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CASES ADJUDGED

IN

THE SUPREME COURT

AT

JULY SPECIAL TERM, 1972

JULY 7, 1972

AND

OCTOBER TERM, 1972

OCTOBER 3, 1972, THROUGH JANUARY 17, 1973

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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Errata

151 U. S. 408, line 5 from bottom: "presents" should be "prevents."

404 U. S. 1007, line 7: "p. III" should be "p. v."

405 U. S. LXIII: The following sentence should appear at the end of the Note: "Opinions reported on page 1201 *et seq.* are those written in chambers by individual Justices."

408 U. S. 913, line 2 from bottom: "Comments 14" should be "Comment 4."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, 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.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

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

OFFICERS OF THE COURT

RICHARD G. KLEINDIENST, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.[1]
EDWARD G. HUDON, Librarian.[2]

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[1] Mr. Hallam retired as Librarian effective November 30, 1972.
[2] Mr. Hudon was appointed Librarian effective December 1, 1972.

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, THURGOOD MARSHALL, 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, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, 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.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE HARLAN*

TUESDAY, OCTOBER 24, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

The Court is in Special Session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to Mr. Justice Harlan.

Mr. Solicitor General Griswold addressed the Court as follows:

Mr. Chief Justice, and may it please the Court:

At a meeting of the Bar held earlier this afternoon Resolutions were adopted in honor and in memory of Mr. Justice John M. Harlan, which I am instructed to lay before the Court.

The Resolutions unanimously adopted are as follows:

RESOLUTIONS

The members of the Bar of the Supreme Court have met to record our respect and esteem for John Marshall

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*Mr. Justice Harlan, who retired from active service on September 23, 1971 (404 U. S. IX), died in Washington, D. C., on December 29, 1971 (404 U. S. XIX). Services were held at Emmanuel Church, Weston, Connecticut, on January 4, 1972, where interment followed.

Harlan, Associate Justice of the Supreme Court of the United States for 16 years from 1955 to 1971. His death on December 29, 1971, following by a few months his retirement from the Court, has saddened the members of the Judiciary and the Bar and many others, in the United States and elsewhere, who recognized and admired his outstanding contributions to the administration of justice and to the development of the law.

Justice Harlan was born in Chicago on May 20, 1899. He was descended from a long line of distinguished forebears, beginning in the United States with George Harlan, who landed in Delaware in 1687 and later became its Governor. His great-grandfather, James Harlan, was a prominent lawyer in the days of the great Chief Justice John Marshall and named his son born in 1833 in honor of the Chief Justice. Forty-four years later, that son, John Marshall Harlan, became a Justice of the Supreme Court, served on the Court for 34 years and has gone down in history as the "Great Dissenter" and the only Justice who dissented in the landmark case of *Plessy* v. *Ferguson*.[1]

The first Justice Harlan's son, John Maynard Harlan, who was the father of our Justice Harlan, was a prominent Chicago lawyer, active in public and civic affairs and a man of great force and commanding personality. Those closest to the second Justice Harlan were aware that his father, as well as his better-known grandfather, was an important influence on the development of the qualities of mind and character which made possible his life's achievements.

After preparatory education in Canada and the United States, Justice Harlan entered Princeton in 1916. At Princeton, he was Chairman of the Daily Princetonian and President of his class for three years and was recognized by both faculty and fellow students as a man of

[1] 163 U. S. 537 (1896), which established the "separate but equal" doctrine in regard to public schools and was not overruled until *Brown* v. *Board of Education* (347 U. S. 483) in 1954.

marked distinction. In 1920, he was awarded a Rhodes scholarship and attended Balliol College at Oxford for three years, where he earned a "First" in Jurisprudence.[2] He maintained his contacts with Oxford and this led to the development of a close relationship with, and a deep appreciation of, the English Bench and Bar. This appreciation was reciprocated and is symbolized by his election as an Honorary Bencher of the Inner Temple.

In 1923, Justice Harlan began his career in the practice of law by accepting a position in the New York law firm of Root, Clark, Buckner and Howland, which was even then a leading firm and which, with various changes of name, has ever since maintained a position of high rank among the great law firms of New York. Emory R. Buckner of that firm was not only a prominent trial lawyer, but was also the partner most concerned with the management of the office, including the recruitment of young lawyers. From the very beginning of young Harlan's association with the firm, Buckner took him under his wing and over the years had a profound influence on his development as a trial lawyer.

In 1925, only two years after young Harlan arrived, Buckner was appointed United States Attorney for the Southern District of New York and Harlan was invited to go with him. There, he was entrusted with increasing responsibilities and was Chief of the Prohibition Section of the office by the time Buckner resigned in 1927 and went back to private practice, again taking Harlan with him. Four years later, Harlan became a partner of the firm and remained a partner, with additional intervals of public service as a Special Prosecutor and in the Air Force in World War II, until 1954, when President Eisenhower appointed him a Judge of the Court of Appeals for the Second Circuit.

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[2] After Justice Harlan returned to the United States, he continued his legal education by enrolling at and earning a degree from New York Law School.

In 1928, Justice Harlan married Ethel Andrews, daughter of a distinguished Professor of History and sister of John Andrews, a fellow associate at Root, Clark. They had one daughter, Eve, now Mrs. Frank H. Dillingham, and five grandchildren who brought them much satisfaction and happiness.

Justice Harlan's great mentor, Emory Buckner, died in 1941, after several years of declining health. In 1964, some 23 years after Buckner's death, when Justice Harlan was immersed in his work at the Supreme Court, he participated with others in arranging for the writing of a biography of Emory Buckner. It is a measure of the debt which Justice Harlan felt that he owed to Buckner and an apt demonstration of the depth and sincerity of his quality of loyalty that he did this and that he also wrote personally an Introduction to the biography which is a masterpiece of concise and perceptive expression.[3]

In his career as a trial and appellate lawyer in private practice, Justice Harlan won increasing recognition as a leader of the Bar and, by 1954, when he became a Judge of the Court of Appeals for the Second Circuit, he had attained a position within his profession which made inevitable the enthusiastic reception accorded to his appointment by the Bench and Bar. This position had been earned, not only by his exceptional skill as an advocate, but also by his unremitting drive for excellence, his penetrating analysis of issues, his clarity and simplicity of expression and his insistence on painstaking attention to detail.

Justice Harlan's career in private practice has been admirably summarized in an article by his former partner, John E. F. Wood, which appeared in December 1971, in an issue of the Harvard Law Review dedicated to Justice Harlan on the occasion of his retirement from the Su-

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[3] Emory Buckner, a biography by Martin Mayer, published in 1968 by Harper & Row, under the auspices of the William Nelson Cromwell Foundation.

preme Court in September of that year.[4] Since Mr. Wood is himself a leading member of the trial and appellate bar and was closely associated with Justice Harlan in various litigations over many years, it was deemed appropriate to adopt for these Resolutions the following from Mr. Wood's article: [5]

> "Throughout his practice, Harlan devoted himself to litigation. His absorbing interest was in the work of the courts and the function of lawyers as officers of the court. . . .
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> "His first major civil trial as leading counsel was in the *Ella Wendel* case, a complicated and much publicized will contest which turned on Harlan's painstaking attention to detail and on his brilliant destruction of false claimants in cross-examination. In contrast to the drama of *Wendel,* he later brought his skills to bear on what some would term drier matters in a complex question of accounting for revenues among affiliated railroads. He entered the arena of political rights in attempting to overturn a decision requiring the New York Board of Higher Education to rescind their offer of employment to Bertrand Russell as a member of the faculty of the College of the City of New York.
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> "But the cases Harlan argued were as often destined for the law school casebook as for newspaper headlines. In *Randall* v. *Bailey,* he dealt with questions of state statutory construction having to do with the determination of surplus for the payment of dividends, and marshalled both legislative history

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[4] 85 Harv. L. Rev. 377–381. Mr. Wood's article was one of five in this issue, the other four being by former Chief Justice Earl Warren, former Chief Judge J. Edward Lumbard, of the Court of Appeals for the Second Circuit, the present Chief Judge of that Court, Henry J. Friendly, and Charles Nesson, Professor of Law at Harvard, and a former Law Clerk of Justice Harlan.

[5] In quoting from Mr. Wood's article, his footnotes have been omitted.

and economic analysis in support of his cause. He examined the contours of federal judicial power with the perception and sensitivity of the academic in two celebrated cases on federal procedure, *De Beers Consolidated Mines, Ltd.* v. *United States* and *Cohen* v. *Beneficial Industrial Loan Corp.* His last task before appointment to the bench—the massive undertaking of both factual and legal analysis in the famous *du Pont-General Motors* case—required the concentration and dexterity of mind that typified his work as a trial lawyer.

"One of his great strengths was his mastery of the facts in every case in which he participated. In the course of his trial practice Harlan developed an amazing capacity to absorb complicated sets of facts, to arrange them in proper relationship to each other, and to state them simply and clearly. This capacity did not flow from any superficial brilliance or from a gift of clever utterance. It was accomplished by methodical and painstaking work pursued with an intensity of concentration that was a marvel to those who had the privilege of working with him."

In addition to his service as an Assistant United States Attorney under Emory Buckner from 1925 to 1927, Justice Harlan interrupted his private practice on three occasions for substantial periods of time to undertake public service. The first such occasion was from 1928 to 1930, when Buckner was appointed by Governor Alfred E. Smith as a Special Assistant Attorney General to investigate a sewer scandal in the Borough of Queens and to prosecute Maurice Connolly, the then Borough President of Queens, for his part in this scandal, and Harlan was appointed to act as Buckner's principal assistant. This assignment involved for Harlan the supervision of a staff of five able young lawyers, all of whom were to achieve prominence in later years, in an unusually complicated and difficult investigation, analysis and correlation of a multitude of detailed facts, and resulted in the resigna-

tion of Connolly and his conviction and sentence to prison.[6]

The next interruption of Justice Harlan's private practice was his service from 1942 to 1945 as Chief of the Operational Analysis Section of the United States Eighth Air Force headquartered in England, at first as a civilian and later as a colonel. Harlan's function was to direct and coordinate the work of a group of scientists in their important task of analyzing, and endeavoring to improve, the selection of targets and methods of operation for the strategic bombing of Germany. The future Justice gave to the performance of his military duties the same intense concentration and devotion to duty that had characterized his earlier work in private practice. One incident in 1943 strikingly illustrates his dedication to the best possible performance of the task he had undertaken. This was his volunteered participation as a waist gunner in a daylight bombing raid on Gelsenkirchen in order to understand better the problems faced in such an operation. For his wartime service, Justice Harlan was awarded the Legion of Merit of the United States and the Croix de Guerre of Belgium and France.[7]

The final interruption of Justice Harlan's private practice was in 1951 and 1952 when, by appointment of Governor Thomas E. Dewey, he served as Chief Counsel of the New York State Crime Commission. This Commission, of which the late Joseph M. Proskauer was Chairman, held extensive hearings and rendered reports which led to important remedial action, including the estab-

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[6] Emory Buckner by Martin Mayer, pp. 252–262.

[7] Article by Judge J. Edward Lumbard in 85 Harv. L. Rev. 372, at 373–374. During his service in the Air Force, Justice Harlan was appointed to a Commission of Air Force officers that met in London and Paris with corresponding representatives of the other services and our allies to set up a Joint Control Council to coordinate plans for the post-hostility occupation of Germany. Justice Harlan's advice and participation in the drafting of documents made a substantial contribution to this important project.

lishment of a Waterfront Commission of New York Harbor.

Justice Harlan had been a Judge of the Court of Appeals for the Second Circuit for only eight months when he was nominated by President Eisenhower to fill the vacancy on the Supreme Court created by the sudden death of Justice Robert H. Jackson. The nomination was confirmed on March 16, 1955, and Justice Harlan took his place on the Court on March 28.

It is safe to predict that history will accord to Justice Harlan a prominent place among the greatest Justices of the Court. This prediction is strongly supported by the views which have already been expressed by a long and growing list of eminent legal scholars who have studied his Supreme Court opinions and have begun the process of analyzing and evaluating their impact.[8]

During his 16 years on the Supreme Court, Justice Harlan wrote a total of 613 opinions, more than any other Justice during this period, of which 168 were opinions for the Court, 149 were concurring opinions and 296 were dissenting opinions. Many of Justice Harlan's opinions were written in cases of major importance in-

[8] One notable example of such expressions of views is a volume of Selected Opinions and Papers of Justice John M. Harlan entitled "The Evolution of a Judicial Philosophy" and edited by David L. Shapiro, Professor of Law at Harvard Law School and a former Law Clerk of Justice Harlan. This volume, published in 1969 by the Harvard University Press, and sponsored by the William Nelson Cromwell Foundation, includes a superb foreword by Professor Paul A. Freund. Additional examples are the five articles in the special issue of the Harvard Law Review referred to in footnote 4 above. Further noteworthy examples are three addresses delivered by Justice Potter Stewart, former Attorney General Herbert Brownell and Professor Paul M. Bator at a memorial ceremony for Justice Harlan at the Association of the Bar of the City of New York on April 5, 1972, an article by Nathan Lewin, of the District of Columbia Bar, in the June 1972 issue of the American Bar Association Journal and an article by Professor Norman Dorsen of the New York University School of Law, in 44 N. Y. U. L. Rev. 249 (1969).

volving complex, difficult, and often novel, questions of substantive and procedural law, requiring extensive study of the applicability and effect of provisions of the Constitution, of the language of federal and state statutes and of prior decisions of the Supreme Court and other courts. In these cases, and also in the less important cases, Justice Harlan's opinions are noteworthy for the clear presentation of the facts of each case and the careful formulation of the issues presented. The opinions of Justice Harlan are admirable examples of the effective execution of the judicial function. They are regarded by the Judiciary and the Bar as models of legal analysis and craftsmanship, even by those who do not always agree with the conclusions reached in such opinions.

The sheer magnitude of the work represented by Justice Harlan's opinions, including, as they did, so many concurring and dissenting opinions which inevitably added materially to the time and effort required, is notable in itself. When it is remembered that during his later years on the Court he was severely handicapped by his impaired eyesight, his output of opinions is remarkable and is convincing proof of his devotion to the Court and his appreciation of its importance to the country.

The task of synthesizing from the many opinions of Justice Harlan his judicial philosophy and approach and the respects in which his contributions to the law and the administration of justice have been distinctive is one which cannot appropriately be undertaken at this time and on this occasion. There are, however, some ingredients of his opinions which are so pervasive that some reference to them seems appropriate.

One of these ingredients is the emphasis placed by Justice Harlan on the division of powers and functions between the Federal Government and the States. This concern on his part surfaced in many different types

of cases,[9] but is aptly demonstrated by his position in the obscenity cases, such as *Roth* v. *United States,* 354 U. S. 476, 496 (1957), and *Ginzburg* v. *United States,* 383 U. S. 463, 493 (1966). In his opinion in the *Roth* case, where he dissents in that case but concurs in the result in a companion case decided on the same day, he says:

> "The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. . . .
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> . . . . . .
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> "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories." [10] (354 U. S., at 503–504, 505.)

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[9] See, for example, dissenting opinions of Justice Harlan in *Fay* v. *Noia,* 372 U. S. 391, 448 (1963), and *Henry* v. *Mississippi,* 379 U. S. 443, 457 (1965).

[10] Justice Harlan's concern for the protection of free speech and related constitutional rights is illustrated, also, by a number of cases where he wrote the opinion of the Court. Examples of these are *NAACP* v. *Alabama,* 357 U. S. 449 (1958), where the Court reversed an Alabama civil contempt judgment against the NAACP

A related component of Justice Harlan's judicial approach is the emphasis placed by him on the separation of the powers and functions of the Legislative, Executive and Judicial Branches of the Government. This is forcefully brought out by his dissenting opinions in the landmark case of *Reynolds* v. *Sims,* 377 U. S. 533, 589 (1964), establishing the "one man, one vote" doctrine, and in *Avery* v. *Midland County,* 390 U. S. 474, 486 (1968), extending the doctrine to the 80,000 units of local government within the States. His dissenting opinion in *Reynolds* is a major exposition of his various reasons for finding it necessary to dissent, including his abovementioned concern to preserve the federal system, and only a reading of the entire opinion reveals fully the extent to which his conclusion was based upon his conviction that the Court's decision went beyond the proper scope of the judicial powers and functions. However, his reliance on this factor can be glimpsed from the following excerpts from this opinion:

> "In these cases the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution. . . . These decisions, with *Wesberry* v. *Sanders,* 376 U. S. 1, involving congressional districting by the States, and *Gray* v. *Sanders,* 372 U. S. 368, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. . . .
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> . . . . . .
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> "The Court's elaboration of its new 'constitutional' doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds

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for its refusal to produce its list of members and agents in the State, and *Cohen* v. *California,* 403 U. S. 15 (1971), where the Court reversed a California conviction for wearing, in a corridor of the Los Angeles Courthouse, a jacket bearing an obscene slogan against the draft.

> of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States. . . .
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> . . . . . .
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> ". . . As I have said before, . . . I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform . . . ." (377 U. S., at 589, 615, 624.)

The dissenting opinion in the *Reynolds* case also includes a succinct statement of another well-defined component of Justice Harlan's judicial approach. This is his firmly held belief that it is a mistake to assume that it is within the functions of the Court to provide a remedy for every persistent major problem of society for which a remedy has not otherwise been provided. Thus, he says:

> "Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise

> that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process." (377 U. S., at 624–625.)

This thesis, expressed in various ways, recurs frequently in Justice Harlan's opinions, and must be counted as one of the significant bases of his decisions in many cases.[11]

Still another pervasive ingredient of Justice Harlan's judicial approach is the view that, in considering the validity of legislative enactments or executive action challenged on constitutional grounds, the asserted infringement of constitutional rights involved in such enactments or action must be balanced against the legitimate interests of society which the Legislative or Executive Branch was seeking to protect. Coupled with this concept of balancing of interests is his further view that determinations by the Legislative or Executive Branch as to the existence of a social problem requiring remedial action and as to the appropriateness of the measures adopted, should be given great weight by the judiciary in determining whether such measures should be invalidated. An example of a major opinion by Justice Harlan illustrating his application of these two related principles is his dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497, 522 (1961), involving a Connecticut statute making it a crime for any person, including married

[11] The importance which Justice Harlan attached to this subject and the amount of thought which he gave to it are demonstrated by the fact that, in one of his infrequent public addresses, delivered at the dedication of the American Bar Center in Chicago in August 1963, he devoted substantially his entire address to a carefully formulated exposition of the bases upon which the notion had been supported, and his own reasons for opposing, the proposition that "all deficiencies in our society which have failed of correction by other means should find a cure in the courts."

couples, to use any contraceptive drug or device. In this instance, after an extensive analysis and detailed appraisal of the individual rights infringed and of the method adopted by the State—invoking criminal sanctions—to carry out its purpose of protecting the morals of the community, he reached the conclusion that the statute should be held invalid. This conclusion was subsequently confirmed by the Court in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), involving the same statute, with Justice Harlan concurring in the result in a separate opinion. In many other cases, the application of these principles by Justice Harlan was a factor in his reaching the conclusion that the statute or executive action challenged should be sustained.[12]

In the field of enforcement of laws protecting citizens from crimes, particularly crimes of violence, where the governmental interest was unquestioned, Justice Harlan believed strongly that, in balancing such interest against the asserted constitutional rights of those accused of such crimes, the decisions of the Supreme Court had in some respects gone too far in upholding the constitutional challenges to convictions. This resulted in his dissenting from a number of such decisions. One of the most notable of such dissents is his opinion in the much-discussed case of *Miranda* v. *Arizona,* 384 U. S. 436, 504 (1966), where the Court reversed a conviction because there had been admitted at the trial a confession obtained while the defendant was in custody and before he had been warned about his right to remain silent and his right to a lawyer.[13]

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[12] See, for example, *Lathrop* v. *Donohue,* 367 U. S. 820, 848 (1961); *Scales* v. *United States,* 367 U. S. 203 (1961); *Shapiro* v. *Thompson,* 394 U. S. 618, 655 (1969); *New York Times Co.* v. *United States,* 403 U. S. 713, 752 (1971)—Justice Harlan's last opinion prior to his retirement from the Court.

[13] See, also, Justice Harlan's concurring opinion in *Orozco* v. *Texas,* 394 U. S. 324, 327 (1969), in which the *Miranda* doctrine was applied to questioning of a suspect immediately after arrest.

