Voting Rights Act Amendments of 1970.**

MINING CLAIMS. See **Mineral Leasing Act of 1920.**

MINORITY GROUPS. See **Voting Rights Act Amendments of 1970.**

MISDEMEANORS. See **Constitutional Law**, III, 1; **Venue.**

MISSISSIPPI. See **Voting Rights Act of 1965**, 1–2.

MISTRIALS. See **Constitutional Law**, II; **Procedure**, 4.

MONTANA. See **Indians; Jurisdiction.**

MOTHERS. See **Civil Rights Act of 1964; Sex Discrimination.**

MOTION FOR RECONSIDERATION. See **Elections**, 3; **Stay**, 2.

MOTIONS IN BAR. See **Constitutional Law**, II; **Procedure**, 4.

MUNICIPAL BOUNDARIES. See **Voting Rights Act of 1965**, 1–2.

MURDER. See **Constitutional Law**, I; **Habeas Corpus**; **Pleas**, 1–3; **Procedure**, 5.

NARCOTIC DRUGS IMPORT AND EXPORT ACT. See **Appeals**, 1; **Constitutional Law**, VI.

NARCOTICS. See **Appeals**, 1; **Constitutional Law**, VI.

NATIONAL BANKS. See **Standing to Sue.**

NATIONAL ELECTIONS. See **Voting Rights Act Amendments of 1970.**

NATIONAL LABOR RELATIONS ACT.

1. *Section 8 (b)(4)(B)—Secondary conduct—Job assignments.*—In seeking to force general contractor to bind all subcontractors on project to particular form of job assignments and implying by its demands that general contractor would have to force change in subcontractor's policy or to terminate subcontractor's contract, respondent union engaged in flagrant secondary conduct within prohibition of § 8 (b)(4)(B). NLRB v. Operating Engineers, p. 297.

2. *Section 8 (b)(4)(D)—Jurisdictional disputes—Remedies.*—Section 8 (b)(4)(D) is not an exclusive remedy for secondary pressure aimed at involving neutral employer in jurisdictional dispute over work assignments made by primary employer. NLRB v. Operating Engineers, p. 297.

NECESSARY AND PROPER CLAUSE. See **Voting Rights Act Amendments of 1970.**

NEGLIGENCE. See **Admiralty.**

NEGROES. See **Voting Rights Act Amendments of 1970.**

NEUTRAL EMPLOYERS. See **National Labor Relations Act**, 1–2.

NEW YORK. See **Aid to Families With Dependent Children**; **Constitutional Law**, IV; VII; **Elections**, 3; **Procedure**, 2; **Stay**, 2.

NOLO CONTENDERE. See **Pleas**, 1–3.

NONPROFIT MUTUAL INSURERS. See **Constitutional Law**, III, 3; **Taxes.**

NORTH CAROLINA. See **Pleas**, 1–3.

NOTICE. See **Abstention**, 2; **Constitutional Law**, III, 4; **Interstate Commerce Act.**

OBSCENITY. See also **Constitutional Law**, V.

Use of mails—Administrative censorship.—The administrative censorship scheme created by 39 U. S. C. §§ 4006, 4007, permitting the Postmaster General to detain and return certain allegedly obscene mail, violates the First Amendment since it lacks adequate safeguards against undue inhibition of protected expression. Blount v. Rizzi, p. 410.

OBSTRUCTION OF JUSTICE. See **Constitutional Law**, III, 2; **Contempt; Trials.**

OCCUPATIONAL QUALIFICATIONS. See **Civil Rights Act of 1964; Sex Discrimination.**

OIL SHALE CLAIMS. See **Mineral Leasing Act of 1920.**

OPERATING ENGINEERS. See **National Labor Relations Act**, 1–2.

OPERATIONAL NEGLIGENCE. See **Admiralty.**

OPTION OF DEFENDANT. See **Constitutional Law**, II; **Procedure**, 4.

OREGON. See **Voting Rights Act Amendments of 1970.**

ORIGINAL ACTIONS. See **Voting Rights Act Amendments of 1970.**

OUT-OF-COURT STATEMENTS. See **Constitutional Law**, I.

PASSENGER TRAINS. See **Interstate Commerce Act.**

PATENTS TO LANDS. See **Mineral Leasing Act of 1920.**

PENNSYLVANIA. See **Constitutional Law**, III, 2; **Contempt; Trials.**

PERSONAL INJURIES. See **Admiralty.**

PLEAS.

1. *Guilty plea—Fear of death penalty.*—Guilty plea that represents a voluntary and intelligent choice among alternatives available to a defendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment because entered to avoid possibility of death penalty. North Carolina v. Alford, p. 25.

2. *Guilty plea—Protestation of innocence.*—Accused may voluntarily, knowingly, and understandingly consent to imposition of prison sentence even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of in-

PLEAS—Continued.

nocence, when, as here, he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. North Carolina v. Alford, p. 25.

3. *Lesser included offenses.*—The Fourteenth Amendment and the Bill of Rights do not prohibit the States from accepting pleas to lesser included offenses. North Carolina v. Alford, p. 25.

POLITICAL PARTIES. See **Elections**, 3; **Stay**, 2.

POLLING PLACES. See **Voting Rights Act of 1965**, 1–2.

PORNOGRAPHY. See **Constitutional Law**, V; **Obscenity.**

POSTAL MONEY ORDERS. See **Constitutional Law**, V; **Obscenity.**

"POSTING" OF NAMES. See **Abstention**, 2; **Constitutional Law**, III, 4.

POSTMASTER GENERAL. See **Constitutional Law**, V; **Obscenity.**

POTENTIAL DISCRIMINATION. See **Voting Rights Act of 1965**, 1–2.

PREJUDICE. See **Constitutional Law**, III, 1; **Venue.**

PREPARING TAX RETURNS. See **Constitutional Law**, II; **Procedure**, 4.

PRE-SCHOOL-AGE CHILDREN. See **Civil Rights Act of 1964; Sex Discrimination.**

PRESIDENTIAL ELECTIONS. See **Voting Rights Act Amendments of 1970.**

PRIEST. See **Constitutional Law**, III, 1; **Venue.**

PRIMARY ELECTIONS. See **Elections**, 2; **Stay**, 1.

PRIMARY JURISDICTION. See **Federal Maritime Commission; Judicial Review; Procedure**, 3.

PRIOR APPROVAL. See **Federal Maritime Commission; Judicial Review; Procedure**, 3; **Voting Rights Act of 1965**, 1–2.

PRIOR RESTRAINTS. See **Constitutional Law**, V; **Obscenity.**

PRISONERS. See **Constitutional Law**, I.

PRIVATE INSURERS. See **Constitutional Law**, III, 3; **Taxes.**

PRIVILEGE. See **Internal Revenue Service**, 1–2; **Intervention.**

PRIVILEGES AND IMMUNITIES OF CITIZENSHIP. See **Voting Rights Act Amendments of 1970.**

PROBABLE CAUSE. See **Aid to Families With Dependent Children; Appeals,** 1; **Constitutional Law,** IV–VI; **Obscenity.**

PROCEDURAL DUE PROCESS. See **Abstention,** 2; **Constitutional Law,** III, 4.

PROCEDURE. See also **Abstention,** 1–2; **Appeals,** 1–2; **Bail; Certiorari; Constitutional Law,** I–II; III, 1–2, 4; V–VII; **Elections,** 1–3; **Federal Maritime Commission; Habeas Corpus; Indians; Internal Revenue Service,** 1–2; **Interstate Commerce Act; Intervention; Judicial Review; Jurisdiction; Labor Management Relations Act; Obscenity; Pleas,** 1–3; **Remedies; Seamen; Sentences; Standing to Sue; Stay,** 1–2; **Venue; Voting Rights Act of 1965,** 1–2.