In the *Miranda* opinion, in addition to expounding his reasons for believing that the Court's decision did not give adequate "recognition to society's interest in suspect questioning as an instrument of law enforcement," *id.*, at 509, Justice Harlan expressed the view that the practical effects of the decision would be disappointing with regard to its influence on policemen and unfortunate in that the new rules propounded would handicap massive ongoing efforts to bring about sound reforms in criminal law enforcement procedures.

Notwithstanding his dissenting view in *Miranda* and related cases that the Fifth Amendment privilege against self-incrimination should not be held to invalidate the confessions involved in such cases, Justice Harlan wrote or joined in several opinions expanding constitutional protections accorded to the accused. One of these was his opinion for the Court in *Marchetti* v. *United States,* 390 U. S. 39 (1968), which added a new dimension to the protections afforded by the Fifth Amendment. In that case, the federal wagering tax statute, requiring payment of an annual occupation tax and registration, was held invalid on the ground that the statute required, on pain of criminal prosecution, the providing of information which could be used to establish guilt in a subsequent prosecution. An unusual feature of this decision is that the Court expressly overruled two relatively recent prior decisions of the Court.

Whatever may be the ultimate verdict of history as to how Justice Harlan's judicial philosophy should be appraised, there can be no doubt that he will always be regarded as a Justice who possessed in the highest degree the qualities of character and dedication which are an essential component of a truly great judge. These qualities—his integrity, his fairness, his candor, his courtesy, his enjoyment of the spirit of professional comradeship, his gentle humor, his modesty, his intellectual and physical courage and his devotion to the Court and to the country—have won for him the admiration and affection

of his colleagues on the Court, of the succession of gifted young men who have served as his Law Clerks and of many other judges and lawyers who have been in a position to form reliable judgments.

The members of the Bar of the Supreme Court are most grateful that they have had the privilege of appearing before and knowing Justice Harlan and that the Court and the country have had the benefit of his extraordinarily productive and effective service on the Court. His death has left us with a deep sense of loss and we extend to his family our most sincere sympathy in their grief. We and our successors at the Bar will remember Justice Harlan with reverence and with great affection, and his noble example of selfless dedication to the law and to the Court will be a source of inspiration to all of us for many years to come.

It is accordingly

Resolved, That we, the Bar of the Supreme Court of the United States, express our profound sorrow at the death of Associate Justice John Marshall Harlan and our thankfulness for the great and enduring contributions made by him to the law, to the Court and to the Nation; and it is further

Resolved, That the Attorney General be asked to present these Resolutions to the Court and to request that they be inscribed upon its permanent records.[14]

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[14] The foregoing Resolutions are proposed by the Committee on Resolutions, which consisted of the following members: Professor Wayne G. Barnett, Professor Paul Bator, Hon. Dudley B. Bonsal, Bruce Bromley, Esq., Hon. Frederick van P. Bryan, Eli Whitney Debevoise, Esq., Professor Norman Dorsen, Harold J. Gallagher, Esq., Cloyd Laporte, Esq., Nathan Lewin, Esq., David H. McAlpin, Esq., Robert W. Meserve, Esq., Matthew Nimetz, Esq., John Lord O'Brian, Esq., William P. Palmer, Esq., David W. Peck, Esq., E. Barrett Prettyman, Jr., Esq., Hon. William P. Rogers, Henry Sailer, Esq., Philip C. Scott, Esq., Charles E. Stewart, Jr., Esq., Hon. William H. Timbers, Lawrence E. Walsh, Esq., Bethuel M. Webster, Esq., and Leo Gottlieb, Esq., *Chairman.*

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. I recognize the Attorney General at this time.

Mr. Attorney General Kleindienst addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

The Bar of this Court met today to honor the memory of John Marshall Harlan, Associate Justice of the Supreme Court from 1955 to 1971.

"A lawyer's and a judge's judge," as he has been so aptly described, Justice Harlan was nominated by President Eisenhower in 1954 to fill the vacancy created by the death of Justice Robert H. Jackson. In announcing the appointment, the late President said: "Judge Harlan's qualifications are the highest. Certainly, they were the highest of any that I could find."

And, indeed they were. Born in Chicago, Illinois, in 1899 to a family whose dedication to public service dates back almost 300 years, John Marshall Harlan was admitted to the New York Bar in 1925, after distinguishing himself academically at Princeton University, as a Rhodes scholar at Oxford University, and at New York Law School.

The future Justice's training as a lawyer began under the tutelage of Emory Buckner, then one of the Nation's ablest and most highly regarded trial lawyers. Almost immediately after entering the practice of law, Justice Harlan accompanied Buckner into public service when the latter was appointed United States Attorney for the Southern District of New York. There the Justice not only assisted Buckner in the trial of many major prosecutions, but also tried a number of criminal cases.

Upon leaving the United States Attorney's Office, Justice Harlan returned to private practice where he became

one of the leading members of the New York Bar, specializing in highly complex civil and criminal litigation which brought him before this Court in the role of an advocate. He twice interrupted his private practice to enter public service, once as a Special Assistant to the Attorney General of New York and later as Chief Counsel to the New York State Crime Commission. During World War II he was decorated by three nations for his services as head of the Operations Analysis Section of the Eighth Army.

Some years ago, writing of his association with his mentor, Emory Buckner, Justice Harlan said: "The Cornerstone of . . . [his] litigation method was objective and relentless preparation. . . . [He] was never content to do the best he could with cases as put to him by his clients, but insisted upon making his own investigation of every fact and circumstance before rendering his estimate of the situation."

The young apprentice had apparently learned his lesson well. "Objective and relentless preparation" and "exhaustive investigation" of cases not only marked Justice Harlan's career at the Bar; these traits were also clearly reflected in the objectivity with which he approached cases, in the probing questions he asked of counsel during oral argument, and in the brilliantly analytical and exhaustively researched opinions he wrote during his tenure on this Court and the United States Court of Appeals for the Second Circuit.

While his opinions, which were the work product of a judicial craftsman, won him the admiration of students of the Court, and while his courtesy, objectivity, and general willingness to listen won him the special affection of the Bar of the Court, it was his profound belief in the American Federal System as a bulwark of freedom, and his devotion to those basic liberties essential to a free society, so brilliantly expounded upon in his opinions, which can safely be said to have won him his place in the history of the Court. Justice Harlan deeply

believed that the diffusion of governmental function between federal and state authority, and between the coordinate branches of the Federal Government, afforded safeguards to our free society of comparable importance to the Bill of Rights and the Fourteenth Amendment. Apart from its significance as an instrument of freedom, he viewed the manner in which our political system was structured as a catalyst, fostering diversity, innovation, and experimentation.

With this guiding belief and his refusal to accept the view that the Fourteenth Amendment incorporated the provisions of the Bill of Rights in their entirety, he frequently dissented from opinions of the Court which he regarded as unnecessarily imposing on the States restrictions and procedures which were not essential to a system of ordered liberty and which stifled diversity and experimentation. But, while he would not acquiesce in interfering with state actions which fell short of infringing on fundamental rights, he had no hesitation in meeting the responsibility of the Court to strike down any action which endangered those liberties essential to a free society.

In cases involving free speech and association, the rights which have been described as "the matrix, the indispensable condition of nearly every other form of freedom," Justice Harlan led the Court in reminding us that "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." (*Cohen* v. *California,* 403 U. S. 15, 24.)

And in another opinion he spoke of the "constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order.' " (*Street* v. *New York,* 394 U. S. 576, 593, citing *Board of Education* v. *Barnette,* 319 U. S. 624, 641–642.)

In *NAACP* v. *Alabama,* 357 U. S. 449, 462, he stressed "the vital relationship between freedom to associate and privacy in one's associations," in an opinion which held that the State could not compel the disclosure of the membership lists of a group that had demonstrated that each time its membership lists were disclosed, its members had been exposed "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."

In *Poe* v. *Ullman,* 367 U. S. 497, 522, his dissenting opinion turned to the essential values reflected by the Fourth and Fourteenth Amendments.

Voting then to strike down Connecticut's ban on the use of contraceptive devices, as a majority of the Court later did, he noted that while the statute was not offensive under the traditional view of these constitutional provisions because it involved not an "intrusion into the home so much as on the life which characteristically has its place in the home," he nevertheless found the distinction to be insubstantial. "[I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home draws its pre-eminence as the seat of family life. And the integrity of that life is . . . fundamental . . ." (367 U. S., at 551). This concern for the sanctity and privacy of the home marked all of Justice Harlan's opinions in Fourth Amendment cases, although he often found it delicate to balance these values with his continuing concern that state criminal proceedings not be unduly shackled.

Time does not permit an exhaustive review of Justice Harlan's work, which included some 600 opinions. But what emerges even from a cursory examination is the image of a man of great intellectual and moral integrity, dedicated to the Constitution and committed to the role of the Court as the protector of the fundamental liberties essential to a free people.

To stop at this point, Mr. Chief Justice, without taking note of Justice Harlan's character and courage would "miss the full measure of the man." None of us will forget his example of courage and fortitude as he worked without diminution in quantity or quality despite the illness which virtually blinded him in the last few years of his life. And all who knew and worked closely with him will never forget his kindness, warmth and concern for others. As his close friend and colleague, Justice Stewart, has said, "What truly set him apart was his character . . . his generous and gallant spirit, his selfless courage, his freedom from all guile, his total decency . . . . He was a great human being of great worth."

May it please this honorable Court:

In the name of the lawyers of this Nation, and particularly the Bar of this Court, I respectfully request that the Resolutions presented to you in memory of the late Justice John Marshall Harlan be accepted by you, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

The CHIEF JUSTICE said:

Your motion is granted, Mr. Attorney General, and we thank you for your statement and tributes of the Supreme Court Bar to our late Brother, John Marshall Harlan.

In responding, on behalf of the Court, to the very appropriate tributes to John Harlan, presented by the

Attorney General and the Solicitor General, I would like to provide a brief glimpse of him as we saw him within the Court on a day-to-day basis. His great powers as an advocate and his superb qualities as a judge have been eloquently expressed and we, his colleagues, not only accept but fully endorse what has been said.

No single Memorial ceremony, of course, can ever encompass the range of qualities and facets of a man of the qualities of John Harlan. At best we can touch on only a few aspects that stand out most clearly. The tributes to him in the various Resolutions give a variety of appraisals and they are of special value because they are expressions of close observers going back over nearly 50 years of his life in the law.

These Resolutions have noted his quiet, but very important public service. His public service was episodic in the sense that whenever he was called he dropped his private concerns and turned all his great talents to the public task at hand. His performance of duty was unspectacular, if that word is used in a careful sense, and I use it to emphasize that John Harlan always concentrated on the objectives and never dramatized himself—a trait not always found in great advocates. His selfless approach that placed public service ahead of private gain or advantage is shown time and again in his life. His service in World War II is a good example. At the peak of his career as an advocate he laid aside all his opportunities and private interests and devoted the war years to the high level military intelligence work that has been described in the Resolutions, and which, for all its crucial importance was necessarily behind the scenes. And he did this at an age well beyond the realistic demands of civilians for active military service.

Low key would be one description that we who worked with him day in and day out would accept even when the task he was performing was far from low key. This

quality was, of course, ideal in a judge from whom all people expect detachment and objectivity.

The colleagues of his early years saw one period of his career when his skills were being formed. Others who knew him at the peak of his career as an advocate saw the intensity of his concentration on the detailed facts which he saw as the foundation of all cases, the bedrock on which legal principles must rest.

John Harlan was essentially a very private person and a man of the present and the future but occasionally he would turn to reminiscences about cases he had tried or which he helped prepare in his earliest days with Emory Buckner. On the rare occasions he did this, what emerged was his passion for facts. He pursued the facts of his cases with the single-minded concentration of a scientist engaged in research. That same concern for the facts of a case persisted throughout his judicial work.

His movements, like his thought processes, were always deliberate and unhurried. His only haste was that of the efficient human machine whose orderly habits always brought him to where he was expected in ample time to be prompt in the most casual way.

We who were his colleagues will always be able to picture him sauntering into the Conference Room, one hand fingering the heavy gold watch chain of his grandfather, the elder Justice Harlan, the other often holding a cigarette.

His head and face had a sculptured aspect, the eyes deep set but very alert even in the years that his sight was failing. Invariably, his countenance had a quizzical half-smiling look, attentive and receptive to any comment of a colleague. He carried himself unself-consciously with great dignity but it was the simple dignity of a man who had long since come to terms with life and with himself.

As an experienced, talented and accomplished advocate he knew that facts are usually the stuff that makes or breaks a case, and in Conference or on the Bench he knew the facts of the cases. All of us can recall his contribution to the Conference process. He never talked at great length but always to the point. In his quietly resonant voice that commanded attention he might open his discussion saying,

> "I would like to back up and link up some facts that, with all deference, seem to have been treated more lightly than I would think they deserve."

Then he would perform the skilled advocate's task of focusing on the facts he thought controlling in the case.

Or he might begin by saying:

> "Now that we have the whole case before us it is clear this is a 'pewee' but it is here and we should deal with it."

For John Harlan the "pewee" case received the same in-depth concentration as every other case. Having mentioned his deep concern with the facts of every case, I hasten to say that his legal research was of the highest order and his long experience and fine scholarship enabled him to carry an enormous number of the Court's opinions in the forefront of his mind.

In this day of labels for public figures, commentators tended to label John Harlan, but the only shorthand that for me comes near the mark is that he was a practitioner of "judicial restraint." This was not something that developed when he became a judge on the Second Circuit or a Justice here. He was by nature a restrained person who never plunged into unexplored doctrinal thickets without the most careful advance patrolling of the area. If he could not reasonably predict the consequences of a holding, he would likely not join it. With Justice Holmes, it was his view that if a legal principle or concept had been accepted for generations past, the burden to abandon it was a heavy one for him.

One of his most profound convictions that has already been alluded to was that all good things are not mandated by the Constitution and all undesirable things are not proscribed. He was willing to let some problems remain for future generations to solve rather than take great leaps to seductively appealing results. I am not sure whether he was acquainted with the writings of Rabbi Louis Finkelstein of the Jewish Theological Seminary of America, but his philosophy seemed to accept that great theologian's admonition that we should be content "to leave a little to the Lord" and to the future.

When the suggestion was made to me in 1954 that I accept a judicial appointment soon expected to develop, I concluded that I would find out how John Harlan as an active practicing lawyer felt about leaving the practice for the Bench. Our backgrounds had some slight similarity. I had practiced privately for 21 years and he for nearly 30 years. I visited him in his chambers at Foley Square in New York and we talked of practice and of government work and he finally said he suspected I would go on the Bench. I told him I was not at all sure and I asked how he liked the life of a Circuit Judge after years of active practice. He smiled and said essentially this:

> "It's not nearly as much fun as law practice but after 20 or 30 years at it I think possibly there is a greater opportunity to grow on the Bench than in the daily grind of a big firm practice."

John Harlan exhibited great growth capacity all his life but no one would deny his growth after he became a judge.

As the date of this Memorial to John Harlan approached I recalled the visits to him in his last illness in which he bore his misfortune as he had always faced every crisis in his life, with fortitude and grace, without complaint, still receiving a friend as though he had asked him to his home or his chambers for tea. It was

in the fall months that the severity of his condition became clear. Last week as I took a final look at my garden beds I reflected on this Memorial and looked back on my association with him. The fallen leaves reminded me that the end of summer was upon us but the beds were still brilliant with masses of scarlet, coral and white petals of the last of the summer flowers. Yet I knew that the frost would soon be on us and the flowers would be gone, and of course the frost came—indeed it came that very night. But just as we can carry the memory and the image of past beauty and color, so do we carry the memory of the beauty of the spirit, the personality, the integrity and character of a friend. John Harlan left a rich legacy of this kind for his friends and loved ones.

His bequest to the Law is recorded so that we can consult him at will in the volumes of the U. S. Reports. But for the warmth of the man as a cherished friend we need no research. To turn the mind to his name brings a flood of images and events of the Conferences, of his resonant voice and patient searching questions from the Bench, of his extraordinary capacity to announce the reasoning of a complex case in simple terms, from memory and without the help of notes or text. Lawyers will remember his genuine understanding of problems of the lawyer at the lectern. And we can recall our luncheon table talk and private discourse in which his warmth and wit and grace came out uninhibited by the diffidence that strangers saw. These are the riches of memory each of his former colleagues will carry as long as we have the power of memory.

Mr. Attorney General, Mr. Solicitor General, on behalf of the Court I thank you for your presentations here today in memory of John Harlan. We ask you to convey to the Chairman and the Committee on Resolutions our appreciation for their efforts. The Resolutions will be made part of the permanent records of this Court.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE BYRNES*

MONDAY, DECEMBER 18, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

The Court is in Special Session this afternoon in memory of our late Brother, Mr. Justice James Francis Byrnes.

At this time the Court recognizes the Solicitor General of the United States.

Mr. Solicitor General Griswold addressed the Court as follows:

Mr. Chief Justice, and may it please the Court:

Earlier this afternoon a meeting of the Bar was held to honor the memory of Justice James F. Byrnes. At that meeting resolutions were adopted which had been prepared by a Committee on Resolutions. I shall read the resolutions so adopted to the Court, and the Attor-

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*Mr. Justice Byrnes, who retired from active service on the Court October 3, 1942 (317 U. S. VII, VIII), died in Columbia, South Carolina, on April 9, 1972 (405 U. S. VII). Services were held at the State House and at Trinity Episcopal Church, Columbia, South Carolina, on April 12, 1972. Interment was in Trinity Episcopal Church Cemetery, Columbia, South Carolina, on April 12, 1972.

ney General will then move that they be accepted by the Court and spread on the Court's records.

The resolutions unanimously adopted are as follows:

Resolutions

On behalf of the Bar of the Supreme Court, we have met to record our respect for James Francis Byrnes, Justice of the Supreme Court of the United States from July 11, 1941, to October 3, 1942. His death on April 9, 1972, closed a career of unique public service. Many have paid their tributes.†

President Nixon: "No man in American history has held so many positions of responsibility in all branches of our Government with such distinction."

Senator Mansfield: "I wish to join in the remarks just made . . . at the passing of an old friend, . . . a man of many accomplishments, . . . a man of integrity, patriotism and deep understanding. Those of us who had the pleasure and the privilege of knowing him will miss him, and miss him greatly."

Senator Scott: "James F. Byrnes was an American's American. His distinguished career spanned five decades, it was capped off by unselfish service to the United Nations and subsequently to his fellow men throughout the world. Historians have placed the great accomplishments of James F. Byrnes high on their list of those who have labored to insure a world of peace."

Senator Thurmond: "His service to the Nation and to the State of South Carolina are hallmarks of great distinction. The scope of his long public career was broad, and he was recognized around the world for his achievements."

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†U. S. Congress, 92d Cong., 2d Sess., Memorial Addresses and Other Tributes in the Congress of the United States on the Life and Contributions of James F. Byrnes, Washington, D. C., U. S. Government Printing Office, 1972; Proceedings in the United States Senate, April 10–13, 19, May 17, 23, 1972; Proceedings in the U. S. House of Representatives, April 10, 13, 1972.

Senator Hollings: "His was the world of action—the arena of great events. Presidents, prime ministers, and kings eagerly sought his advice. But his wisdom was never exclusively reserved for statesmen and monarchs. It was given as openly and freely to anyone willing to listen."

Governer West: "The State of South Carolina has lost its most honored citizen; the Nation has lost a dedicated servant; and the world has lost a great leader."

General Lucius Clay: "He met with the great and with the humble, and was at home with both. His warm compassion, his deep and abiding loyalty, and his faith in America and its people were ever inspiring. There are only a few—a very few—in a world of many people who can by virtue of both character and achievement be called great. Justice Byrnes was such a man. But of the few who are recognized as great, there are an even smaller number who are both great and good. Justice Byrnes was also a good man."

James F. Byrnes was born in Charleston, South Carolina, May 2, 1879, in a simpler era, when America was about to make its great leap into modern times. The Nation in which he began his life was predominantly rural and overwhelmingly isolationist. But the Nation in which he ultimately rose to leadership was complex, highly industrialized, and intimately involved in the affairs of the world. Few men have lived to witness as much history—as much profound transformation—as did Justice Byrnes.

Those who knew him marveled at the ease with which he moved through the passing years. There was ever present some tremendous inner strength which helped him hold fast to his moorings amidst the changes he encountered. America's greatest men have seemed almost invariably to possess that quality. Through it all, they have retained their fundamental faith in their fellow man and their deep belief in the destiny and goodness

of their native land. James F. Byrnes had that kind of character—that kind of greatness.

Those traits of character were nourished during his early years in Charleston. Jimmy Byrnes was the son of Irish immigrants. His father died before he was born. His mother faced the upbringing of two young children—a girl and a boy—having only about $200. It took hard work and devotion to see the family through—but these were abundant assets in the Byrnes household. The young boy soon was peddling seafood and selling newspapers up and down the streets of Charleston, while his mother worked long hours as a dressmaker and took on the additional task of leading a local Catholic choir.

Jimmy attended St. James School, but the family resources allowed no additional formal education. High school was out of the question. By age 14, he was working for $2 a week as office boy in one of Charleston's leading law firms—Mordecai, Gadsden, Rutledge, & Hagood. It was Benjamin Rutledge of that firm who advised young Byrnes to seek an education by reading books in the Charleston Library. His following that advice led to his becoming one of the best informed and educated men of his generation, and his education never ended.

In 1900, when 20, he won a competitive examination for the position of Court Stenographer for the Second Judicial Circuit at Aiken, South Carolina, where, in his spare time, he read law under Judge James Aldrich. From 1903 until 1907 he was editor and publisher of The Aiken Journal and Review, a weekly newspaper. He was admitted to the Bar in 1904 and practiced law in Aiken from 1904 to 1908. On May 2, 1906, he married Miss Maude Busch, whom he, as a newcomer to Aiken, had met in the choir of the Episcopal Church there. In casting about for an explanation of the subsequent flowering of his remarkable life, it is easy to see that "Miss Maude" was at the heart of all he was

and did. She was his inspiration—ever his charming, devoted, and gracious helpmate.

Things moved quickly for this young couple. Soon the "public years"—over 50 years of dedicated service to his State and Nation—would begin. As was stated in the citation when he much later received the Doctor of Laws degree from Yale University: "He shattered the tradition that energy ends at the Mason and Dixon Line." In 1908 he was elected Solicitor for the Second Judicial Circuit of South Carolina. It was rumored that he did not enjoy prosecuting his fellow man. In any event, he, a Democrat, won a seat in Congress two years later and served in that office for 14 years. There he enjoyed warm and constructive associations with the political leaders of that time—men like Joe Cannon and Champ Clark, Speakers of the House—Presidents Woodrow Wilson, Warren Harding, and Calvin Coolidge—and Carter Glass, with whom he worked effectively for the adoption of the Federal Reserve Act, which is still our central banking law. In the House he was identified with many important legislative activities and was soon recognized as a master of the art of persuasion and conciliation. There, as a member of an Appropriations Subcommittee, he met and became a fast friend of young Franklin D. Roosevelt, then Assistant Secretary of the Navy.

At the end of seven terms in the House, he came home from Washington in 1924 determined to seek greater opportunities for public service offered in the Senate. The race that year marked his only loss of an election. Former Governor Cole L. Blease defeated him in a closely contested second primary.

At the invitation of Sam Nichols, with whom he had served in Congress, and Cecil Wyche, he moved to Spartanburg and successfully practiced law there for six years in the firm known as Nichols, Wyche, & Byrnes. In 1930, he returned to politics, defeated Senator Blease, and thus commenced his service in the Senate on the

eve of the first administration of President Franklin D. Roosevelt. He had supported Roosevelt for nomination as Vice President in 1920, and he supported him for President in 1932. President Roosevelt relied upon him to guide much of the sweeping and complicated New Deal legislation. It was a tribute to the talent and tact of Senator Byrnes that as a first-term Senator he could play such an important role without offending the party leaders and committee chairmen. He was easily re-elected to the Senate in 1936.

On visits to Japan in 1935 and to Germany in 1937, Senator Byrnes had been shocked by the mounting evidence of war preparations he observed. On his return from Germany he reported to President Roosevelt his deep concern and his feeling that immediate action was necessary to awaken the Congress and the people to the Nation's imperative need of increased appropriations for national defense. He found that the President fully shared his concern and welcomed his assistance. But it was a long, hard, up-hill struggle, and both the President and Senator Byrnes had to be careful not to get too far ahead of public opinion and the Congress. Then came Hitler's annexation of Austria in March 1938 and the Munich agreements in September. Despite the appeals of the President and Secretary Hull in the spring of 1939 for modification of the Neutrality Act, Byrnes was unable to obtain action by the Congress before adjournment. At the end of August Hitler invaded Poland.

The President then informed Senator Byrnes that he was calling a special session of the Congress for September 21 to take action on the repeal of the Arms Embargo. He asked Mr. Byrnes to come to Washington to discuss the situation with him, particularly the steps he contemplated taking to obtain bipartisan cooperation, both in the Executive Branch and in the Congress. Byrnes not only arranged to clear the way for the confirmation of the appointments of Henry Stimson as

Secretary of War and Frank Knox as Secretary of the Navy, but at the President's request took over the management of the fight for the repeal of the arms embargo in the Senate.

In the summer of 1940 the President requested Mr. Byrnes to represent him on the Platform Committee at the Democratic National Convention in Chicago. Byrnes handled the delicate and bitterly contested war clauses with consummate skill, managing to add the saving words "except in case of attack" to the pledge "not to participate in foreign wars." In August after the fall of France, Byrnes was able to attach for General Marshall an amendment to a defense appropriation bill which would permit the promotion of officers of exceptional ability, like Eisenhower, Patton, Clark, and Bradley over others with higher seniority. He was also able to expedite the passage of the highly controversial Selective Service Act on the eve of the election.

In January 1941, the President called on Senator Byrnes to assume responsibility for piloting the Lend-Lease bill through the Congress. Byrnes was a member of both the Foreign Relations Committee and the Appropriations Committee. During the winter and spring Byrnes gave unstintingly of his time and energy to secure the passage of the Lend-Lease bill and the initial appropriation of seven billion dollars to implement its program.

On June 12, 1941, in the afterglow of their cooperation in the promotion of the needed legislation, President Roosevelt named Senator Byrnes to fill a vacancy on the Supreme Court. The nomination was confirmed by his fellow Senators the same day. He took office July 11, 1941, and sat for the first time October 6, 1941. The transition from the Senate to the quiet chambers of the Court was not altogether easy. But he attacked the new assignment with that lively curiosity, sensitivity, perceptiveness, and practicality which were his trademarks. At a distance he had been an admirer of

Chief Justice Stone. That admiration promptly flowered when they came together in a working relationship, and it was to the Chief Justice that Byrnes turned most often for counsel during his first weeks on the Court.

In the short span of a single term of Court, the new Justice's philosophy hardly had time to take shape, and its full profile is not easily discerned from the 15 opinions he wrote. His brief service on the Bench revealed a dedication to the Constitution as written, a respect for the place of the judiciary, the Congress, and the President, in our form of Government, and a true appreciation of the powers reserved to the States.

His initial opinion was in the important case of *Edwards* v. *California,* 314 U. S. 160 (1941), in which the Court unanimously held that a California statute making it a crime to knowingly bring a nonresident "indigent person" into that State violated the Constitution of the United States. Byrnes' majority opinion was that the California statute was unconstitutional because it erected a barrier to interstate commerce. Justice Douglas, in a concurring opinion in which Justices Black and Murphy joined, and Justice Jackson in a separate concurring opinion, were of the view that the invalidation of the California statute should be based upon the Privileges and Immunities Clause of the Fourteenth Amendment. The trio of opinions which ultimately emerged were eyed somewhat quizzically by the majority spokesman, fresh from long years in the legislative forum in which earthy compromises were the law of life.

In his maiden opinion, Justice Byrnes revealed that he was not an undeviating disciple of *stare decisis.* In 1837 the Supreme Court had 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 infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease." *City of New York* v. *Miln,* 11 Pet. 102, at 142–143. Although he quoted from the *Miln* language and noted the casual repetition of similar language by the Court over the years, as recently as 1898, *Missouri K & T R. Co.* v. *Haber,* 169 U. S. 613, 629, he observed that times and attitudes change, and he rejected the notion that one without employment or funds is a "moral pestilence."

Following *Edwards,* Justice Byrnes wrote 14 opinions for the Court. They included three dealing with the priorities enjoyed by federal claims against insolvent or bankrupt debtors, *United States* v. *Emory,* 314 U. S. 423 (1941), *United States* v. *Texas,* 314 U. S. 480 (1941), and *United States* v. *New York,* 315 U. S. 510 (1942); two dealing with insurance for members of the Armed Forces, *Halliday* v. *United States,* 315 U. S. 94 (1942), and *United States* v. *Citizens Loan & Trust Co.,* 316 U. S. 209 (1942); and one dealing with each of the following subjects: peonage, *Taylor* v. *Georgia,* 315 U. S. 25 (1942); an anti-racketeering statute, *United States* v. *Local 807,* 315 U. S. 521 (1942); a quantitative restriction on corporate landholding in Puerto Rico, *Puerto Rico* v. *Rubert Hermanos Co.,* 315 U. S. 637 (1942); the Miller Act, *United States* v. *Irwin,* 316 U. S. 23 (1942); review of an order of the National Labor Relations Board, *Southern S. S. Co.* v. *NLRB,* 316 U. S. 31 (1942); Indian lands, *Sioux Tribe* v. *United States,* 316 U. S. 317 (1942); a coerced confession, *Ward* v. *Texas,* 316 U. S. 547 (1942); an antitrust consent decree, *Chrysler Corp.* v. *United States,* 316 U. S. 556 (1942); and the Fair Labor Standards Act, *Walling* v. *Belo Corp.,* 316 U. S. 624 (1942).

Of these, *Taylor* v. *Georgia,* striking down a Georgia statute binding a workman to his private employment by the threat of imprisonment, and *Ward* v. *Texas,* reversing a state court criminal conviction based upon

a confession obtained by coercion, are indicative of Justice Byrnes' reaction to oppression on economic or racial grounds, although the result in each case was clearly supported by earlier decisions of the Court. *Local 807* reflects a strong inclination to search for and to honor Congressional intention. And *Southern S. S. Co.*, which involved conduct of seamen considered by the Court to be mutinous, reflects an abhorrence of such conduct so sharp as to require holding that the Labor Board had abused its discretion in ordering reinstatement of the strikers.

Although he wrote no dissents or concurring opinions, Justice Byrnes was in the minority in 12 cases, six times in the company of Justice Black, five in the company of Justice Frankfurter, and one in the company of neither.

It is not easy to speculate how Justice Byrnes' service as a member of the Court would have developed had he remained there for many of the 30 years of life which still lay before him. That was not to be.

Sixty-three days after he took his seat on the Court, Pearl Harbor brought the minds of all to the task of winning World War II. A greatly harassed President turned to Justice Byrnes for counsel in the formulation of military policy and the drafting of needed war legislation. Byrnes put the President at ease by assuring him that if he thought that in wartime because of his—Byrnes'—experience in the ways of the Congress and of the Government he could be of greater service elsewhere than on the Court, he hoped the President would call upon him. Within the week it was arranged that the Attorney General would confer with Byrnes on all the emergency war legislation and related executive orders. Early in January 1942, an omnibus bill known as the Second War Powers Act was submitted to the Congress and passed with record speed. Although the activities of Byrnes outside the Court became known, no public announcement was made, as both the President

and Byrnes thought for the time being Byrnes could be more effective working quietly and unobtrusively.

In the summer of 1942 the inflationary situation was becoming tense. Legislation to establish ceilings on wages and prices was stalled in the Congress. The President's Council and others had recommended to the President that he issue an Executive Order establishing an Office of Economic Stabilization vested with power to control wages and prices, without awaiting action by the Congress. When consulted, Byrnes advised strongly against that course on the ground that the controls were too sweeping and affected too many people to be attempted without congressional approval. The President made another appeal to the Congress, and a fireside chat, and the legislation was approved by the Congress and became effective on October 2, 1942.

The following day Byrnes was summoned to the White House. The President asked him to take a leave of absence from the Court and become the Director of Economic Stabilization. The President also stated that there were other duties beyond those of the Director of Economic Stabilization that he would wish him to assume. Justice Byrnes replied that no one could grant a Justice of the Supreme Court a leave of absence and that the Justice alone was responsible for the discharge of his duties. He further stated that the regulation of wages and prices involved so many decisions with political implications that it would not be proper for him to assume such duties and remain on the Court. He then inquired about the "other duties." The President explained that he, himself, would not have time to devote to the prosecution of the war and the many related diplomatic problems and have any appreciable time left to supervise domestic affairs. He wanted Byrnes to relieve him of the problems on the home front and the jurisdictional disputes which increased with the creation of every new agency. In these disputes he wanted Byrnes to act as "judge" and he would let it be known

that Byrnes' decision was his decision. For all practical purposes Byrnes would be Assistant President with offices in the White House. On October 3, 1942, Justice Byrnes promptly resigned from the Court and accepted appointment as head of the Office of Economic Stabilization. His fellow Justices expressed their deep sense of loss and their awareness that he had been moved by "a sense of duty to render a needed service of public importance in a time of great national emergency." He responded that it was indeed "only a sense of duty [which] impelled me to resign from the Court." (317 U. S. vii, viii.)

As Director of Economic Stabilization, Byrnes created no organization of his own. He had only four or five personal assistants. He conceived it to be his task to see that the various agencies involved in the stabilization efforts—OPA, Agriculture, War Labor Board, RFC, WPB, and the Treasury—cooperated and worked as a team. He gained the confidence, goodwill and respect of all those who looked to him for guidance—those representing labor as well as those representing management, and those representing agriculture as well as those representing industry. But inflation was already out of hand and the fight to curb the rise of wages and prices without hampering production was a tough one. From October 1942 to April 1943 the rise in the cost of living index was held to 4.3 percent. Byrnes was not satisfied and prepared a stronger, more effective directive known as the Hold-the-Line order. At Byrnes' suggestion, the President asked Judge (later Chief Justice) Fred Vinson to take over as Director of Economic Stabilization in order that Byrnes could devote his energies to expediting the mobilization of our resources for the prosecution of the war. With the aid of Byrnes' Hold-the-Line order which he courageously administered, Judge Vinson was able to hold the rise in the cost-of-living index from April 1943 until his resignation in April 1945 to 3.2 percent.

Byrnes, on May 27, 1943, had become Director of the Office of War Mobilization under an order of the President which authorized him to originate policies and lay out programs that would coordinate the work of all war agencies and departments in any way connected with the production, procurement, transportation, and distribution of civilian and military supplies. It probably constituted a greater delegation of authority than a President had ever previously made. Byrnes became in a very real sense Assistant President. With few exceptions, his authority was respected and welcomed. His first act as War Mobilizer was to call upon all agencies engaged in the war effort to review and report to him their procurement programs realistically and objectively. The President sought his counsel on the most delicate matters affecting his relations with the highest officials in the administration, and with congressional leaders, and left the handling of the troublesome coal and railroad strikes, in large measure, to Byrnes.

In June 1944, the President suggested to Byrnes that he wished him to become the permanent chairman of the forthcoming Democratic National Convention in Chicago and a candidate for Vice President. Byrnes was prepared to proceed as the President wished. But when some opposition in labor circles was voiced to Byrnes, and it appeared that he could not have the exclusive support of the President, he withdrew his candidacy.

After the 1944 election, the President, in January 1945, invited Byrnes to accompany him to the Yalta Conference where postwar planning was to be considered. There Byrnes got a first taste of some of the difficult problems which would confront him later that year as Secretary of State. When Montgomery crossed the Rhine in March 1945, everyone knew the end of the War was near. Mr. Byrnes saw that the great domestic job ahead was reconversion. His had been the task of mobilization. At his suggestion, Fred Vinson

was appointed his successor. In early April Mr. Byrnes returned to his Spartanburg home for a well earned rest. That was not to be. President Roosevelt died April 12.

A few days after President Truman took office, he advised Byrnes that he wished to appoint him Secretary of State, but it was agreed that no announcement of the appointment would be made until the end of the United Nations Conference at San Francisco. In the meantime the President appointed him to the Interim Committee he had created to consider when and how the newly developed atomic bomb should be used. The Committee's recommendation for the use of the bomb, in the opinion of many at the time, saved hundreds of thousands of lives that would have been lost in the prolongation of the War. Mr. Byrnes took the oath of office as Secretary of State on July 3, 1945. One of his first official acts was to sign the protocol formally attesting that the Charter of the United Nations had come into being. He called the day "memorable—for all the peace loving peoples of all nations," but cautioned that peace depended on the will of the peoples rather than on documents.

When Byrnes became Secretary of State, World War II was coming to a close, but the struggle for peace was beginning. The United States and the Soviet Union—each after its fashion—had sought to suppress their differences and to cooperate in winning the war. The war-weary people throughout the world looked to them to cooperate in restoring peace. But with the defeat of their common enemies, the suppressed ideological differences of the two great Super-Powers were beginning to surface and to give rise to fears that the two great allies in war would become bitter and distrusting rivals in the making of the peace.

In this distressing situation Byrnes pleaded for patience and firmness on our part in the pursuit of peace—patience in not abandoning the pursuit and hope of

world peace, firmness in resisting demands which did not advance the cause of peace. While eager to reach agreement where he could find common interest to sustain agreement, he was particularly firm in avoiding any agreement or understanding that would delay or hamper the restoration of conditions of peace and normal life in areas under our control.

Byrnes was a realist. If in negotiation he could not secure all that he wished to secure, he would ask himself whether the cause he pleaded would fare better with no agreement than with such agreement as he could obtain. If he concluded that the agreement he could obtain was better than no agreement, he preferred a half loaf to no loaf. It was this realism of Secretary Byrnes which made possible the restoration of conditions of peace in Western Europe and which laid the foundation for the present strength of Western Europe.

It was Secretary Byrnes who arranged the reparation settlement at Potsdam which confined the Soviet claims for reparations from Germany to reparations from the Soviet zone, apart from only limited contributions from the Western zones. Byrnes foresaw that without such a settlement the Russians would take as war booty or reparation whatever they wanted from the Soviet zone, and then in the absence of such settlement would make inflated claims against the Western zones for additional reparations which would seriously hamper economic recovery.

At the meeting of the Council of Foreign Ministers in Paris on July 11, 1946, Byrnes was able to resolve an equally, if not more, significant controversy in a strikingly similar fashion. It had been agreed in principle at Potsdam that Germany should be treated as an economic unit and common economic policies should be applied in all zones. But the Allied Control Council could not agree on how Germany should be administered as an economic unit. The Soviet Union was dragging its feet and France also was procrastinating. In the

meantime, the economic situation was deteriorating. Whereupon, in the Council of Foreign Ministers, Byrnes formally announced:

> "Pending agreement among the four powers to implement the Potsdam agreement requiring the administration of Germany as an economic unit, the United States will join with any other occupying government or governments for the treatment of our respective zones as an economic unit. The continuation of the present situation will result in inflation and economic paralysis. It will result in increased costs to the occupying powers and unnecessary suffering to the German people. The United States is unwilling to share the responsibility for the continuance of such conditions."

On September 6, 1946, Secretary Byrnes made his memorable speech at Stuttgart, formally setting forth the American policy towards Germany which charted the course that the Western Allies were to follow in restoring peace, prosperity, security, and freedom within the allied zones.

The British promptly agreed to merge their zone, and the French did likewise a few months later. The Soviet Union held aloof, but could no longer hamper the slowly developing economic recovery in the West. The merger of the Western zones, called Trizonia, made possible in due course the establishment of the democratically responsible West German Government equipped to play its part in the economic revival of Western Europe.

To shore up Germany against advancing Communism, Secretary Byrnes had made it clear at Stuttgart that America favored economic reconstruction in Germany. He had declared, "The American people want to return the Government of Germany to the German people. The American people want to help the German people win their way back to an honorable place among the free and peace-loving people of the world." As General

Clay said at the funeral of Secretary Byrnes, April 12, 1972, "I think this was his finest hour and the policy which he announced then is still our basic policy. We had taken a major step to accepting the leadership of the free world, later to result in the Marshall Plan, the North Atlantic Treaty Organization, and the establishment of the German Government." The German people still gratefully remember Secretary Byrnes' speech at Stuttgart. In 1956, they held there a Tenth Anniversary Celebration, including a great ovation to Secretary and Mrs. Byrnes who were in attendance as honor guests. A Twenty-fifth Anniversary Celebration was held last year. Secretary Byrnes, then 91, was unable to attend.

In April 1946, Secretary Byrnes had informed President Truman that medical tests had revealed he had a heart problem and that the doctors had advised him to relax. He wished therefore to resign as soon as he had completed the peace treaties with the satellite enemy states. He had submitted his resignation effective July 1, 1946, and agreed with the President he would remain until the treaties were completed. A subsequent test by a different doctor showed no trace of heart trouble. But, being in doubt as to which test most truly reflected his condition, he did not inform the President of the subsequent test, and did not withdraw his resignation. When he had completed the treaties, he reminded the President of his resignation and asked to be released. The President said he had hoped Byrnes had forgotten the resignation. Byrnes' signing the treaties on January 20, 1947, was his last official act as Secretary of State.