1. *Application for restraining order—First Amendment rights—Re-examination of holding.*—Restraining order requested by applicants, who rely on *Dombrowski* v. *Pfister,* 380 U. S. 479, denied since re-examination of holding in that case is involved in cases to be argued in coming Term. Dexter v. Schrunk (DOUGLAS, J., in chambers), p. 1207.

2. *Certiorari—Testimony before grand jury—Immunity.*—Writ of certiorari, granted to resolve question whether "transactional" rather than "use" immunity is constitutionally required to compel a witness to testify before New York grand jury, is dismissed as improvidently granted in light of another decision by highest state court holding that transactional immunity is required in New York and that its earlier decision in the instant case may have rested on that premise. Piccirillo v. New York, p. 548.

3. *Collateral attack—Administrative hearing.*—Respondent, having been represented by its agent in the administrative hearing and having also had every opportunity to participate before the FMC and to seek timely review in the Court of Appeals, cannot collaterally attack the FMC's order. Marine Terminal v. Rederi. Transatlantic, p. 62.

4. *Double jeopardy—Mistrial.*—Judgment dismissing information on ground of former jeopardy, on appellee's pretrial motion where judge had discharged jury and aborted earlier trial in order that witnesses consult with attorneys, is affirmed. United States v. Jorn, p. 470.

5. *Habeas corpus—Voluntariness of statement—Shortcomings of state procedure.*—Applicant for federal habeas corpus relief is not entitled to new hearing on voluntariness of statement introduced at his trial merely because of shortcomings in state procedure used to decide voluntariness issue, as he must also show that his version of the events, if true, would require conclusion that statement was involuntary. Procunier v. Atchley, p. 446.

PROMPT JUDICIAL REVIEW. See **Constitutional Law**, V; **Obscenity.**

PROPERTY. See **Bankruptcy Act.**

PROPRIETARY INTEREST. See **Internal Revenue Service**, 1–2; **Intervention.**

PROSPECTORS. See **Mineral Leasing Act of 1920.**

PROTECTABLE INTEREST. See **Internal Revenue Service**, 1–2; **Intervention.**

PROTECTED INTERESTS. See **Standing to Sue.**

PROTESTATIONS OF INNOCENCE. See **Pleas**, 1–3.

PROVOCATION. See **Bail.**

PUBLIC ASSISTANCE. See **Aid to Families With Dependent Children; Constitutional Law**, IV.

PUBLIC LANDS. See **Mineral Leasing Act of 1920.**

PUERTO RICO. See **Abstention**, 1; **Appeals**, 2.

PUNISHMENT. See **Certiorari; Sentences.**

QUALIFICATIONS FOR CANDIDATES. See **Elections**, 2; **Stay**, 1.

QUALIFICATIONS FOR VOTING. See **Voting Rights Act Amendments of 1970.**

RACIAL DISCRIMINATION. See **Voting Rights Act Amendments of 1970; Voting Rights Act of 1965**, 1–2.

RAILROADS. See **Interstate Commerce Act.**

RECIPIENTS OF WELFARE. See **Aid to Families With Dependent Children; Constitutional Law**, IV.

RECONSIDERATION. See **Elections**, 3; **Stay**, 2.

RECORDED STATEMENTS. See **Habeas Corpus; Procedure**, 5.

RECORDS OF EMPLOYMENT. See **Internal Revenue Service**, 1–2; **Intervention.**

RE-EXAMINATION OF HOLDING. See **Procedure**, 1.

RELIABILITY. See **Constitutional Law**, I.

RELIEF. See **Elections**, 1–2; **Stay**, 1.

RELIEF BENEFITS. See **Aid to Families With Dependent Children; Constitutional Law**, IV.

RELOCATION. See **Mineral Leasing Act of 1920.**

REMEDIES. See also **Admiralty; Labor Management Relations Act; National Labor Relations Act,** 1–2; **Seamen; Voting Rights Act of 1965,** 1–2.