After his retirement as Secretary of State on January 21, 1947, he divided his time for the next two years between his home in Spartanburg and law practice in the well-known Washington firm of Hogan and Hartson, which had been founded by his cousin, Frank Hogan. Soon finding himself relaxed and in good health, the

world-renowned statesman, at the urging of many friends, consented to wind up his extraordinary political career by serving his beloved South Carolina as Governor from 1951 to 1955. His term as Governor was one of enlightenment and pointed the way for continuing progress in his State. In his inaugural address he had stated: "It is our duty to provide for the races substantial equality in school facilities. We should do it because it is right. For me that is sufficient reason. If any person wants additional reason, I say it is wise." This set the tone for his administration. His recommendations to the 1951 General Assembly resulted in the enactment of a vast school improvement program designed to furnish equal facilities for all children.

When he retired from public life, January 19, 1955, at the end of his four-year term as Governor, it was said that the school facilities for black children in South Carolina then were superior to those for white children. Two-thirds of the bond money had been spent to provide facilities for black children. When the 1954–1955 decisions of the Court dismantled the dual public school system, South Carolina accomplished the transition gracefully and without violence. During his administration, the State also provided substantial funds for better college and university education of both races, for the care of the mentally ill, and for other needed public improvements.

Mr. Byrnes' own education did not reach high school, but he was a self-taught scholar. His schooling never ended. In his later life he liked to say, "I am being educated by degrees." Starting in 1935, he received honorary doctorate degrees from the following colleges and universities: College of Charleston, Presbyterian College of South Carolina, John Marshall College of Jersey City, University of North Carolina, The Citadel, University of South Carolina, Columbia University, Furman University, Wofford College, Washington and Lee University, Yale University, and University of Pennsylvania.

Having experienced adversity and hardship during his youth, Mr. Byrnes had compassion for all who were similarly situated. In 1948, with his competent and devoted secretary, Miss Cassie Connor, as Trustee, he established the James F. Byrnes Scholarship Foundation, to provide college educations for boys and girls who had lost their parents early in life. He funded it principally with the proceeds of his two books: Speaking Frankly (Harper & Brothers, 1947) and All In One Lifetime (Harper & Brothers, 1958), and with his retirement pay, and the proceeds of the sale of his "Isle of Palms" home. That private Foundation already has provided college educations for almost 400 "Byrnes Scholars." Since the deaths of Mr. Byrnes and Miss Connors, the fund for the Foundation continues to grow and work under the guidance of executives selected by them, including now two of the former "Scholars." Many of the "Scholars" already have made good in life and are, in turn, making their financial contributions to the Foundation. Friends of Governor and Mrs. Byrnes are contributing, and much of his estate has been added to its usefulness. Approximately $400,000 already has gone into this magnificent educational enterprise. Mrs. Byrnes early this year wrote: "The results have given us much pleasure and pride and, although we have no children of our own, we now have 380 Scholars who call us Mom and Pop."

In 1943, he was awarded, for his World War II service to our Country, the Distinguished Service Medal, he being one of only 14 civilians who have ever been awarded that honor.

In 1953, while he was Governor, he was appointed by President Eisenhower as United States Delegate to the United Nations General Assembly, where he served with distinction.

In 1941, he was elected Life Trustee of Clemson University, with which he maintained warm associations until

his death. In 1966, he accepted Clemson's formal request, by unanimous resolution, to place the vast collection of personal papers, documents, historical memoranda, memorabilia, and souvenirs of his remarkable life in the James F. Byrnes Room of its main Library, for permanent preservation. A competent custodian is on duty there to make these treasures accessible to researchers, historians, and the millions of others who keep him in revered and grateful memory.

We do

RESOLVE that we, the Bar of the Supreme Court of the United States, express our profound sorrow at the death of Justice James Francis Byrnes, and our grateful appreciation for his long life of public service of the highest order in the Executive, Legislative, and Judicial Branches of his State and National Governments, giving his all to a search for light and truth and justice and the promotion of love, peace, and freedom for all mankind:

IT IS FURTHER RESOLVED

That the Attorney General be asked to present these Resolutions to the Court and to ask that they be inscribed on its permanent records and that copies of these Resolutions be forwarded to Mrs. Byrnes in Columbia, South Carolina.

Robert R. Carpenter, Rockhill, S. C.
Benjamin V. Cohen, Washington, D. C.
J. Bratton Davis, Columbia, S. C.
James E. Doyle, Madison, Wis.
Nelson Hartson, Washington, D. C.
E. F. Hollings, Washington, D. C.
W. F. Prioleau, Jr., Columbia, S. C.
David W. Robinson, Columbia, S. C.
T. Frank Watkins, Anderson, S. C.
C. G. Wyche, Greenville, S. C.
E. Smythe Gambrell, Atlanta, Ga., *Chairman.*

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. Mr. Attorney General.

Mr. Attorney General Kleindienst addressed the Court as follows:

Mr. Chief Justice, and may it please the Court:

The Bar of this Court met today to honor the memory of James Francis Byrnes, whose brief tenure as Associate Justice of this Court was characteristic of a lifetime of exceptional service to his Nation. A man of action and of experience, James F. Byrnes is among the very few Americans who have served in all three branches of the Government at the highest levels and with great distinction. His accomplishments, especially during the war and early postwar years, when as "assistant president" he directed the crucial efforts on the home front—and as Secretary of State—laid the foundation of our postwar foreign policy, will surely endure for the life of this Nation.

It is not difficult to see why James F. Byrnes had so important an impact on the history of our country, for he combined to a rare degree the qualities that make for leadership and influence: a good mind, good judgment, character, and energy. These were, of course, rooted in his childhood. Raised by a widowed mother in Charleston, South Carolina, young "Jimmy" Byrnes learned by example the value of perseverance and thrift. The necessities of life meant the end of formal schooling at the age of 14, but not the end of self-education. His discipline in pursuing a course of reading in the Charleston library prepared him well for the study of law in Judge Aldrich's chambers while acting as court stenographer in Aiken.

It was not long after James Byrnes passed the bar, at the age of 24, that he began his career in public

service—first as prosecuting attorney, then for 14 years as Congressman and 10 years as Senator. After one term as Associate Justice of this Court, he served as Director of Economic Stabilization and later as Director of the Office of War Mobilization, Secretary of State, and finally Governor of his beloved State of South Carolina.

Quite early in his remarkable career, James Byrnes had begun to learn, as he later observed, that "in all relationships in life success and happiness can be achieved only by a willingness to make concessions." This lesson served him particularly well in the Congress where, in his words, "the art of legislating is the art of intelligent compromise." Those who knew him as a legislator recognized him as a master of this art. But compromise for James Byrnes was never the surrender of principles; it was rather the temporary retreat from one desired objective in order to attain another.

As Congressman and Senator, Justice Byrnes commanded the respect and admiration of his colleagues of both parties. As he later observed, a legislator can achieve distinction if he possesses unusual ability or unusual personality. Justice Byrnes had both, and to these qualities he added, characteristically, unusual diligence and unusual civility. He never let political differences disrupt his personal relations; and he knew well that today's opponent may be tomorrow's ally.

Once, after a hard-fought battle over the Administrative Reorganization Act of 1939, in which Senator Byrnes was successful, the leader of the opposition, Harry Byrd of Virginia, was among the first to congratulate Byrnes. "That," he later remarked of Byrd, "is one of the reasons he is respected and loved." And so it was with Byrnes himself.

Even before he had served in all three branches of the Government, James Byrnes had developed a strong sense of the importance of separation of powers, which he regarded as the principal safeguard against dictatorship. It was on this ground that he advised against and resisted

President Roosevelt's ill-fated effort to purge the Senate in the 1938 primaries.

When in July of 1941 Byrnes was appointed to fill the seat of retiring Justice James McReynolds, he brought with him his commitment to separation of powers, which, had his tenure been a longer one, would surely have been reflected in his decisions.

His fifteen opinions for the Court could not, of course, do more than suggest the new Justice's developing judicial philosophy. He could later say, however, that the "supreme test of judicial statesmanship," in his view, was "to preserve the balance between the powers of the Federal Government and the powers of the State." He strongly believed that the role of the Court is to interpret the laws and not to make them, and that it should resolve ambiguities by consulting the legislative history in an effort to understand the intent of the legislature.

His colleagues on the Court quickly recognized the new Justice's special abilities and personal qualities. On a draft of one opinion, a colleague wrote: "Neat and complete. I verily believe that you say more by saying less—and what you say is truly good."

Like Holmes, Justice Byrnes believed a dissenting opinion should not be written unless a Justice felt strongly on the subject. He did not find it necessary to write a dissent during his one term, although his opinion for the court in *Walling* v. *Belo Corp.*, 316 U. S. 624, involving a difficult question under the Fair Labor Standards Act, was drafted as a dissent and was issued as the majority opinion only after it persuaded Justice Jackson to change his vote.

Later, when the President called upon him in a time of national emergency, Justice Byrnes saw that he would have to resign. He has said: "It was not easy to leave the Court, with its opportunity for service, its prestige and security—the work I liked and the Associates for whom I had a genuine affection. But in time of war my duty was plain." And his responsibilities were awesome.

As Director of the Office of War Mobilization, Justice Byrnes was given greater authority than any President had previously delegated, with full responsibility for all federal efforts connected with the production and distribution of civilian and military supplies. When Byrnes resigned from that position several years later, President Roosevelt said he would reappoint him to the Supreme Court when the next vacancy occurred. Byrnes, the political realist, demurred, however, saying that his reappointment would lead to false and damaging speculation that there had been a secret understanding between them.

As President Truman's Secretary of State and later as Governor of South Carolina, James Byrnes completed one of the most diverse and extraordinary public careers in our country's history. In January 1955 he left the Governor's office and public life with an understandable sense of fulfillment. His own words are an especially fitting expression of that sentiment:

"Within me was the satisfaction that comes from the consciousness that through the years I had faithfully tried to discharge my duty. I knew I had made mistakes, because I am human. I knew I had made political enemies because I had taken positions on controversial issues and fought to sustain those convictions. But there was compensation in the knowledge that I had made countless friends whose understanding and sympathy had enriched my life.

"As I thought of the past, overriding all thoughts of personal relations was my realization that this country is truly the land of opportunity.

"Now as I think of the future, my hope is that my experiences may encourage others to dedicate their talents and energies to public service, for I believe with Tolstoi that 'The sole meaning of life is to serve humanity.'"

May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice James F.

Byrnes be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Your motion is granted, Mr. Attorney General, and we thank you for your statement and tributes of the Supreme Court Bar to our late Brother, James Francis Byrnes.

At the time of this Memorial today, only Justice Douglas of the present Court served on the Court when Justice Byrnes was here, and Justice Douglas has asked me to express his very deep regret that a commitment made before the date was fixed for this memorial service prevents his being here today. In visiting with Justice Douglas about Justice Byrnes, I learned that he and Byrnes had been friends from the time Justice Douglas first came to Washington as a member of the Securities and Exchange Commission more than 35 years ago.

As others have done, Justice Douglas recalled particularly the warm human qualities that have been spoken of so eloquently in the Memorial today. He said few men he had known could concentrate on important governmental problems of the highest order for long hours and yet, when the work was finished at the end of the day, turn to the rich pleasures of congenial friends at dinner. He recalled that a favorite pastime of Justice Byrnes was to participate in singing folk songs and ballads of the South and of America in his rich tenor voice.

When Justice Byrnes came to this Court it was after an enormously active career as a leader in public life, and he found the change to the isolated life of a Justice of this Court not easy to make. But nothing in his opinions while he was on the Court would give any indication of any difficulties in the transition.

Justice Byrnes had a remarkable capacity to adjust to new responsibilities and new situations. When *Taylor* v. *Georgia* was unanimously decided in 1942, Chief Justice Stone assigned the writing of the opinion to Justice Byrnes for the very sound reason that an opinon by a leading figure from the South gave added force to a holding that the Georgia statute violated federal prohibitions against peonage. From yet another point of view, the opinion in that case reflects the broad national outlook he was prepared to take once he came to this Court and was free to lay aside sectional or regional interests and attitudes.

I had the honor to attend the services for Justice Byrnes in Columbia and heard the eloquent eulogy to him delivered by General Lucius Clay, who in 1944 became Deputy Director, under Justice Byrnes, of the Office of War Mobilization. Later they were intimately associated in Europe following our occupation of Germany. General Clay described very graphically the breadth of vision and the great skill of Justice Byrnes in the representation of American interests in Europe while he was Secretary of State. This, of course, was one of the crucial periods in the development of American foreign policy, and his handling of these problems took into account the natural tendency of every country to turn inward after a war.

Justice Byrnes, as Secretary of State and as a leading political figure in the country, was determined that the United States should not turn its back on the world after the enormous sacrifices that had brought victory. His remarkable talents as a conciliator and a negotiator that had developed through his many years in legislative work enabled him to deal with some of the most difficult and trying problems ever to confront an American statesman or diplomat. His exposition of American policy relating to postwar Europe and the pledge on behalf of the United States that we would support Western civilization and

the restoration of Europe stand out as one of the high points in his remarkable career.

General Clay, who shared some of the most trying hours in Europe in the work of Justice Byrnes as Secretary of State, recalls the same warm human qualities that so many others remember. General Clay told me that these qualities helped to sustain the Justice while he was representing the interests of our country in those difficult times.

In Europe, as in the days when Justice Byrnes sat on this Court, he would renew and refresh himself, after long hours of negotiation and intense dealing with the representatives of Russia, by laying work aside and spending an evening with friends singing the songs that are a common heritage for all Americans. The historians and biographers will chronicle the unique career of Justice Byrnes in the highest levels of all three branches of Government, but his friends will remember him for his humanity and his love of life and people.

Mr. Attorney General, Mr. Solicitor General, on behalf of the Court I thank you for your presentations here today in memory of James Byrnes. We ask you to convey to the Chairman and the Committee on Resolutions our appreciation for their efforts. The resolutions will be made part of the permanent records of this Court.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1970 edition.

Cases reported before page 801 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 801 *et seq.* are those in which orders were entered. Opinions reported on page 1201 *et seq.* are those written in chambers by individual Justices.

TABLE OF CASES CITED

TABLE OF STATUTES CITED

(A) Statutes of the United States

(B) Constitutions and Statutes of the States and the District of Columbia

(C) Foreign Statutes

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

JULY SPECIAL TERM, 1972

O'BRIEN ET AL. *v.* BROWN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND ON APPLICATION FOR STAY

Nos. 72–34 and A–23. Decided July 7, 1972*

On July 3, 1972, delegates from California and Illinois brought suits in District Court contesting their unseating, recommended by the Democratic Party's Credentials Committee, in the 1972 Democratic National Convention, scheduled to convene July 10. The District Court dismissed both actions. On July 5, the Court of Appeals reversed both decisions, granting relief to the California delegates, and denying relief to the Illinois delegates. *Held:* In view of the probability that the Court of Appeals erred in deciding the cases on the merits and in view of the traditional right of a political convention to review and act upon the recommendations of a Credentials Committee, the judgments of the Court of Appeals must be stayed. The important constitutional issues cannot be resolved within the limited time available, and no action is now taken on the petitions for certiorari.

See: 152 U. S. App. D. C. 157, 469 F. 2d 563.

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*Together with Nos. 72–35 and A–24, *Keane et al.* v. *National Democratic Party et al.*, on petition for writ of certiorari and on application for stay to the same court.

PER CURIAM.

Yesterday, July 6, 1972, the petitioners filed petitions for writs of certiorari to review judgments of the United States Court of Appeals for the District of Columbia Circuit in actions challenging the recommendations of the Credentials Committee of the 1972 Democratic National Convention regarding the seating of certain delegates to the convention that will meet three days hence.

In No. 72–35, the Credentials Committee recommended unseating 59 uncommitted delegates from Illinois on the ground, among others, that they had been elected in violation of the "slate-making" guideline adopted by the Democratic Party in 1971. A complaint challenging the Credentials Committee action was dismissed by the District Court. The Court of Appeals on review rejected the contentions of the unseated delegates that the action of the Committee violated their rights under the Constition of the United States.

In No. 72–34, the Credentials Committee recommended unseating 151 of 271 delegates from California committed by California law to Senator George McGovern under that State's "winner-take-all" primary system. The Committee concluded that the winner-take-all system violated the mandate of the 1968 Democratic National Convention calling for reform in the party delegate selection process, even though such primaries had not been explicitly prohibited by the rules adopted by the party in 1971 to implement that mandate. A complaint challenging the Credentials Committee action was dismissed by the District Court. On review the Court of Appeals concluded that the action of the Credentials Committee in this case violated the Constitution of the United States.

Accompanying the petitions for certiorari were applications to stay the judgments of the Court of Appeals pending disposition of the petitions.

The petitions for certiorari present novel questions of importance to the litigants and to the political system under which national political parties nominate candidates for office and vote on their policies and programs. The particular actions of the Credentials Committee on which the Court of Appeals ruled are recommendations that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee.

This Court is now asked to review these novel and important questions and to resolve them within the remaining days prior to the opening sessions of the convention now scheduled to be convened Monday, July 10, 1972.

The Court concludes it cannot in this limited time give to these issues the consideration warranted for final decision on the merits; we therefore take no action on the petitions for certiorari at this time.

The applications to stay the judgments of the Court of Appeals call for a weighing of three basic factors: (a) whether irreparable injury may occur absent a stay; (b) the probability that the Court of Appeals was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the judgments of the Court of Appeals.

Absent a stay, the mandate of the Court of Appeals denies to the Democratic National Convention its traditional power to pass on the credentials of the California delegates in question. The grant of a stay, on the other hand, will not foreclose the Convention's giving the respective litigants in both cases the relief they sought in federal courts.

We must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates.[1] No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. Cf. *Luther* v. *Borden,* 7 How. 1 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F. 2d 119 (CA8 1968), affirming 287 F. Supp. 794 (Minn. 1968), and cases cited; *Lynch* v. *Torquato,* 343 F. 2d 370 (CA3 1965); *Smith* v. *State Exec. Comm. of Dem. Party of Ga.,* 288 F. Supp. 371 (ND Ga. 1968). Cf. *Ray* v. *Blair,* 343 U. S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action and, if so, the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake

[1] This is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single State. Cf. *Terry* v. *Adams,* 345 U. S. 461 (1953); *Smith* v. *Allwright,* 321 U. S. 649 (1944).

final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals.

In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed.

We recognize that a stay of the Court of Appeals' judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions. If this system is to be altered by federal courts in the exercise of their extraordinary equity powers, it should not be done under the circumstances and time pressures surrounding the actions brought in the District Court, and the expedited review in the Court of Appeals and in this Court.[2]

The applications for stays of the judgments of the Court of Appeals are granted.

MR. JUSTICE BRENNAN is of the view that in the limited time available the Court cannot give these difficult and important questions consideration adequate for

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[2] Argument was had and the case decided in the District Court on July 3; the Court of Appeals entered its judgment July 5. Papers were filed here July 6.

their proper resolution. He therefore concurs in the grant of the stays pending action by the Court on the petitions for certiorari.

MR. JUSTICE WHITE would deny the applications for stays.

MR. JUSTICE DOUGLAS, dissenting.

I would deny the stays and deny the petitions for certiorari. The grant of the stays is, with all respect, an abuse of the power to grant one. The petitions for certiorari will not be voted on until October, at which time everyone knows the cases will be moot. So the action granting the stays is an oblique and covert way of deciding the merits. If the merits are to be decided, the cases should be put down for argument. As MR. JUSTICE MARSHALL has shown, the questions are by no means frivolous. The lateness of the hour before the Convention and the apparently appropriate action by the Court of Appeals on the issues combine to make a denial of the stays and a denial of the petitions the only responsible action we should take without oral argument.

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

These two separate actions challenge the exclusion from the Democratic National Convention by the party's Credentials Committee of 151 delegates from the State of California and 59 delegates from the State of Illinois, all of whom were selected as delegates as a result of primary elections in their respective States. The excluded delegates allege, in essence, that the refusal of the party to accept them as delegates denies them due process, and denies the voters who elected them their

right to full participation in the electoral process as guaranteed by the United States Constitution.[1]

Two assertions are central to the challenge made by the delegates from California. First, they contend that under California's winner-take-all primary election law, which the Democratic Party explicitly approved prior to the 1972 primary election,[2] and which the California voters relied on in casting their ballots, they are validly elected delegates committed to the presidential candidacy of Senator George McGovern. Second, they claim that after all of the presidential candidates who were on the ballot in California had planned and carried out their campaigns relying on the validity of the State's election laws, and after all votes had been cast in the expectation that the winner of the primary would command the entire California delegation, the Credentials Committee changed the party's rules and reneged on the party's earlier approval of the California electoral system. The delegates contend that, in so doing, the committee and the party impaired the rights of both voters and duly elected delegates in violation of the Fourteenth Amendment.[3]

The Illinois delegates contend that they were excluded on the ground that they were "selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in

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[1] While the delegates couch their arguments in various ways, all of the arguments boil down to these two: *i. e.*, they have been denied due process and the voters who elected them have been denied an opportunity to vote for the candidate or delegate of their choice.

[2] This approval was given in the form of a written communication from the Commission on Party Structure and Delegate Selection to the Democratic National Committeeman from California.

[3] A hearing officer found merit in the delegates' claims, but he was reversed by the Credentials Committee.

Chicago and specifically and clearly identifiable as the party apparatus in [certain districts], to the exclusion of other candidates not favored by the organization, and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate." [4] They argue that the restrictions placed by the rules on party officials violate their rights under the First and Fourteenth Amendments. It is also suggested that another reason why the delegates were excluded was that their delegation had an insufficient number of Negroes, women, and representatives of certain other identifiable classes of persons. This is alleged to be establishment of a "quota" system in violation of the Fourteenth Amendment.[5]

The United States District Court for the District of Columbia denied both sets of plaintiffs relief on the ground that there was no justiciable question before it.[6] The United States Court of Appeals reversed the District Court and held that the questions presented in both suits were justiciable. It unanimously rejected the challenge made by the Illinois delegates, and by a 2–1 vote upheld the claim of the delegates from California that the belated change in the rules constituted a denial of due process of law.

The losing parties in the Court of Appeals seek review, and today this Court grants partial relief in the form of a stay of the judgments of the Court of Appeals. The Court holds, in effect, that even if the District

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[4] Report of Hearing Officer 2, adopted by Credentials Committee, June 30, 1972.

[5] See Report of Hearing Officer 3–4.

[6] The District Court Judge indicated that, in his view, a quota system would raise serious constitutional questions. Two judges of the Court of Appeals found that the rules did not require any quotas. Judge MacKinnon disagreed, believing that the rules did establish a quota and that they were, therefore, unconstitutional.

Court was incorrect in ruling that the issues before it were "political questions" not properly justiciable in a court of law, the posture and timing of these cases require that federal courts defer to the Democratic National Convention for resolution of the underlying disputes. I cannot agree.

In each of these cases, the claim is made that the Credentials Committee has impaired the right of Democratic voters to have their votes counted in a presidential primary election. The related claim is also made that the committee has deprived the delegates themselves of their right to participate in the convention, by methods that deny them due process of law. Both these claims are entitled to judicial resolution, and now is the most appropriate time for them to be heard.

If these cases present justiciable controversies, then we are faced with a decision as to the most appropriate time to resolve them. There would appear to be three available choices: now; after the Credentials Committee's report is either accepted or rejected by the national convention; or after the convention is over.

There can be no doubt, in my view, that there is, at the present time, a live controversy between the excluded delegates and the Democratic National Committee. Nevertheless, because this controversy may vanish at the national convention, it is suggested that judicial intervention is premature at this point. This may be correct with respect to a decision on whether to grant injunctive relief, but not with respect to the appropriateness of a declaratory judgment.

Should this Court, or a lower federal court, be compelled to wait until the national convention makes a final decision on whether it will seat the delegates excluded by the Credentials Committee, it may never again be practicable to consider the important constitutional issues presented. Once the convention rules, we will

be faced with the Hobson's choice between refusing to hear the federal questions at all, or hearing them and possibly stopping the Democratic convention in midstream. This would be a far more serious intrusion into the democratic process than any we are asked to make at this time.

If we wait even longer—until the national convention is over—and ultimately sustain the delegates' claims on the merits, we would have no choice but to declare the convention null and void and to require that it be repeated. The dispute in these cases concerns the right to *participate* in the machinery to elect the President of the United States. If participation is denied, there is no possible way for the underlying disputes to become moot. The drastic remedy that delay might require should be avoided at all costs.

It is, therefore, obvious to me that now is the time for us to act. It is significant in this regard that the delegates request declaratory, as well as injunctive, relief. A declaratory judgment is a milder remedy than an injunction, cf. *Perez* v. *Ledesma,* 401 U. S. 82, 111 (1971) (BRENNAN, J., concurring in part and dissenting in part). It is a particularly appropriate remedy under these circumstances, because it can protect any constitutional rights that may be threatened at the same time that the premature issuance of an injunction is avoided. Hence, I believe that we should consider the prayer for declaratory relief and that we should do so now.

In granting the stays, then, the Court seems to rely at least in part on the view that the claims are not yet ripe for decision, a view which I cannot accept for the reasons stated above. In addition, the Court suggests that judicial relief will be inappropriate even after the full convention has ruled on these claims. The point appears to be that, quite apart from the mere matter of timing, the cases present a "political question,"

or are otherwise nonjusticiable, because they concern the internal decisionmaking of a political party. That argument misconceives the nature and the purpose of the doctrine. Half a century ago, Mr. Justice Holmes, writing for a unanimous Court, made it clear that a question is not "political," in the jurisdictional sense, merely because it involves the operations of a political party:

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White,* 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court. *Wiley* v. *Sinkler,* 179 U. S. 58, 64, 65. *Giles* v. *Harris,* 189 U. S. 475, 485. See also Judicial Code, § 24 (11), (12), (14). Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092. If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result." *Nixon* v. *Herndon,* 273 U. S. 536, 540 (1927).

The doctrine of "political questions" was fashioned to deal with a very different problem, which has nothing to do with this case. As the Court said in *Baker* v. *Carr,* 369 U. S. 186 (1962), the basic characteristic of a political question is that its resolution would lead a court into conflict with one or more of the coordinate branches of government; courts decline to decide political questions out of deference to the separation of powers. 369 U. S., at 217; see *Powell* v. *McCormack,* 395 U. S. 486, 518–549 (1969). Neither the Executive nor the

Legislative Branch of Government purports to have jurisdiction over the claims asserted in these cases. Apart from the judicial forum, only one other forum has been suggested—the full convention of the National Democratic Party—and that is most assuredly not a coordinate branch of government to which the federal courts owe deference within the meaning of the separation of powers or the political-question doctrine.

Moreover, it cannot be said that "judicially manageable standards" are lacking for the determinations required by these cases, 369 U. S., at 217. The Illinois challenge requires the Court to determine whether certain rules adopted by the National Party for the selection of delegates violate the First and Fourteenth Amendment rights of Illinois voters and, if the rules are valid, whether they were correctly applied to the facts of the case. The California challenge requires the Court to determine whether the votes of party members were counted in accordance with the rules announced prior to the election and, if not, whether a change in the rules after the election violates the constitutional rights of the voters or the candidates. Both these determinations are well within the range of questions regularly presented to courts for decision, and capable of judicial resolution.

A second threshold objection, however, has been raised as an obstacle to judicial determination of these claims. Even if the actions of a political party are not inherently nonjusticiable, it is suggested that the Constitution places few, if any, restrictions on the actions of a political party, and none of those restrictions are even arguably implicated by any of the allegations here. On this view, then, the plaintiffs below failed to state a claim on which relief can be granted. I disagree.

1. First, I agree with the Court of Appeals that the action of the Party in these cases was governmental

action, and therefore subject to the requirements of due process. The primary election was, by state law, the first step in a process designed to select a Democratic candidate for President; the State will include electors pledged to that candidate on the ballot in the general election. The State is intertwined in the process at every step, not only authorizing the primary but conducting it, and adopting its result for use in the general election. In these circumstances, the primary must be regarded as an integral part of the general election, see *United States* v. *Classic,* 313 U. S. 299 (1941), quoted *infra,* at 15–16, and the rules that regulate the primary must be held to the standards of elementary due process.

It is suggested that California, at least, cannot be charged with responsibility for the rules that are challenged here, because California by law sought (albeit unsuccessfully) to prohibit the Party from adopting those rules. That argument is somewhat disingenuous, however, unless it can seriously be contended that California will decline to recognize on its ballot in the general election the nominee of the Democratic convention. For so long as the State recognizes and adopts the fruits of the primary as it was actually conducted, then the State has made that primary an integral part of the election process, and infused the primary with state action, no matter how vociferously it may protest. A State cannot render the action of officials "private" and strip it of its character as state action, merely by disapproving that action. *Monroe* v. *Pape,* 365 U. S. 167, 172–187 (1961).

Thus, when the Party deprived the candidates of their status as delegates, it was obliged to do so in a manner consistent with the demands of due process. Because the Court does not reach the question, I likewise refrain from expressing my views on the merits of the due process challenge in either case. It is sufficient to say that beyond all

doubt, these claimants are entitled to a judicial resolution of their claim.

2. Even if the action of the Credentials Committee did not deny the delegates due process, petitioners in these cases claim that it impaired the federally protected right of voters to vote, and to have their votes counted, in the presidential primary election.[7]

It is, of course, well established that the Constitution protects the right to vote in federal or state elections without impairment on the basis of race or color, Const. Amdt. XV, or on the basis of any other invidious classification, *e. g., Baker* v. *Carr,* 369 U. S. 186 (1962); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). With respect to federal elections, however, the right to vote enjoys a broader constitutional protection. In *Oregon* v. *Mitchell,* 400 U. S. 112 (1970), Mr. Justice Black cited a long line of precedents for the proposition that Congress has ultimate supervisory power over all congressional elections, based on Art. I, § 4, of the Constitution. *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, supra.* On the basis of these precedents, it is be-

[7] The alleged impairment of that right may be regarded as state action, as above, and hence subject to challenge under 42 U. S. C. § 1983. Alternatively, it may be regarded as the action of the Federal Government, on the theory that Congress has the ultimate authority over presidential elections, and has acquiesced in the administration of the primary election process by the national political parties; in that case it may be subject to challenge on the theory of an implied remedy for a federal deprivation of constitutional rights, see *Bivens* v. *Six Unknown Agents,* 403 U. S. 388 (1971). Finally, it may be regarded as private action that interferes with a federally protected right; in that case the existence of a right of action may depend on the question whether the claims can be brought within the terms of 42 U. S. C. § 1985 (3), which protects certain federal rights against certain kinds of private interference, see *Griffin* v. *Breckenridge,* 403 U. S. 88 (1971).

yond dispute that the right to vote in congressional elections is a federally secured right.

Mr. Justice Black went on to argue that presidential elections have the same constitutional status: "It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." 400 U. S., at 124. To support this conclusion, he relied on Art. II, § 1, and its judicial interpretation in *Burroughs* v. *United States,* 290 U. S. 534 (1934), and also on "the very concept of a supreme national government with national officers." 400 U. S., at 124 n. 7. On the basis of *Oregon* v. *Mitchell,* then, in which Mr. Justice Black's analysis was decisive, the right to vote in national elections, both congressional and presidential, is secured by the Federal Constitution.

Moreover, federal protection of the right to vote in federal elections extends not only to the general election, but to the primary election as well. In *United States* v. *Classic, supra,* this Court sustained an indictment charging a conspiracy "to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast." *Id.,* at 308. It was critical to the decision to hold, first, that the Constitution protects the right to vote in federal congressional elections, and, second, that the right to vote in the general election includes the right to vote in the primary.

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the

> right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." *Id.*, at 318.

That reasoning has equal force in the case of a presidential election. Where the primary is by law made an integral part of the election machinery, then the right to vote at that primary is protected just as is the right to vote at the election. In the cases before this Court, it is claimed that the presidential primary is an integral part of the election machinery, and that the right to vote in the presidential primary has been impaired. That claim should be heard and decided on its merits, certainly not by the use of the stay mechanism in lieu of granting certiorari and plenary consideration.

It is unfortunate that cases like these must be decided quickly or not at all, but sometimes that cannot be avoided. Where there are no substantial facts in dispute, and where the allegation is made that a right as fundamental as the right to participate in the process leading to the election of the President of the United States is threatened, I believe that our duty lies in making decisions, not avoiding them.

I would therefore deny the applications for stays.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1972

UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE)

No. 9, Orig. Decided May 31, 1960—Final Decree Entered December 12, 1960—Supplemental Decrees Entered December 13, 1965, December 20, 1971, and October 16, 1972

The motion by the State of Louisiana for the entry of a supplemental decree as to the United States is granted (*post,* p. 909), and a supplemental decree is entered.

Opinions reported: 363 U. S. 1 and 394 U. S. 11; final decree reported: 364 U. S. 502; supplemental decrees reported: 382 U. S. 288 and 404 U. S. 388.

Supplemental Decree

For the purpose of giving effect to the conclusions of this Court as stated in its opinion, announced May 31, 1960, 363 U. S. 1, and other opinions or decrees entered by this Court on December 12, 1960, 364 U. S. 502; on December 13, 1965, 382 U. S. 288; on March 3, 1969, 394 U. S. 11; and on December 20, 1971, No. 9, Original, 404 U. S. 388.

IT IS ORDERED, ADJUDGED AND DECREED:

1. With the exceptions provided by § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313 (1964 ed.), the State of Louisiana is entitled, as against the United States, to all the lands, minerals and other natural

resources lying more than one foot landward of the lines described in paragraph 2 hereof and seaward of the ordinary low-water mark on the Louisiana shore, provided that the United States is not hereby required to relinquish any monies presently held by it for offset purposes solely in connection with accounting problems which have heretofore been deferred by the parties pending resolution of the larger disputes between them, without prejudice to the right of the State of Louisiana to contest either the substance of the United States's offset claims or its right to withhold monies in connection with them.

2. The lines referred to in paragraph 1 hereof are described by coordinates in the Louisiana Plane Coordinate System, South Zone, in two segments, as follows:

Segment I

South and west of the Mississippi-Louisiana border to grid line Y = 158695, north of West Bay,

	X	Y
BEGINNING AT	2769357	575650
BY STRAIGHT LINE TO	2790258	526390
BY ARC CENTERED AT	2779032	512013
TO	2791385	525434
BY STRAIGHT LINE TO	2793119	523838
BY ARC CENTERED AT	2780766	510417
TO	2794594	522313
BY STRAIGHT LINE TO	2795887	520810
BY ARC CENTERED AT	2782059	508914
TO	2796579	519954
BY STRAIGHT LINE TO	2799209	516495
BY ARC CENTERED AT	2784689	505455
TO	2800441	514653
BY STRAIGHT LINE TO	2804270	508096
BY ARC CENTERED AT	2788518	498898
TO	2804495	507699
BY STRAIGHT LINE TO	2806028	504916
BY ARC CENTERED AT	2790051	496115
TO	2807014	502822
BY STRAIGHT LINE TO	2808653	498677
BY ARC CENTERED AT	2791690	491970
TO	2809151	497245

	X	Y
BY STRAIGHT LINE TO	2812250	486987
BY ARC CENTERED AT	2794789	481712
TO	2812519	485996
BY STRAIGHT LINE TO	2813932	480148
BY ARC CENTERED AT	2796202	475864
TO	2814262	478425
BY STRAIGHT LINE TO	2815269	471324
BY ARC CENTERED AT	2797209	468763
TO	2815426	469688
BY STRAIGHT LINE TO	2815673	464823
BY ARC CENTERED AT	2797456	463898
TO	2815697	463895
BY STRAIGHT LINE TO	2815696	458116
BY ARC CENTERED AT	2797455	458119
TO	2815657	456928
BY STRAIGHT LINE TO	2815269	450999
BY ARC CENTERED AT	2797067	452190
TO	2815171	449960
BY STRAIGHT LINE TO	2813957	440103
BY ARC CENTERED AT	2795853	442333
TO	2813809	439123
BY STRAIGHT LINE TO	2812678	432796
BY ARC CENTERED AT	2794722	436006
TO	2812419	431584
BY STRAIGHT LINE TO	2810957	425733
BY ARC CENTERED AT	2793260	430155
TO	2810699	424807
BY STRAIGHT LINE TO	2807854	415530
BY ARC CENTERED AT	2790415	420878
TO	2807572	414684
BY STRAIGHT LINE TO	2805322	408452
BY ARC CENTERED AT	2788165	414646
TO	2805227	408196
BY STRAIGHT LINE TO	2803786	404384
BY ARC CENTERED AT	2786724	410834
TO	2803319	403263
BY STRAIGHT LINE TO	2799845	395648
BY ARC CENTERED AT	2783250	403219
TO	2798971	393968
BY STRAIGHT LINE TO	2795394	387889
BY ARC CENTERED AT	2779673	397140
TO	2795311	387750
BY STRAIGHT LINE TO	2793560	384834
BY ARC CENTERED AT	2777922	394224
TO	2792249	382934
BY STRAIGHT LINE TO	2790814	381113
BY ARC CENTERED AT	2776487	392403
TO	2789360	379480

	X	Y
BY ARC CENTERED AT	2774670	390293
TO	2788262	378129
BY STRAIGHT LINE TO	2786553	375045
BY ARC CENTERED AT	2770599	383887
TO	2785045	372750
BY STRAIGHT LINE TO	2783942	371319
BY STRAIGHT LINE TO	2783792	371062
BY ARC CENTERED AT	2768031	380244
TO	2780548	366976
BY STRAIGHT LINE TO	2775735	360553
BY ARC CENTERED AT	2761138	371491
TO	2775111	359766
BY STRAIGHT LINE TO	2773031	357287
BY ARC CENTERED AT	2757465	366796
TO	2771721	355417
BY STRAIGHT LINE TO	2770673	354054
BY STRAIGHT LINE TO	2770505	353847
BY ARC CENTERED AT	2755015	363480
TO	2767788	350458
BY STRAIGHT LINE TO	2761994	344775
BY ARC CENTERED AT	2749221	357797
TO	2760703	343624
BY STRAIGHT LINE TO	2757791	341265
BY ARC CENTERED AT	2746309	355438
TO	2756022	339999
BY STRAIGHT LINE TO	2754136	338812
BY STRAIGHT LINE TO	2742173	323079
BY ARC CENTERED AT	2727653	334120
TO	2741983	322834
BY STRAIGHT LINE TO	2741182	321817
BY ARC CENTERED AT	2726852	333103
TO	2738042	318698
BY STRAIGHT LINE TO	2736381	317408
BY STRAIGHT LINE TO	2736060	316935
BY STRAIGHT LINE TO	2732627	311249
BY ARC CENTERED AT	2717012	320677
TO	2731416	309486
BY STRAIGHT LINE TO	2729640	307200
BY ARC CENTERED AT	2715236	318391
TO	2728702	306088
BY STRAIGHT LINE TO	2728099	305428
BY ARC CENTERED AT	2714633	317731
TO	2725197	302861
BY STRAIGHT LINE TO	2723888	301931
BY ARC CENTERED AT	2713324	316801
TO	2720770	300149
BY STRAIGHT LINE TO	2719218	299455
BY ARC CENTERED AT	2711772	316107

	X	Y
TO	2714238	298034
BY STRAIGHT LINE TO	2704480	294684
BY STRAIGHT LINE TO	2704099	293666
BY ARC CENTERED AT	2687014	300054
TO	2701338	288761
BY STRAIGHT LINE TO	2699382	286280
BY ARC CENTERED AT	2685058	297573
TO	2697436	284175
BY STRAIGHT LINE TO	2699302	266715
BY ARC CENTERED AT	2688235	252215
TO	2704468	260534
BY ARC CENTERED AT	2689305	250395
TO	2707507	251577
BY ARC CENTERED AT	2700735	234640
TO	2717908	240788
BY ARC CENTERED AT	2701500	232820
TO	2719022	237890
BY ARC CENTERED AT	2707635	223640
TO	2721632	235337
BY STRAIGHT LINE TO	2736873	228413
BY ARC CENTERED AT	2738320	210230
TO	2745585	226961
BY ARC CENTERED AT	2738938	209975
TO	2749646	224742
BY ARC CENTERED AT	2750755	206535
TO	2759837	222354
BY ARC CENTERED AT	2755325	204680
TO	2773229	201192
BY ARC CENTERED AT	2755178	203815
TO	2770763	194337
BY ARC CENTERED AT	2754100	186915
TO	2771780	191404
BY ARC CENTERED AT	2754263	186316
TO	2772100	182502
BY ARC CENTERED AT	2753885	183460
TO	2765449	169354
BY ARC CENTERED AT	2752470	182170
TO	2761213	166161
BY ARC CENTERED AT	2751045	181305
TO	2752202	163101
BY ARC CENTERED AT	2750586	181270
TO	2749611	163055
BY ARC CENTERED AT	2736662	175902
TO	2748316	161869
BY ARC CENTERED AT	2734720	174030
TO	2747824	161341
BY STRAIGHT LINE TO	2746249	159715
BY ARC CENTERED AT	2728153	162005