Seamen's wage claims—Optional remedies.—Enactment of § 301 of the Labor Management Relations Act, which provides for enforcement of grievance and arbitration provisions of collective-bargaining agreements in industries affecting commerce, did not abrogate, but merely added an optional remedy to, the remedy of 46 U. S. C. § 596, which permits seamen to sue for wages in federal court. U. S. Bulk Carriers v. Arguelles, p. 351.

REMOVAL FROM COURTROOM. See **Constitutional Law,** III, 2; **Contempt; Trials.**

REPRESENTATIVES. See **Abstention,** 1; **Appeals,** 2.

REPROSECUTIONS. See **Constitutional Law,** II; **Procedure,** 4.

REQUIREMENTS FOR VOTING. See **Voting Rights Act of 1965,** 1–2.

RESENTENCES. See **Certiorari; Sentences.**

RESERVATION INDIANS. See **Indians; Jurisdiction.**

RESIDENCE REQUIREMENTS. See **Voting Rights Act Amendments of 1970.**

RESISTING ARREST. See **Constitutional Law,** III, 1; **Venue.**

RESTRAINING ORDERS. See **Procedure,** 1.

RESTRAINTS ON MAILING. See **Constitutional Law,** V; **Obscenity.**

RETRIALS. See **Constitutional Law,** II; **Procedure,** 4.

RETROACTIVITY. See **Abstention,** 1; **Appeals,** 2; **Certiorari; Sentences.**

REVIEW. See **Bail.**

REVISED TARIFFS. See **Federal Maritime Commission; Judicial Review; Procedure,** 3.

RIGHT TO CONFRONTATION. See **Constitutional Law,** I.

RIGHT TO INTERVENE. See **Internal Revenue Service,** 1–2; **Intervention.**

RISK OF INJURY. See **Elections,** 2; **Stay,** 1.

RULES OF CIVIL PROCEDURE. See **Constitutional Law,** V; **Internal Revenue Service,** 1–2; **Intervention; Obscenity.**

SAILORS. See **Admiralty; Labor Management Relations Act; Remedies; Seamen.**

SALES OF LIQUOR. See **Abstention,** 2; **Constitutional Law,** III, 4.

SAVING CLAUSES. See **Mineral Leasing Act of 1920.**

SAVINGS AND LOAN ASSOCIATIONS. See **Constitutional Law,** III, 3; **Taxes.**

SEAMEN. See also **Admiralty; Labor Management Relations Act; Remedies.**

Wage claims—Optional remedies.—Enactment of § 301 of the Labor Management Relations Act, which provides for enforcement of grievance and arbitration provisions of collective-bargaining agreements in industries affecting commerce, did not abrogate, but merely added an optional remedy to, the remedy of 46 U. S. C. § 596, which permits seamen to sue for wages in federal court. U. S. Bulk Carriers v. Arguelles, p. 351.

SEARCH AND SEIZURE. See **Appeals,** 1; **Constitutional Law,** VI.

SEARCHES. See **Aid to Families With Dependent Children; Constitutional Law,** IV.

SECONDARY PRESSURES. See **National Labor Relations Act,** 1–2.

SECOND-DEGREE MURDER. See **Pleas,** 1–3.

SECRETARY OF THE INTERIOR. See **Mineral Leasing Act of 1920.**

SELF-INCRIMINATION. See **Constitutional Law,** VII; **Procedure,** 2.

SENTENCES. See also **Certiorari; Constitutional Law,** III, 2; **Contempt; Pleas,** 1–3; **Trials.**

Increased sentence—Conduct after first sentence—Certiorari.—Greater severity of petitioner's second sentence, as Court learned after granting certiorari on issue of retroactivity of *North Carolina* v. *Pearce,* 395 U. S. 711, was based on petitioner's conduct (specifically referred to at resentencing) after the first sentencing; writ is therefore dismissed as improvidently granted. Odom v. United States, p. 23.

SEX DISCRIMINATION. See also **Civil Rights Act of 1964.**

Discrimination in employment—Hiring policy—Business necessity.—Under Title VII of the Civil Rights Act of 1964, an employer may not, in the absence of business necessity, refuse to hire women with pre-school-age children while hiring men with such children. Phillips v. Martin Marietta Corp., p. 542.

SHALE. See **Mineral Leasing Act of 1920.**

SHIPOWNERS. See **Admiralty.**

SHIPPING ACT, 1916. See **Federal Maritime Commission; Judicial Review; Procedure,** 3.

SHIPPING ASSOCIATIONS. See **Federal Maritime Commission; Judicial Review; Procedure,** 3.

SHIPS. See **Admiralty.**

SHORTCOMINGS OF STATE PROCEDURE. See **Habeas Corpus; Procedure,** 5.

SIXTH AMENDMENT. See **Constitutional Law,** I; III, 1; **Venue.**

SMUGGLING. See **Appeals,** 1; **Constitutional Law,** VI.

SOCIALIST WORKERS PARTY. See **Elections,** 3; **Stay,** 2.

SOCIAL SECURITY ACT. See **Aid to Families With Dependent Children; Constitutional Law,** IV.

SPECIAL AGENTS. See **Internal Revenue Service,** 1–2; **Intervention.**

SPECIAL ELECTIONS. See **Indians; Jurisdiction.**

STANDING TO SUE.

Travel agents—Competition with national banks—Zone of protected interests.—Court of Appeals erred in dismissing complaint for lack of standing of travel agents seeking to invalidate Comptroller of Currency's ruling that national banks may provide travel services for their customers, as § 4 of Bank Service Corporation Act "arguably brings a competitor within the zone of interests protected by it." Arnold Tours v. Camp, p. 45.

STARE DECISIS. See **Procedure,** 1.

STATE COURTS. See **Indians; Jurisdiction.**

STATE ELECTIONS. See **Voting Rights Act Amendments of 1970.**

STATEMENTS. See **Constitutional Law,** I; **Habeas Corpus; Procedure,** 5.

STATE OFFICIALS. See **Elections,** 2; **Stay,** 1.

STATE STATUTES. See **Abstention,** 1–2; **Appeals,** 2; **Constitutional Law,** III, 4.

STATE WELFARE PROGRAMS. See **Aid to Families With Dependent Children; Constitutional Law,** IV.

STATUS QUO ANTE. See **Elections,** 3; **Stay,** 2.

STATUTES OF PUERTO RICO. See **Abstention,** 1; **Appeals,** 2.

STAY. See also **Appeals,** 1; **Constitutional Law,** VI; **Elections,** 2–3.

1. *Candidates for federal office—Proximity of election—State law.*—Would-be candidates for Congress seek to stay judgment of Florida Supreme Court upholding state law requiring state officials to resign before becoming candidates for another office. Since constitutional issues cannot be finally resolved prior to primary election, and the risk of injury to applicants outweighs that to Florida, applications for stays are granted. Davis v. Adams (BLACK, J., in chambers), p. 1203.

2. *Preserve status quo—Reconsideration—Placing candidates on ballots.*—Stay granted to preserve *status quo ante* to enable Court, at first Conference in October, to determine disposition of appeal. Reconsideration denied on basis of appellants' representation that appellee parties' candidates can be placed on ballot for November 1970 election. Rockefeller v. Socialist Workers Party (HARLAN, J., in chambers), p. 1201.

STEVEDORES. See **Admiralty.**

STIGMA. See **Abstention,** 2; **Constitutional Law,** III, 4.

STRIKES. See **National Labor Relations Act,** 1–2.

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SUBMISSION OF VOTING CHANGES. See **Voting Rights Act of 1965,** 1–2.

SUMMONSES. See **Internal Revenue Service,** 1–2; **Intervention.**

SUPPRESSION OF EVIDENCE. See **Appeals,** 1; **Constitutional Law,** VI.

SUPREME COURT.

1. Amendment of United States Supreme Court Rules, p. 1027.

2. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Sixth Circuit, p. 805.

3. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Eighth Circuit, p. 921.