	X	Y
TO	2746094	158715
BY STRAIGHT LINE TO	2745156	153600
BY ARC CENTERED AT	2727215	156890
TO	2745054	153083
BY ARC CENTERED AT	2726951	150846
TO	2743622	143444
BY ARC CENTERED AT	2726105	148530
TO	2731258	131033
BY STRAIGHT LINE TO	2716731	112786
BY ARC CENTERED AT	2702461	124148
TO	2716719	112772
BY ARC CENTERED AT	2699435	118600
TO	2710698	104252
BY ARC CENTERED AT	2697850	117200
TO	2683320	106173
BY STRAIGHT LINE TO	2682980	106621
BY ARC CENTERED AT	2697510	117648
TO	2679799	113283
BY STRAIGHT LINE TO	2679589	114135
BY ARC CENTERED AT	2697300	118500
TO	2679155	116635
BY ARC CENTERED AT	2685325	133800
TO	2670977	122536
BY STRAIGHT LINE TO	2670552	122781
BY STRAIGHT LINE TO	2666743	124295
BY ARC CENTERED AT	2673482	141245
TO	2665719	124739
BY ARC CENTERED AT	2672315	141745
TO	2661428	127109
BY ARC CENTERED AT	2644940	134910
TO	2660589	125539
BY STRAIGHT LINE TO	2657484	120354
BY ARC CENTERED AT	2641835	129725
TO	2656150	118421
BY STRAIGHT LINE TO	2653860	115521
BY ARC CENTERED AT	2639545	126825
TO	2648682	111038
BY STRAIGHT LINE TO	2648610	110974
BY STRAIGHT LINE TO	2648531	110887
BY STRAIGHT LINE TO	2646419	107265
BY ARC CENTERED AT	2630660	116450
TO	2646250	106981
BY STRAIGHT LINE TO	2644270	103721
BY ARC CENTERED AT	2628680	113190
TO	2642494	101278
BY STRAIGHT LINE TO	2640182	98597
BY ARC CENTERED AT	2624995	108700
TO	2638408	96339

	X	Y
BY STRAIGHT LINE TO	2638210	96123
BY STRAIGHT LINE TO	2637530	95377
BY ARC CENTERED AT	2624045	107660
TO	2637471	95312
BY STRAIGHT LINE TO	2635351	93007
BY ARC CENTERED AT	2621925	105355
TO	2634923	92558
BY STRAIGHT LINE TO	2633653	91268
BY ARC CENTERED AT	2620655	104065
TO	2631973	89760
BY STRAIGHT LINE TO	2631344	89262
BY STRAIGHT LINE TO	2630156	87770
BY ARC CENTERED AT	2615885	99131
TO	2630068	87661
BY STRAIGHT LINE TO	2629389	86821
BY STRAIGHT LINE TO	2626027	82661
BY STRAIGHT LINE TO	2624340	80576
BY ARC CENTERED AT	2610160	92050
TO	2621555	77806
BY STRAIGHT LINE TO	2621180	77506
BY ARC CENTERED AT	2609785	91750
TO	2617996	75462
BY STRAIGHT LINE TO	2617391	75157
BY ARC CENTERED AT	2609180	91445
TO	2597416	77505
BY STRAIGHT LINE TO	2595526	79100
BY ARC CENTERED AT	2607290	93040
TO	2589664	97736
BY ARC CENTERED AT	2607455	93710
TO	2591541	102625
BY STRAIGHT LINE TO	2592751	104785
BY ARC CENTERED AT	2608665	95870
TO	2593838	106495
BY STRAIGHT LINE TO	2595167	108350
BY STRAIGHT LINE TO	2596041	109955
BY ARC CENTERED AT	2614270	110615
TO	2597233	117130
BY STRAIGHT LINE TO	2597210	155899
BY ARC CENTERED AT	2614790	160765
TO	2596949	156969
BY STRAIGHT LINE TO	2596342	158695
BY STRAIGHT LINE TO SHORE AT	2615450	157770

SEGMENT II

From the vicinity of Bayou Goreau to the vicinity

of Sabine Pass, west of grid line X = 2082361 and east of the Texas-Louisiana border,

	X	Y
BEGINNING AT	2082361	169358
BY STRAIGHT LINE TO	2081470	169553
BY ARC CENTERED AT	2085370	187372
TO	2076984	171174
BY ARC CENTERED AT	2077417	189409
TO	2071846	172040
BY STRAIGHT LINE TO	2070630	172430
BY ARC CENTERED AT	2076201	189799
TO	2064747	175603
BY STRAIGHT LINE TO	2063841	176334
BY ARC CENTERED AT	2075295	190530
TO	2059951	180668
BY ARC CENTERED AT	2071131	195080
TO	2058843	181599
BY ARC CENTERED AT	2062055	199555
TO	2057134	181991
BY STRAIGHT LINE TO	2053779	182931
BY ARC CENTERED AT	2058700	200495
TO	2053474	183019
BY STRAIGHT LINE TO	2052967	183053
BY STRAIGHT LINE TO	2051871	183006
BY ARC CENTERED AT	2051090	201230
TO	2050845	182991
BY STRAIGHT LINE TO	2048985	183016
BY ARC CENTERED AT	2049230	201255
TO	2048033	183054
BY STRAIGHT LINE TO	2044865	183262
BY STRAIGHT LINE TO	2041482	183446
BY ARC CENTERED AT	2042475	201660
TO	2037472	184119
BY STRAIGHT LINE TO	2033139	185355
BY STRAIGHT LINE TO	2032934	185387
BY ARC CENTERED AT	2035775	203405
TO	2029791	186174
BY STRAIGHT LINE TO	2027401	187004
BY ARC CENTERED AT	2033385	204235
TO	2026834	187211
BY STRAIGHT LINE TO	2023510	188491
BY STRAIGHT LINE TO	2020959	189327
BY ARC CENTERED AT	2026640	206660
TO	2019190	190010
BY STRAIGHT LINE TO	2016613	191163
BY STRAIGHT LINE TO	2015796	191414
BY ARC CENTERED AT	2021155	208850

	X	Y
TO	2013823	192148
BY STRAIGHT LINE TO	2010121	193773
BY ARC CENTERED AT	2017453	210475
TO	2007660	195086
BY STRAIGHT LINE TO	2006450	195856
BY ARC CENTERED AT	2016243	211245
TO	2002812	198903
BY STRAIGHT LINE TO	2001329	200516
BY STRAIGHT LINE TO	1998627	203119
BY STRAIGHT LINE TO	1996877	204647
BY ARC CENTERED AT	2008873	218388
TO	1994484	207177
BY STRAIGHT LINE TO	1993669	208223
BY ARC CENTERED AT	2008058	219434
TO	1992024	210737
BY STRAIGHT LINE TO	1991723	211291
BY STRAIGHT LINE TO	1991392	211653
BY STRAIGHT LINE TO	1987527	215292
BY ARC CENTERED AT	2000030	228573
TO	1985881	217061
BY STRAIGHT LINE TO	1984419	218858
BY ARC CENTERED AT	1998568	230370
TO	1982726	221329
BY STRAIGHT LINE TO	1981279	223864
BY ARC CENTERED AT	1987818	240892
TO	1975782	227186
BY ARC CENTERED AT	1987371	241272
TO	1972054	231367
BY STRAIGHT LINE TO	1937446	246505
BY ARC CENTERED AT	1933172	264238
TO	1920501	251117
BY ARC CENTERED AT	1924399	268936
TO	1916888	252314
BY ARC CENTERED AT	1914373	270380
TO	1900989	257987
BY ARC CENTERED AT	1896827	275747
TO	1895100	257588
BY ARC CENTERED AT	1882306	270590
TO	1867537	259884
BY ARC CENTERED AT	1872418	277460
TO	1858534	265630
BY ARC CENTERED AT	1843467	275912
TO	1848729	258447
BY ARC CENTERED AT	1835344	270839
TO	1841538	253682
BY ARC CENTERED AT	1834019	270301
TO	1817077	263541
BY ARC CENTERED AT	1833527	271423

	X	Y
TO	1815531	274401
BY ARC CENTERED AT	1820994	291804
TO	1808997	278064
BY ARC CENTERED AT	1809845	296285
TO	1792971	289357
BY ARC CENTERED AT	1791584	307545
TO	1773422	305849
BY ARC CENTERED AT	1783067	321331
TO	1771284	307407
BY ARC CENTERED AT	1782391	321876
TO	1769317	309156
BY ARC CENTERED AT	1778769	324757
TO	1763172	315299
BY ARC CENTERED AT	1763190	333540
TO	1762008	315338
BY STRAIGHT LINE TO	1761238	315388
BY ARC CENTERED AT	1762420	333590
TO	1761004	315404
BY ARC CENTERED AT	1758630	333490
TO	1751585	316665
BY STRAIGHT LINE TO	1749527	316597
BY STRAIGHT LINE TO	1745678	316238
BY STRAIGHT LINE TO	1741757	315745
BY STRAIGHT LINE TO	1738098	314155
BY ARC CENTERED AT	1730831	330886
TO	1737269	313819
BY STRAIGHT LINE TO	1733962	312572
BY STRAIGHT LINE TO	1733065	312110
BY ARC CENTERED AT	1724713	328326
TO	1729983	310863
BY STRAIGHT LINE TO	1729557	310735
BY STRAIGHT LINE TO	1727510	309315
BY ARC CENTERED AT	1717114	324303
TO	1726647	308752
BY STRAIGHT LINE TO	1721463	305574
BY STRAIGHT LINE TO	1721351	305467
BY ARC CENTERED AT	1708756	318661
TO	1715565	301739
BY STRAIGHT LINE TO	1713599	300948
BY ARC CENTERED AT	1706790	317870
TO	1711471	300240
BY STRAIGHT LINE TO	1707761	299255
BY ARC CENTERED AT	1703080	316885
TO	1706765	299020
BY STRAIGHT LINE TO	1704365	298525
BY ARC CENTERED AT	1700680	316390
TO	1702465	298237
BY STRAIGHT LINE TO	1698144	297812

	X	Y
BY ARC CENTERED AT	1696359	315965
TO	1696239	297725
BY STRAIGHT LINE TO	1692448	297750
BY ARC CENTERED AT	1692568	315990
TO	1691302	297793
BY STRAIGHT LINE TO	1688714	297973
BY ARC CENTERED AT	1689980	316170
TO	1687709	298071
BY STRAIGHT LINE TO	1684999	298411
BY ARC CENTERED AT	1687270	316510
TO	1683393	298686
BY STRAIGHT LINE TO	1674668	300584
BY ARC CENTERED AT	1678545	318408
TO	1674182	300697
BY STRAIGHT LINE TO	1670983	301485
BY ARC CENTERED AT	1675346	319196
TO	1670472	301619
BY STRAIGHT LINE TO	1666144	302819
BY ARC CENTERED AT	1671018	320396
TO	1665216	303103
BY STRAIGHT LINE TO	1663698	303612
BY STRAIGHT LINE TO	1662427	303960
BY STRAIGHT LINE TO	1661678	304151
BY STRAIGHT LINE TO	1659494	304616
BY ARC CENTERED AT	1663290	322457
TO	1659476	304620
BY STRAIGHT LINE TO	1658120	304910
BY ARC CENTERED AT	1658887	323134
TO	1656354	305070
BY ARC CENTERED AT	1655896	323305
TO	1652650	305356
BY STRAIGHT LINE TO	1650184	305802
BY ARC CENTERED AT	1653430	323751
TO	1648635	306152
BY STRAIGHT LINE TO	1647051	306584
BY ARC CENTERED AT	1649308	324684
TO	1643681	307333
BY STRAIGHT LINE TO	1636292	308607
BY STRAIGHT LINE TO	1627130	309807
BY STRAIGHT LINE TO	1620757	310390
BY ARC CENTERED AT	1622420	328555
TO	1619895	310490
BY STRAIGHT LINE TO	1614565	311235
BY ARC CENTERED AT	1617090	329300
TO	1613148	311491
BY STRAIGHT LINE TO	1611814	311591
BY ARC CENTERED AT	1613190	329780
TO	1609960	311828

	X	Y
BY STRAIGHT LINE TO	1606070	312528
BY ARC CENTERED AT	1609300	330480
TO	1604702	312829
BY STRAIGHT LINE TO	1604290	312866
BY ARC CENTERED AT	1605965	331030
TO	1601325	313389
BY STRAIGHT LINE TO	1601195	313403
BY ARC CENTERED AT	1603140	331540
TO	1598672	313855
BY STRAIGHT LINE TO	1596370	314437
BY STRAIGHT LINE TO	1596179	314483
BY STRAIGHT LINE TO	1592424	315063
BY ARC CENTERED AT	1595210	333090
TO	1591479	315235
BY ARC CENTERED AT	1594075	333290
TO	1589694	315583
BY ARC CENTERED AT	1593010	333520
TO	1589433	315634
BY STRAIGHT LINE TO	1588108	315899
BY ARC CENTERED AT	1591685	333785
TO	1585928	316477
BY STRAIGHT LINE TO	1584286	317023
BY STRAIGHT LINE TO	1582201	317563
BY ARC CENTERED AT	1586780	335220
TO	1581596	317732
BY STRAIGHT LINE TO	1576266	319312
BY ARC CENTERED AT	1581450	336800
TO	1575360	319606
BY STRAIGHT LINE TO	1570080	321476
BY ARC CENTERED AT	1576170	338670
TO	1569889	321545
BY STRAIGHT LINE TO	1565349	323210
BY ARC CENTERED AT	1571630	340335
TO	1563529	323992
BY STRAIGHT LINE TO	1563104	324202
BY STRAIGHT LINE TO	1561073	324994
BY ARC CENTERED AT	1567695	341990
TO	1558882	326020
BY STRAIGHT LINE TO	1558879	326021
BY ARC CENTERED AT	1564160	343480
TO	1556225	327056
BY STRAIGHT LINE TO	1556066	327133
BY STRAIGHT LINE TO	1553511	327894
BY ARC CENTERED AT	1558720	345375
TO	1551769	328511
BY STRAIGHT LINE TO	1549575	329415
BY ARC CENTERED AT	1553840	347150
TO	1546081	330642

	X	Y
BY STRAIGHT LINE TO	1543911	331662 .....
BY ARC CENTERED AT	1551670	348170 .....
TO	1541402	333094 .....
BY STRAIGHT LINE TO	1540011	333646 .....
BY ARC CENTERED AT	1546740	350600 .....
TO	1537927	334630 .....
BY STRAIGHT LINE TO	1531757	337418 .....
BY ARC CENTERED AT	1539270	354040 .....
TO	1530263	338178 .....
BY STRAIGHT LINE TO	1527498	339748 .....
BY ARC CENTERED AT	1536505	355610 .....
TO	1526511	340351 .....
BY STRAIGHT LINE TO	1526495	340356 .....
BY ARC CENTERED AT	1532515	357575 .....
TO	1523959	341466 .....
BY ARC CENTERED AT	1531240	358190 .....
TO	1522813	342013 .....
BY STRAIGHT LINE TO	1516478	345313 .....
BY STRAIGHT LINE TO	1505572	350398 .....
BY ARC CENTERED AT	1513280	366930 .....
TO	1504778	350792 .....
BY STRAIGHT LINE TO	1493968	356487 .....
BY ARC CENTERED AT	1502470	372625 .....
TO	1493740	356609 .....
BY STRAIGHT LINE TO	1488240	359607 .....
BY STRAIGHT LINE TO	1483855	361809 .....
BY ARC CENTERED AT	1492040	378110 .....
TO	1483320	362089 .....
BY STRAIGHT LINE TO	1481464	363099 .....
BY STRAIGHT LINE TO	1472522	367321 .....
BY STRAIGHT LINE TO	1464632	370389 .....
BY ARC CENTERED AT	1471240	387390 .....
TO	1464433	370467 .....
BY STRAIGHT LINE TO	1461367	371700 .....
BY STRAIGHT LINE TO	1455041	373829 .....
BY STRAIGHT LINE TO	1449142	375498 .....
BY ARC CENTERED AT	1454105	393050 .....
TO	1447394	376089 .....
BY STRAIGHT LINE TO	1443224	377739 .....
BY ARC CENTERED AT	1449935	394700 .....
TO	1442769	377926 .....
BY STRAIGHT LINE TO	1437906	380003 .....
BY STRAIGHT LINE TO	1435142	381048 .....
BY STRAIGHT LINE TO	1431147	382502 .....
BY ARC CENTERED AT	1431465	400740 .....
TO	1426148	383291 .....
BY STRAIGHT LINE TO	1423703	384036 .....
BY ARC CENTERED AT	1429020	401485 .....

	X	Y
TO	1421665	384793
BY STRAIGHT LINE TO	1421218	384903
BY ARC CENTERED AT	1425600	402610
TO	1417428	386302
BY STRAIGHT LINE TO	1411695	388054
BY STRAIGHT LINE TO	1406675	389181
BY STRAIGHT LINE TO	1400158	390267
BY STRAIGHT LINE TO	1395815	390681
BY STRAIGHT LINE TO	1390919	390971
BY ARC CENTERED AT	1392000	409180
TO	1390575	390995
BY STRAIGHT LINE TO	1386958	390977
BY STRAIGHT LINE TO	1385797	390942
BY STRAIGHT LINE TO	1383281	390516
BY ARC CENTERED AT	1380235	408500
TO	1382827	390444
BY STRAIGHT LINE TO	1380530	390115
BY STRAIGHT LINE TO	1379793	389887
BY ARC CENTERED AT	1363392	397870
TO	1364288	379651
BY STRAIGHT LINE TO	1363312	379603
BY ARC CENTERED AT	1362416	397822
TO	1348021	386619
BY STRAIGHT LINE TO	1347740	386685
BY STRAIGHT LINE TO	1339580	387874
BY STRAIGHT LINE TO	1332311	388694
BY STRAIGHT LINE TO	1328041	388886
BY STRAIGHT LINE TO	1323345	388897
BY STRAIGHT LINE TO	1318624	388814
BY STRAIGHT LINE TO	1313961	388548
BY STRAIGHT LINE TO	1309176	388114
BY STRAIGHT LINE TO	1299212	386972
BY STRAIGHT LINE TO	1294264	386189
BY ARC CENTERED AT	1291413	404205
TO	1293948	386141
BY STRAIGHT LINE TO	1288689	385403
BY ARC CENTERED AT	1286154	403467
TO	1288273	385350
BY STRAIGHT LINE TO	1282879	384719
BY ARC CENTERED AT	1280760	402836
TO	1282343	384664
BY STRAIGHT LINE TO	1277050	384203
BY ARC CENTERED AT	1275467	402375
TO	1276974	384197
BY STRAIGHT LINE TO	1266567	383334
BY STRAIGHT LINE TO	1261754	382855
BY STRAIGHT LINE TO	1256845	382176
BY STRAIGHT LINE TO	1252082	381444

	X	Y
BY STRAIGHT LINE TO	1247120	380489
BY ARC CENTERED AT	1243670	398400
TO	1246626	380401
BY STRAIGHT LINE TO	1243866	379947
BY STRAIGHT LINE TO	1240511	379144
BY STRAIGHT LINE TO	1238894	378640
BY STRAIGHT LINE TO	1234692	377218
BY ARC CENTERED AT	1228846	394497
TO	1233981	376994
BY ARC CENTERED AT	1225768	393281
TO	1230677	375713
BY STRAIGHT LINE TO	1229077	374980
BY ARC CENTERED AT	1219065	390227
TO	1227371	373987
BY STRAIGHT LINE TO	1226185	373381
BY STRAIGHT LINE TO	1227214	367277
BY ARC CENTERED AT	1209227	364245
TO	1214918	346915
BY STRAIGHT LINE TO	1213304	346385

3. The United States is not entitled, as against the State of Louisiana, to any interest in the lands, minerals or natural resources described in paragraph 1 hereof, with the exceptions provided by § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313 (1964 ed.).

4. Pending further order of the Court or agreement of the parties, leases of lands lying partly within the area above described and partly seaward of that area shall be in no way affected by anything contained in this decree, and revenues derived from such leases shall remain subject to impoundment under the Interim Agreement of October 12, 1956, as amended, in the same manner as heretofore.