4. Assignment of Mr. Justice Reed (retired) to United States Court of Claims, p. 883.

5. Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, p. 1029.

SURVEILLANCE. See **Appeals,** 1; **Constitutional Law,** VI.

TARIFFS. See **Federal Maritime Commission; Judicial Review; Procedure,** 3.

TAXES. See also **Constitutional Law,** III, 3.

Income tax exemption—Nonprofit mutual insurers—Cutoff date.—Section 501 (c)(14)(B) of the Internal Revenue Code, which limits income tax exemption for nonprofit mutual insurers to those organized before September 1, 1957, is not an arbitrary classification violative of due process requirements, Congress having had a rational basis for concluding that an extension of the cutoff date could adversely affect federal programs. U. S. v. Maryland Savings-Share Ins. Corp., p. 4.

TAXPAYERS. See **Constitutional Law,** II; **Procedure,** 4.

TAX RETURNS. See **Constitutional Law,** II; **Internal Revenue Service,** 1–2; **Intervention; Procedure,** 4.

TEMPORARY DETENTION OF MAIL. See **Constitutional Law,** V; **Obscenity.**

TERMINAL ASSOCIATIONS. See **Federal Maritime Commission; Judicial Review; Procedure,** 3.

TERMINATION OF BENEFITS. See **Aid to Families With Dependent Children; Constitutional Law,** IV.

TERMINATION OF CONTRACTS. See **Abstention,** 1; **Appeals,** 2.

TERMINATION OF TRAIN SERVICE. See **Interstate Commerce Act.**

TESTIMONY. See **Constitutional Law,** VII; **Procedure,** 2.

TEXAS. See **Voting Rights Act Amendments of 1970.**

THREE-JUDGE COURTS. See **Elections,** 1; **Voting Rights Act of 1965,** 1–2.

THROUGH TRAINS. See **Interstate Commerce Act.**

TIMELINESS. See **Federal Maritime Commission; Judicial Review; Procedure,** 3.

TIRE IRONS. See **Constitutional Law,** VII; **Procedure,** 2.

TOTALITY OF CIRCUMSTANCES. See **Habeas Corpus; Procedure,** 5.

TRAINS. See **Interstate Commerce Act.**

"TRANSACTIONAL" IMMUNITY. See **Constitutional Law,** VII; **Procedure,** 2.

TRANSFERABLE ASSETS. See **Bankruptcy Act.**

TRANSFER OF JURISDICTION. See **Indians; Jurisdiction.**

TRANSPORTATION. See **Interstate Commerce Act.**

TRAVEL AGENTS. See **Standing to Sue.**

TRIAL JUDGES. See **Pleas,** 1–3.

TRIALS. See also **Constitutional Law,** II; III, 1–2; **Contempt; Procedure,** 4; **Venue.**

Criminal contempt—Vilification of judge—Due process.—Here, where defendant in state criminal contempt proceeding vilified the judge during course of defendant's trial and was sentenced by that judge to 11 to 22 years for contempt, he is entitled under Due Process Clause to a public trial before another judge. Mayberry v. Pennsylvania, p. 455.

TRIBAL COUNCILS. See **Indians; Jurisdiction.**

TRUSTEE IN BANKRUPTCY. See **Bankruptcy Act.**

TRUSTWORTHINESS. See **Constitutional Law,** I.

TURNOVER ORDERS. See **Bankruptcy Act.**

UNAMBIGUOUS STATUTE. See **Abstention,** 2; **Constitutional Law,** III, 4.

UNFAIR EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964; Sex Discrimination.**

UNFAIR LABOR PRACTICES. See **National Labor Relations Act,** 1–2.

UNIONS. See **National Labor Relations Act,** 1–2.

UNSEAWORTHINESS. See **Admiralty.**

"USE" IMMUNITY. See **Constitutional Law,** VII; **Procedure,** 2.

USE OF THE MAILS. See **Constitutional Law,** V; **Obscenity.**

VACATION OF STAY. See **Elections,** 3; **Stay,** 2.

VACATION PAY. See **Bankruptcy Act.**

VENUE. See also **Constitutional Law,** III, 1.

Misdemeanors—Change of venue—Due process.—State law that categorically prevents change of venue for jury trial in criminal case, regardless of extent of local prejudice against defendant, solely on ground that crime with which he is charged is misdemeanor is violative of right to trial by impartial jury guaranteed by the Fourteenth Amendment. Groppi v. Wisconsin, p. 505.

VESSELS. See **Admiralty.**

VILIFICATION OF JUDGES. See **Constitutional Law**, III, 2; **Contempt; Trials.**

VINDICTIVENESS. See **Certiorari; Sentences.**

VIOLATIONS OF TAX LAWS. See **Internal Revenue Service**, 1–2; **Intervention.**

VOLUNTARINESS OF STATEMENT. See **Habeas Corpus; Procedure**, 5.

VOLUNTARY PLEAS. See **Pleas**, 1–3.

VOTERS. See **Voting Rights Act Amendments of 1970; Voting Rights Act of 1965**, 1–2.

VOTING RIGHTS ACT AMENDMENTS OF 1970.

Lowering of minimum age for voting—Literacy test ban—Residency requirements for voting.—The 18-year-old minimum-age requirement of the statute is valid for national elections, but not valid for state and local elections; the ban on use of literacy tests for a five-year period in any area where they are not already proscribed by the Voting Rights Act of 1965, is valid; and the prohibition of disqualification in presidential elections for failure to meet state residency requirements is valid. Oregon v. Mitchell, p. 112.

VOTING RIGHTS ACT OF 1965. See also **Voting Rights Act Amendments of 1970.**

1. *Approval of voting changes—Function of three-judge court.*—Three-judge court should have considered only issue of "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enactment." Perkins v. Matthews, p. 379.

2. *Voting changes—Prior submission.*—Each of the challenged changes—locations of polling places, boundary lines, and from ward to at-large election of aldermen—falls within § 5 of the Act as a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," and requires prior submission. Perkins v. Matthews, p. 379.

WAGE CLAIMS. See **Labor Management Relations Act; Remedies; Seamen.**

WAGE EARNERS. See **Bankruptcy Act.**

WAIVERS. See **Pleas**, 1–3.

WARD ELECTIONS. See **Voting Rights Act of 1965**, 1–2.

WARNINGS OF RIGHTS. See **Constitutional Law**, II; **Procedure**, 4.

WARRANTS. See **Aid to Families With Dependent Children; Constitutional Law,** IV.

WELDING MACHINES. See **National Labor Relations Act,** 1–2.

WELFARE PAYMENTS. See **Aid to Families With Dependent Children; Constitutional Law,** IV.

WHARF DEMURRAGE CHARGES. See **Federal Maritime Commission; Judicial Review; Procedure,** 3.

WINCHES. See **Admiralty.**

WISCONSIN. See **Abstention,** 2; **Constitutional Law,** III, 1, 4; **Venue.**

WITNESSES. See **Constitutional Law,** II; **Procedure,** 4.

WORDS.

1. *"Cease doing business with any other person."* § 8 (b) (4) (B), National Labor Relations Act, 29 U. S. C. § 158 (b) (4) (B). NLRB v. Operating Engineers, p. 297.

2. *"Maintained in compliance with the laws under which initiated."* § 37, Mineral Leasing Act of 1920, 30 U. S. C. § 193. Hickel v. Oil Shale Corp., p. 48.

3. *"Property."* § 70a (5), Bankruptcy Act, 11 U. S. C. § 110a (5). Lines v. Frederick, p. 18.

4. *"Reasonable cause to suspect."* 19 U. S. C. § 482. Harris v. United States (DOUGLAS, J., in chambers), p. 1211.

WORK ASSIGNMENTS. See **National Labor Relations Act,** 1–2.

WORKING MOTHERS. See **Civil Rights Act of 1964; Sex Discrimination.**

ZONE OF PROTECTED INTERESTS. See **Standing to Sue.**