5. All sums now held impounded by the State of Louisiana or the United States under the Interim Agreement of October 12, 1956, as amended, derived from leases of lands wholly within areas referred to in paragraph 1 hereof are hereby released to the State of Louisiana absolutely, and the State of Louisiana is relieved of any obligation under said agreement to impound any sums hereafter received by it from leases

of lands lying wholly within said area and the State of Louisiana is and shall be entitled to lease lands wholly within said areas and to directly receive any sums hereafter derivable therefrom.

6. Nothing in this decree or the proceedings leading to it shall prejudice any rights, claims or defenses of the United States or the State of Louisiana with respect to the remainder of the disputed area or past or future payments derived therefrom or attributable thereto or the operation of the Interim Agreement of October 12, 1956, as amended, with respect to such remaining disputed area and payments. Nor shall anything in this decree nor in the proceedings leading to it prejudice any rights, claims or defenses of the State of Louisiana as to its maritime lateral boundaries with the States of Mississippi and Texas, which boundaries are not at issue in this litigation.

7. The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to its previous orders or decrees herein or to this decree or to effectuate the rights of the parties in the premises.

CALIFORNIA *v.* KRIVDA ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 71-651. Argued October 10, 1972—Decided October 24, 1972

It not being clear whether the judgment of the California Supreme Court affirming the lower court is based on federal or state constitutional grounds, or both, and whether this Court has jurisdiction on review, that judgment is vacated and the case remanded.

5 Cal. 3d 357, 486 P. 2d 1262, vacated and remanded.

Russell Iungerich, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Evelle J. Younger,* Attorney General, *Edward A. Hinz, Jr.,* Chief Assistant Attorney General, *William E. James* and *S. Clark Moore,* Assistant Attorneys General, and *William R. Pounders,* Deputy Attorney General, joined by *John D. LaBelle* for the State of Connecticut and by the following Attorneys General: *William J. Baxley* of Alabama, *Gary K. Nelson* of Arizona, *Ray Thornton* of Arkansas, *Duke W. Dunbar* of Colorado, *W. Laird Stabler, Jr.,* of Delaware, *Robert L. Shevin* of Florida, *Arthur K. Bolton* of Georgia, *George Pai* of Hawaii, *W. Anthony Park* of Idaho, *Theodore L. Sendak* of Indiana, *Richard C. Turner* of Iowa, *Jack P. F. Gremillion* of Louisiana, *Francis B. Burch* of Maryland, *A. F. Summer* of Mississippi, *Robert L. Woodahl* of Montana, *Clarence A. H. Meyer* of Nebraska, *Robert List* of Nevada, *Warren B. Rudman* of New Hampshire, *George F. Kugler, Jr.,* of New Jersey, *Louis J. Lefkowitz* of New York, *Helgi Johanneson* of North Dakota, *William J. Brown* of Ohio, *J. Shane Creamer* of Pennsylvania, *Richard J. Israel* of Rhode Island, *Daniel R. McLeod* of South Carolina, *Gordon Myland* of South Dakota, *David M. Pack* of Tennessee, *Crawford C.*

Martin of Texas, *Vernon B. Romney* of Utah, *James M. Jeffords* of Vermont, *Andrew P. Miller* of Virginia, *Ronald H. Tonkin* of the Virgin Islands, *Slade Gorton* of Washington, *Robert W. Warren* of Wisconsin, and *Clarence A. Brimmer* of Wyoming.

Roger S. Hanson, by appointment of the Court, 406 U. S. 904, argued the cause for respondents. With him on the brief was *George R. Milman.*

Briefs of *amici curiae* were filed by *William J. Scott,* Attorney General, and *James B. Zagel,* Assistant Attorney General, for the State of Illinois; by *Frank G. Carrington, Jr., Alan S. Ganz, Glen Murphy,* and *Wayne W. Schmidt* for Americans for Effective Law Enforcement, Inc., et al.; by *Melvin L. Wulf, Sanford J. Rosen, Joel M. Gora, A. L. Wirin, Fred Okrand,* and *Lawrence R. Sperber* for the American Civil Liberties Union et al.; by *Sheldon Portman* and *Rose Elizabeth Bird* for the California Public Defenders Assn.; and by *Theodore A. Gottfried* and *Marshall J. Hartman* for the National Legal Aid and Defender Assn.

PER CURIAM.

On the basis of evidence obtained in a police search of respondents' trash, respondents were charged with possession of marihuana in violation of § 11530 of the California Health & Safety Code. The Supreme Court of California affirmed the superior court's judgment of dismissal and order suppressing the evidence on the grounds that, under the circumstances of this case, respondents "had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant." *People* v. *Krivda,* 5 Cal. 3d 357, 366–367, 486 P. 2d 1262, 1268 (1971) (*en banc*). We granted certiorari. 405 U. S. 1039.

After briefing and argument, however, we are unable to determine whether the California Supreme Court based its holding upon the Fourth and Fourteenth Amendments to the Constitution of the United States, or upon the equivalent provision of the California Constitution, or both. In reaching its result in this case, the California court cited pertinent excerpts from its earlier decision in *People* v. *Edwards,* 71 Cal. 2d 1096, 458 P. 2d 713 (1969) (*en banc*), which relied specifically upon both the state and federal provisions. 5 Cal. 3d, at 367, 486 P. 2d, at 1269. Thus, as in *Mental Hygiene Dept.* v. *Kirchner,* 380 U. S. 194, 196–197 (1965), "[w]hile we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground." We therefore vacate the judgment of the Supreme Court of California and remand the cause to that court for such further proceedings as may be appropriate. *Mental Hygiene Dept.* v. *Kirchner, supra; Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940); *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511 (1939). We intimate no view on the merits of the Fourth and Fourteenth Amendment issue presented.

ILLINOIS *v.* MICHIGAN

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 57, Orig. Decided October 24, 1972

The failure of the State of Illinois to petition for a writ of certiorari with respect to an adverse Michigan Supreme Court decision in a case to which Illinois was a party "vindicat[ing] . . . grievances of particular individuals" precludes recourse to this Court's original jurisdiction as an alternative to normal appellate review.

Motion denied. See 386 Mich. 474, 192 N. W. 2d 242.

PER CURIAM.

The State of Illinois moved to file its bill of complaint in this case on the theory that a "reciprocal treaty" between the States of Illinois and Michigan was violated by a decision of the Supreme Court of the State of Michigan which allowed recovery by two injured workmen against an Illinois re-insurance company. *Federoff* v. *Ewing,* 386 Mich. 474, 192 N. W. 2d 242 (1971). It claims that such an agreement arose when the two States enacted the Uniform Insurers Liquidation Act, which contains certain reciprocal features, and that the agreement has the dignity of an interstate compact.*

The State of Illinois was a party to the case decided by the Supreme Court of Michigan through the person of the Director of Insurance of the State of Illinois, who was the liquidator of the workmen's compensation insurer, Highway Insurance Co. It was the imposition of

*See generally Frankfurter & Landis, The Compact Clause of the Constitution—a Study in Interstate Adjustments, 34 Yale L. J. 685 (1925); Engdahl, Characterization of Interstate Arrangements: When is a Compact not a Compact?, 64 Mich. L. Rev. 63 (1965); Note, At the Intersection of Jurisdiction and Choice of Law, 59 Calif. L. Rev. 1514 (1971).

liability upon that company's re-insurer which Illinois claims was inappropriate under the uniform act. Review of the Michigan decision should have been sought in that case by means of a petition for writ of certiorari.

It is now too late for any such petition for certiorari to be filed. But original jurisdiction of the Court is not an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought.

The problem presented is essentially one between private litigants and, though the point now raised may not have been presented in the Michigan litigation, these controversies are recurring and essentially not state concerns.

While the complaint on its face is within our original, as well as our exclusive, jurisdiction, it seems apparent from the moving papers and the response that Illinois, though nominally a party, is here "in the vindication of the grievances of particular individuals." *Louisiana* v. *Texas,* 176 U. S. 1, 16.

The motions to file briefs *amici curiae* by Jack Federoff, William F. Ewing, dba William Ewing Roofing Co., and John H. Shannon are granted.

The motion of the State of Illinois for leave to file a bill of complaint is denied.

ROBINSON *v.* HANRAHAN, STATES ATTORNEY OF COOK COUNTY

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 71–6918. Decided October 24, 1972

Notwithstanding its knowledge that appellant was in the Cook County jail awaiting trial, the State of Illinois mailed notice of automobile forfeiture proceedings to appellant at his home, which he did not receive until his release, when he learned that the car had been forfeited. The circuit court rejected appellant's motion for rehearing. The Illinois Supreme Court affirmed. *Held:* The procedure followed here did not comport with due process requirements as the State made no effort to provide appellant with notice "reasonably calculated" to apprise him of the pendency of the forfeiture proceedings.

52 Ill. 2d 37, 284 N. E. 2d 646, reversed and remanded.

PER CURIAM.

On June 16, 1970, appellant was arrested on a charge of armed robbery and, immediately thereafter, the State of Illinois instituted forfeiture proceedings against appellant's automobile pursuant to the Illinois vehicle forfeiture statute, Ill. Rev. Stat., c. 38, § 36–1 *et seq.* (1969). Appellant was held in custody in the Cook County jail from June 16, 1970, to October 7, 1970, awaiting trial. Nevertheless, the State mailed notice of the pending forfeiture proceedings, not to the jail facility, but to appellant's home address as listed in the records of the Secretary of State.[1] It is undisputed that ap-

[1] Under Illinois law, the address of a vehicle owner must be registered in the office of the Secretary of State. Ill. Rev. Stat., c. 95½, § 3–405 (1971). The Illinois vehicle forfeiture statute authorizes service of notice by certified mail to the address as listed in the records of the Secretary of State. Ill. Rev. Stat., c. 38, § 36–1 (1969).

pellant, who remained in custody throughout the forfeiture proceedings, did not receive such notice until his release.[2] After an *ex parte* hearing on August 19, 1970, the circuit court of Cook County ordered the forfeiture and sale of appellant's vehicle.

Upon learning of the forfeiture after his release, appellant filed a motion for rehearing, requesting that the order of forfeiture be set aside because the manner of notice did not comport with the requirements of the Due Process Clause of the Fourteenth Amendment. The circuit court of Cook County denied the motion. On appeal, the Supreme Court of Illinois, three justices dissenting, held that, in light of the *in rem* nature of the proceedings, substituted service as utilized by the State did not deny appellant due process of law. *People ex rel. Hanrahan* v. *One 1965 Oldsmobile,* 52 Ill. 2d 37, 284 N. E. 2d 646 (1972). We cannot agree.

In *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950), after commenting on the vagueness of the classifications "*in rem,* or more indefinitely *quasi in rem,* or more vaguely still, 'in the nature of a proceeding *in rem,*' " this Court held that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Id.,* at 312. "An elementary and fundamental requirement of due process in

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[2] Appellant was tried on October 7, 1970, for the offense of armed robbery. The court, sitting without a jury, found appellant guilty only of plain robbery and sentenced him to probation for three years, the first four months of which to be served in the Cook County jail. In light of appellant's pretrial detention, the four-month requirement was "considered served" and appellant was released immediately on his own recognizance.

any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, at 314. More specifically, *Mullane* held that notice by publication is not sufficient with respect to an individual whose name and address are known or easily ascertainable. Similarly, in *Covey* v. *Town of Somers,* 351 U. S. 141 (1956), we held that, in the context of a foreclosure action by the town, notice by mailing, posting, and publication was inadequate where the individual involved was known by the town to be an incompetent without the protection of a guardian. See also *Schroeder* v. *New York,* 371 U. S. 208 (1962); *Walker* v. *City of Hutchinson,* 352 U. S. 112 (1956); *New York* v. *New York, N. H. & H. R. Co.,* 344 U. S. 293 (1953).

In the instant case, the State knew that appellant was not at the address to which the notice was mailed and, moreover, knew also that appellant could not get to that address since he was at that very time confined in the Cook County jail. Under these circumstances, it cannot be said that the State made any effort to provide notice which was "reasonably calculated" to apprise appellant of the pendency of the forfeiture proceedings.[3] Accordingly, we grant the motion for leave to proceed *in forma pauperis,* reverse the judgment of the Supreme Court of Illinois, and remand for further proceedings not inconsistent with this opinion.

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[3] Since we dispose of this case on the notice question, we do not reach the additional issues raised by appellant.

MURCH ET AL. *v.* MOTTRAM

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

No. 72–55. Decided November 6, 1972

In a 1965 proceeding respondent substituted for his original attack on the constitutional validity of his underlying convictions a petition challenging only the constitutionality of procedures attending revocation of his parole, notwithstanding advice that, under the judge's construction of Maine's statute governing post-conviction relief, a prisoner is deemed to waive constitutional grounds not asserted and that both the petition and the previous attack came within the statute. Respondent's 1965 challenge was not successful, and in 1967 he filed another petition for state post-conviction relief, collaterally attacking the validity of the previous convictions. Following an adverse ruling by the State's highest court, respondent sought relief in the District Court, which ruled against him on the ground that in the 1965 proceeding he had bypassed the state statutory procedures. The Court of Appeals reversed, holding that respondent had not waived his right to raise the constitutional issues. *Held:* Maine could properly provide that a prisoner seeking post-conviction relief must assert all known constitutional claims in a single proceeding, and a state prisoner may not "elect" not to comply with a state court's interpretation of the statute and claim, as respondent (who had received fair warning) did here, that he did not have the subjective intent to waive his constitutional claims.

Certiorari granted; 458 F. 2d 626, reversed.

PER CURIAM.

Respondent Mottram sought habeas corpus from the United States District Court in Maine, challenging on various constitutional grounds the validity of a criminal conviction obtained in the Maine state courts. After a full evidentiary hearing, the District Court denied relief, both on the ground that respondent had deliberately bypassed state procedures established for the post-conviction adjudication of such claims, and on the ground that the

constitutional claims were without merit. 330 F. Supp. 51 (1971). The Court of Appeals for the First Circuit reversed, holding that respondent had not waived his right to raise the constitutional issues, and ruling in favor of respondent on one such issue. 458 F. 2d 626 (1972). We have concluded that, under settled principles governing the availability of federal habeas for state prisoners, the finding of the District Court as to waiver must be sustained. We therefore grant the motion of the respondent for leave to proceed *in forma pauperis,* grant the petition for a writ of certiorari, and reverse the judgment of the Court of Appeals.

Mottram was convicted in 1960 of larceny and of being a habitual offender, and these convictions were upheld on appeal. *State* v. *Mottram,* 158 Me. 325, 184 A. 2d 225 (1962). On that appeal, Mottram did not litigate the constitutional issue upon which the Court of Appeals based its decision. Respondent was paroled in 1963, but parole was revoked in 1965. Following that revocation, Mottram brought in state court the action that later became the main focus of concern of the Court of Appeals and the District Court. The original petition in that proceeding challenged directly the validity of the underlying convictions. Prior to the presentation of evidence to the state court judge, however, Mottram's counsel sought to withdraw the original petition without prejudice and to substitute a "Supplemental Petition," which challenged on constitutional grounds only the propriety of the procedures attending the revocation of respondent's parole. At this point the state judge advised respondent's counsel that he considered both the petition and the proceeding to be for post-conviction relief, and that therefore, under the applicable state statutes, Me. Rev. Stat. Ann., Tit. 14, §§ 5502, 5507 (1964), Mottram would either have to raise all grounds for relief from custody or be deemed to waive those that had not

been asserted. Mottram's counsel disagreed with the state judge, contending that the petition was one for common-law habeas corpus, and that therefore the statutory requirement that all grounds for attack be presented did not apply. The judge reiterated his interpretation, and the following colloquy then took place:

> "THE COURT: I think I will have to ask you to deal with this at this moment in making a decision as to what you want to do on the basis that I will undoubtedly view it as post-conviction and your only remedy at that point might be an appeal on this point from my decision. I think in all fairness, I should indicate to you this is as I view it. I think that is the result we are led to by the statute, myself.
>
> "MR. TEVANIAN [Mottram's counsel]: I understand your position and I shall discuss it."

(Conference between Mr. Tevanian and Mr. Mottram.) (Off-record discussion.)

(RECESS)

> "MR. TEVANIAN: For the record, it is our position here that we do not attack the judgment and conviction of 1960. We are now attacking his personal freedom as a parole violator so that whatever rights we may reserve in appeal as to whether or not this is a post-conviction hearing, we would now like to avail ourselves of that reservation. We have elected to go ahead on that issue.
>
> "THE COURT: I think that makes it clear, Brother Tevanian, for the record . . . ."

Mottram's attack on the parole revocation procedures was unsuccessful before the state judge, and the latter's decision was sustained on appeal by the Supreme Judicial Court of Maine. *Mottram* v. *State,* 232 A. 2d 809 (1967). In 1967, Mottram filed another petition for state

post-conviction relief, in which he sought to attack collaterally the validity of the 1960 convictions upon grounds that included the constitutional ground ultimately sustained by the Court of Appeals. The Supreme Judicial Court of Maine held that the failure to present those claims in the 1965 petition, after an explicit warning by the trial judge, constituted a waiver of those claims under the applicable provisions of the Maine post-conviction statutes, and therefore those statutes precluded Mottram from raising those claims in a subsequent petition for post-conviction relief. *Mottram* v. *State,* 263 A. 2d 715 (1970). Mottram then commenced this litigation in the federal courts.

In *Fay* v. *Noia,* 372 U. S. 391, 439 (1963), this Court said:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default."

The District Court devoted four days to such a hearing, at which the transcripts of the trials and of the state post-conviction proceedings, as well as the testimony of witnesses called by Mottram, were introduced in evidence. Following this evidentiary hearing, the District Court concluded as follows:

> "From the Court's personal observation of petitioner, it is apparent that he is of at least average

> intelligence and well deserves his reputation as a cunning 'jailhouse lawyer.' He was represented at the time by counsel of unquestioned competence and integrity. It is inconceivable that his counsel did not fully explain to petitioner the possible consequences of his action. The Court, therefore, finds that petitioner was fully aware of these consequences and that by deliberately bypassing the orderly procedures provided by the Maine post-conviction statute for raising the issues presented in his most recent state habeas petition and in his present petition in this Court, petitioner has forfeited his right to do so. [Citing cases.]" 330 F. Supp., at 57.

In *Sanders* v. *United States,* 373 U. S. 1, 18 (1963), this Court said, in speaking of habeas corpus for federal prisoners:

> "Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay."

There can be no doubt that States may likewise provide, as Maine has done, that a prisoner seeking post-conviction relief must assert all known constitutional claims in a single proceeding. Indeed, the Court of Appeals agreed that the Maine statutory scheme was an "orderly procedure of the state courts," as that term is used in *Fay* v. *Noia, supra,* at 438. No prisoner has a right either under the Federal Constitution or under 28 U. S. C. § 2241 to insist upon piecemeal collateral attack on a

presumptively valid criminal conviction in the face of such a statutory provision.

The Court of Appeals conceded that "[t]here are a great many instances where a party must be bound by a mistake of his counsel." 458 F. 2d, at 629. But it concluded that because the statutory question presented to the state trial judge, whether the Maine post-conviction statute required respondent to assert in the 1965 proceeding all of his attacks upon his detention, was not open and shut, counsel's failure to assert the constitutional claim in the state proceeding could not be regarded as a "deliberate by-pass" under *Fay* v. *Noia, supra,* at 438–439. That court also relied on the fact that there was no "extrinsic evidence" that Mottram "was seeking to circumvent state procedures . . . ." 458 F. 2d, at 629.

Concededly, Mottram testified at the hearing in the District Court that he did not intend to waive his constitutional attacks on the underlying 1960 convictions. But if a subjective determination not to waive or to abandon a claim were sufficient to preclude a finding of a deliberate bypass of orderly state procedures, constitutionally valid procedural requirements, such as those contained in the Maine statute requiring the joining of all bases for attack in one proceeding, would be utterly meaningless. Nothing in our previous holdings in this area supports the conclusion that Mottram, having fair warning of the effect of the Maine statute, could cavalierly disregard that intended effect by simply announcing that he did not choose to be bound by it. In this sensitive and ofttimes strained area of federal-state relations, a state prisoner may not deliberately "elect" not to comply with the interpretation of the state procedural statute by the state court, and then assert in federal court that no rights were waived because he did not have the subjective intent to waive his constitutional claims. The Court of Appeals apparently felt that so

long as the highest state court has not construed the relevant procedural statute, a prisoner is free to adhere to his own interpretation and to establish thereby that he did not deliberately ignore state procedure. But here, respondent had reasonable warning from the trial judge of the risk that he ran in declining to assert his claim in the first proceeding, and nonetheless chose to run that risk. Such conduct fully supported the District Court's conclusion that he had deliberately chosen to bypass orderly state procedures, and the Court of Appeals erred in upsetting that determination.

Reversed.

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

I dissent and would affirm because in my view the Court of Appeals reached the correct result on the facts presented.

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL VAN LINES

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

No. 71-895. Argued October 12, 1972—Decided November 7, 1972

Four employees of respondent refused to cross a picket line formed in connection with a union's organization campaign. Respondent thereafter advised the employees that because of their failure to report to work they were being permanently replaced, which was not true at the time of the discharges. When respondent refused reinstatement, charges were filed with the National Labor Relations Board (NLRB). Concluding that the discharges were unfair labor practices under the National Labor Relations Act, and that the employees thereby became unfair labor practice strikers, the NLRB ordered unconditional reinstatement with back pay. The Court of Appeals reversed that portion of the NLRB's order, holding that the employees were not unfair labor practice strikers, who were entitled to unconditional reinstatement, but economic strikers, who were not entitled to reinstatement if the employer had substantial business justifications for refusing to rehire them. *Held:* The unconditional reinstatement of the employees was proper since their discriminatory discharges prior to the time their places were filled constituted unfair labor practices regardless of whether they were economic strikers or unfair labor practice strikers. Pp. 52–53.

448 F. 2d 905, reversed in part.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post,* p. 53.

Peter G. Nash argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Samuel Huntington, Patrick Hardin, Norton J. Come,* and *Linda Sher.*

Norman H. Kirshman argued the cause for respondent. With him on the briefs was *Louis R. Garcia.*

Briefs of *amici curiae* were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, and by *Milton Smith, Jerry Kronenberg,* and *Gerard C. Smetana* for the Chamber of Commerce of the United States.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent is a moving and storage company based in Santa Maria, California. In August 1967, Local 381 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America began a campaign to organize the employees of moving and storage firms in the area. By September 21, five of the respondent's employees had signed union authorization cards; it is undisputed that they constituted a clear majority of what would be an appropriate bargaining unit. Instead of demanding recognition by the respondent, the Union on September 21, 1967, petitioned the National Labor Relations Board for certification as the exclusive bargaining agent of the respondent's employees.

Shortly thereafter, on October 2 and 3, the Union held meetings where it was announced that the respondent had at first consented to a representation election but had later withdrawn its consent. It was decided at the October 3 meeting that all of the moving and storage companies involved in the Union organization campaign should be struck, and on October 4, picketing commenced at the respondent's place of business.

Four of the respondent's employees, Robert and Manuel Vasquez, Richard Dicus, and Salvador Casillas, were present at the respondent's premises on the morning when picketing commenced. They refused to cross the picket line. The next morning, Robert and Manuel Vasquez and Richard Dicus received identical tele-

grams which read: "For failure to report to work as directed at 7 A. M. on Wednesday Oct. 4, 1967 you are being permanently replaced. [Signed] International Van Lines." [1] It is undisputed that at the time of the discharges, the respondent had not in fact hired permanent replacements.

Casillas sought reinstatement in late November, and the other three discharged employees made unconditional offers to return to work on December 12. At least as to these three,[2] the respondent refused reinstatement, claiming that it had at that point hired permanent replacements. The Union then went to the National Labor Relations Board with unfair labor practice charges against the respondent.

The Board determined that the labor picketing that commenced on October 4 was activity protected under § 7 of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. § 157, and concluded that the subsequent discharges of striking employees discriminated against lawful union activity and were unfair labor practices under §§ 8 (a)(1) and 8 (a)(3) of the Act, 29 U. S. C. §§ 158 (a)(1), (a)(3).

It is settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346. It is equally settled that employees striking in protest of an employer's unfair labor practices are entitled, absent some contractual or

[1] Casillas did not receive such a telegram, but the Court of Appeals found that he was discharged at about the same time as the other three, and for the same reasons. 448 F. 2d 905, 909.

[2] There remains some question as to whether Casillas, a part-time employee, was actually denied subsequent employment or whether instead there had been no occasion for the employer to use his services. The Court of Appeals remanded to the Board for a determination of this question—a determination that will affect the amount of back pay, if any, that Casillas is entitled to receive.

statutory provision to the contrary, to unconditional reinstatement with back pay, "even if replacements for them have been made." *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 278. Since the strike in the instant case continued after the unfair labor practices had been committed by the employer, the Board reasoned that the original economic strike became an unfair labor practice strike on October 5, when the three telegrams were sent. The Board held the four employees to be unfair labor practice strikers and, accordingly, ordered their unconditional reinstatement with back pay.

The Board then sought enforcement of its order in the Court of Appeals for the Ninth Circuit. The Court of Appeals agreed that the labor picketing was a lawful economic strike, and that the discharges of the striking employees were unfair labor practices. 448 F. 2d 905, 910–911. Nevertheless, the Court of Appeals reversed the portion of the Board's order providing for reinstatement with back pay,[3] reasoning as follows:

> "The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been discharged would eliminate the distinction between [the] economic-striker-reinstatement rule (*Mackay Radio & Tele-*

[3] The Court of Appeals also rejected the Board's finding of an unfair labor practice in the form of conversations between the son of the respondent's president and the employees, 448 F. 2d, at 908–909, but this aspect of the judgment is not before us.

graph) and the unfair-labor-practice-striker-reinstatement rule (*Mastro Plastics*) in cases like this one." *Id.*, at 911–912.

Consistent with its determination that the discharged employees were economic strikers entitled to reinstatement only if the employer could not show legitimate and substantial business justifications for refusing to take them back, the Court of Appeals remanded the case for further findings concerning the reasons for the employer's refusal to rehire them. *Id.*, at 912. Because this decision appeared to involve principles important to the administration of the National Labor Relations Act as amended, we granted the Board's petition for certiorari, 405 U. S. 953.

Both the Board and the Court of Appeals have agreed that the labor picketing was a lawful economic strike, and the validity of that conclusion is not before us.[4] Given that hypothesis, the Board and the Court of Appeals were clearly correct in concluding that the respondent committed unfair labor practices when it fired its striking employees. "[T]he discharge of economic strikers prior . . . to the time their places are filled constitutes an unfair labor practice." *NLRB* v. *Globe Wireless,* 193 F. 2d 748, 750; *NLRB* v. *Comfort, Inc.,* 365 F. 2d 867, 874; *NLRB* v. *McCatron,* 216 F. 2d 212, 215. We need not decide, however, whether the Board was

[4] The Court of Appeals construed the picketing as a strike for the purpose of forcing the respondent employer to agree to a consent election, 448 F. 2d, at 910, and held this to be protected under the Act. The respondent disagrees. But since no timely cross-petition for certiorari was filed by the respondents, this question is not before us. *Alaska Industrial Board* v. *Chugach Electric Assn.,* 356 U. S. 320, 325; *NLRB* v. *Express Publishing Co.,* 312 U. S. 426, 431–432; *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185, 191. We therefore proceed on the premise that the Union was engaged in protected activity, while intimating no view on the merits of this portion of the decision of the Court of Appeals.

correct in determining that the discharged employees assumed the status of unfair labor practice strikers on October 5, 1967, to reach the conclusion that the Court of Appeals erred in refusing to enforce the Board's order of reinstatement with back pay.

Unconditional reinstatement of the discharged employees was proper for the simple reason that they were the victims of a plain unfair labor practice by their employer. Quite apart from any characterization of the strike that continued after the wrongful discharges occurred, the discharges *themselves* were a sufficient ground for the Board's reinstatement order. "Reinstatement is the conventional correction for discriminatory discharges," *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 187, and was clearly within the Board's authority. 29 U. S. C. § 160 (c).

It would undercut the remedial powers of the Board with respect to § 8 violations, and subvert the protection of § 7 of the Act, to hold that the employees' rights to reinstatement arising from the discriminatory discharges were somehow forfeited merely because they continued for a time to engage in their lawful strike after the unfair labor practices had been committed.

The judgment of the Court of Appeals is reversed insofar as it refused to enforce the Board's order that the discharged employees be reinstated with back pay.[5]

It is so ordered.

MR. JUSTICE BLACKMUN, concurring in the judgment.

The result mandated by the narrow factual situation presented in this case need not be automatically im-

[5] The Court of Appeals remanded to the Board for a determination of whether Casillas had actually been denied employment subsequent to his request for reinstatement, and did not reach the propriety of the bargaining order entered by the Board. We leave these aspects of the Court of Appeals decision undisturbed.

posed whenever an economic striker is discharged before being permanently replaced. Although the Court's opinion speaks only of permanent replacement as a justification for refusal to reinstate an economic striker, the Court has recognized in the past that, in addition to permanent replacement, other "legitimate and substantial business justifications" for not reinstating an economic striker may exist. *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375, 378–380 (1967). The Court is not faced in the present case with other "legitimate and substantial business justifications" because the employer, who bears the burden of proof, asserted only the permanent-replacement justification. The finding of an unfair labor practice here is not to be read, therefore, as necessarily precluding an employer from reliance on appropriate justifications other than permanent replacement.

Since the employer failed to show any business justification arising before the discharges, these workers enjoyed reinstatement rights when they were discriminatorily discharged. I concur in the reversal of the Court of Appeals' judgment because preservation of the rights existing before the workers were discharged is the appropriate remedy to provide "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194 (1941).

RIVAS ET AL. *v.* COZENS, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF CALIFORNIA, ET AL.

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

No. 71-5780. Decided November 13, 1972

Vacated and remanded. See: 327 F. Supp. 867.

PER CURIAM.

The appellants' supplemental brief filed October 14, 1972, recites:

> "The California Supreme Court's decision in *Rios* [v. *Cozens,* 7 Cal. 3d 792, 499 P. 2d 979 (1972),] has been given full prospective and retroactive effect. Cal. Sup. Ct. Order Denying Stay Pending Appeal, filed August 30, 1972. Accordingly, the individual petitioners herein, Celestino V. Rivas and Zeferino Samaniego, have now been accorded the opportunity for a personal evidentiary hearing regarding the suspension of their driver's licenses."

Accordingly the motion for leave to proceed *in forma pauperis* is granted, the judgment is vacated, and the case is remanded to the United States District Court for the Northern District of California to determine whether this case has become moot.

GIVENS ET AL. *v.* W. T. GRANT CO.

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

No. 72–5256. Decided November 13, 1972

Certiorari granted; 457 F. 2d 612, vacated and remanded.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for reconsideration of its order of dismissal in light of 28 U. S. C. § 1447 (c).

WARD *v.* VILLAGE OF MONROEVILLE

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 71–496. Argued October 17, 1972—Decided November 14, 1972

Petitioner was denied a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment where he was compelled to stand trial for traffic offenses before the mayor, who was responsible for village finances and whose court through fines, forfeitures, costs, and fees provided a substantial portion of village funds. *Tumey* v. *Ohio,* 273 U. S. 510. A statutory provision for the disqualification of interested or biased judges did not afford petitioner a sufficient safeguard, and it is of no constitutional relevance that petitioner could later be tried *de novo* in another court, as he was entitled to an impartial judge in the first instance. Pp. 59–62.

27 Ohio St. 2d 179, 271 N. E. 2d 757, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post,* p. 62.

Bernard A. Berkman argued the cause for petitioner. With him on the brief was *Niki Z. Schwartz.*

Franklin D. Eckstein argued the cause for respondent. With him on the brief was *Joseph F. Dush.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Pursuant to Ohio Rev. Code Ann. § 1905.01 *et seq.* (1968), which authorizes mayors to sit as judges in cases of ordinance violations and certain traffic offenses, the Mayor of Monroeville, Ohio, convicted petitioner of two traffic offenses and fined him $50 on each. The Ohio Court of Appeals for Huron County, 21 Ohio App. 2d 17,

254 N. E. 2d 375 (1969), and the Ohio Supreme Court, 27 Ohio St. 2d 179, 271 N. E. 2d 757 (1971), three justices dissenting, sustained the conviction, rejecting petitioner's objection that trial before a mayor who also had responsibilities for revenue production and law enforcement denied him a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment. We granted certiorari. 404 U. S. 1058 (1972).

The Mayor of Monroeville has wide executive powers and is the chief conservator of the peace. He is president of the village council, presides at all meetings, votes in case of a tie, accounts annually to the council respecting village finances, fills vacancies in village offices and has general overall supervision of village affairs. A major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court. Thus, in 1964 this income contributed $23,589.50 of total village revenues of $46,355.38; in 1965 it was $18,508.95 of $46,752.60; in 1966 it was $16,085 of $43,585.13; in 1967 it was $20,060.65 of $53,931.43; and in 1968 it was $23,439.42 of $52,995.95. This revenue was of such importance to the village that when legislation threatened its loss, the village retained a management consultant for advice upon the problem.[1]

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[1] Ordinance No. 59–9:

"WHEREAS, the legislation known as the County Court law passed by the 102nd General Assembly greatly reduces the jurisdictional powers of Mayor Courts as of January 1, 1960; and

"WHEREAS, such restrictions may place such a hardship upon law enforcement personnel in this village and surrounding areas as to endanger the health, welfare and safety of persons residing or being in our village; and

"WHEREAS, other such provisions of this legislation may cause such a reduction in revenue to this village that an additional burden

Conceding that "the revenue produced from a mayor's court provides a substantial portion of a municipality's funds," the Supreme Court of Ohio held nonetheless that "such fact does not mean that a mayor's impartiality is so diminished thereby that he cannot act in a disinterested fashion in a judicial capacity." 27 Ohio St. 2d, at 185, 271 N. E. 2d, at 761. We disagree with that conclusion.

The issue turns, as the Ohio court acknowledged, on whether the Mayor can be regarded as an impartial judge under the principles laid down by this Court in *Tumey* v. *Ohio*, 273 U. S. 510 (1927). There, convictions for prohibition law violations rendered by the Mayor of North College Hill, Ohio, were reversed when it appeared that, in addition to his regular salary, the Mayor re-

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may result from increased taxation and/or curtailment of services essential to the health, welfare and safety of this village; . . .

. . . . . .

"BE IT ORDAINED BY THE VILLAGE OF [MONROEVILLE] OHIO:

"Section 1. That the services of the management consulting firm of Midwest Consultants, Incorporated of Sandusky, Ohio, be employed to conduct a survey and study to ascertain the extent of the effects of the County Court Law on law enforcement and loss of revenue in and to the Village of [Monroeville], Ohio, so that said Village can prepare for the future operations of the Village to safeguard the heath [*sic*], welfare and safety of its citizens . . . ."

Moreover, Monroeville's Chief of Police, appointed by the Mayor, Ohio Rev. Code Ann. § 737.15 (Supp. 1971), testified that it was his regular practice to charge suspects under a village ordinance, rather than a state statute, whenever a choice existed. App. 9. That policy must be viewed in light of § 733.40 (1954), which provides that fines and forfeitures collected by the Mayor in state cases shall be paid to the county treasury, whereas fines and forfeitures collected in ordinance and traffic cases shall be paid into the municipal treasury. Petitioner asserts that the Mayor conceded at trial that this policy was carried out under the Mayor's orders. The record lends itself to this inference. App. 10–11.

ceived $696.35 from the fees and costs levied by him against alleged violators. This Court held that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.*, at 523.

The fact that the mayor there shared directly in the fees and costs did not define the limits of the principle. Although "the mere union of the executive power and the judicial power in him can not be said to violate due process of law," *id.*, at 534, the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . ." *Id.*, at 532. Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Id.*, at 534.

This situation is wholly unlike that in *Dugan* v. *Ohio*, 277 U. S. 61 (1928), which the Ohio Supreme Court deemed controlling here. There the Mayor of Xenia, Ohio, had judicial functions but only very limited executive authority. The city was governed by a commission of five members, including the Mayor, which exercised all legislative powers. A city manager, together with the commission, exercised all executive powers. In those circumstances, this Court held that the Mayor's relation-

ship to the finances and financial policy of the city was too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge.

Respondent urges that Ohio's statutory provision, Ohio Rev. Code Ann. § 2937.20 (Supp. 1971), for the disqualification of interested, biased, or prejudiced judges is a sufficient safeguard to protect petitioner's rights. This argument is not persuasive. First, it is highly dubious that this provision was available to raise petitioner's broad challenge to the mayor's court of this village in respect to all prosecutions there in which fines may be imposed. The provision is apparently designed only for objection to a particular mayor *"in a specific case* where the circumstances in that municipality might warrant a finding of *prejudice in that case."* 27 Ohio St. 2d, at 184, 271 N. E. 2d, at 760 (emphasis added). If this means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little. But even if petitioner might have utilized the procedure to make his objection, the Ohio Supreme Court passed upon his constitutional contention despite petitioner's failure to invoke the procedure. In that circumstance, see *Raley* v. *Ohio,* 360 U. S. 423, 436 (1959), he may be heard in this Court to urge that the Ohio Supreme Court erred in holding that he had not established his Fourteenth Amendment claim.

Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial *de novo* in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is en-

titled to a neutral and detached judge in the first instance.[2] Accordingly, the judgment of the Supreme Court of Ohio is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Ohio mayor who judged this case had no direct financial stake in its outcome. *Tumey* v. *Ohio,* 273 U. S. 510 (1927), is therefore not controlling, and I would not extend it.

To justify striking down the Ohio system on its face, the Court must assume either that every mayor-judge in every case will disregard his oath and administer justice contrary to constitutional commands or that this will happen often enough to warrant the prophylactic, *per se* rule urged by petitioner. I can make neither assumption with respect to Ohio mayors nor with respect to similar officials in 16 other States. Hence, I would leave the due process matter to be decided on a case-by-case basis, a question which, as I understand the posture of this case, is not now before us. I would affirm the judgment.

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[2] The question presented on this record is the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where he elects to contest the charges against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official to serve in essentially a ministerial capacity in a traffic or ordinance violation case to accept a free and voluntary plea of guilty or *nolo contendere,* a forfeiture of collateral, or the like.

Syllabus

GOTTSCHALK, ACTING COMMISSIONER OF PATENTS *v.* BENSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 71–485. Argued October 16, 1972—Decided November 20, 1972

Respondents' method for converting numerical information from binary-coded decimal numbers into pure binary numbers, for use in programming conventional general-purpose digital computers is merely a series of mathematical calculations or mental steps and does not constitute a patentable "process" within the meaning of the Patent Act, 35 U. S. C. § 100 (b). Pp. 64–73.

— C. C. P. A. (Pat.) —, 441 F. 2d 682, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which all Members joined except STEWART, BLACKMUN, and POWELL, JJ., who took no part in the consideration or decision of the case.

Richard B. Stone argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Kauper, Acting Assistant Attorney General Comegys, Howard E. Shapiro, Richard H. Stern,* and *S. William Cochran.*

Hugh B. Cox argued the cause for respondents. With him on the brief were *Henry P. Sailer, Michael Boudin, William L. Keefauver,* and *Robert O. Nimtz.*

Briefs of *amici curiae* urging reversal were filed by *James M. Clabault* and *Edward G. Fiorito* for Burroughs Corp.; by *Henry L. Hanson* and *D. D. Allegretti* for Honeywell, Inc.; by *Lloyd N. Cutler, Ezekiel G. Stoddard, Deanne C. Siemer, Nicholas DeB. Katzenbach,* and *Elmer W. Galbi* for International Business Machines Corp.; and by *Donald J. Gavin* for the Business Equipment Manufacturers Assn.

Briefs of *amici curiae* urging affirmance were filed by *Sidney Neuman, Tom Arnold,* and *Jack C. Goldstein* for the American Patent Law Assn.; by *Claron N. White*

and *Louis Robertson* for the Chicago Bar Assn.; by *James J. Hill* and *William E. Dominick* for the Patent Law Association of Chicago; by *Timothy L. Tilton* for Iowa State University Research Foundation, Inc.; by *Michael I. Rackman* for Institutional Networks Corp.; by *David J. Toomey* for Whitlow Computer Systems, Inc.; by *Virgil E. Woodcock, Richard E. Kurtz,* and *Oswald G. Hayes* for Mobil Oil Corp.; by *Morton C. Jacobs* for the Association of Data Processing Service Organizations et al.; by *Mr. Jacobs* for Applied Data Research, Inc.; and by *Howard J. Marsh* for Computer Software Analysts, Inc., et al.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondents filed in the Patent Office an application for an invention which was described as being related "to the processing of data by program and more particularly to the programmed conversion of numerical information" in general-purpose digital computers. They claimed a method for converting binary-coded decimal (BCD) numerals into pure binary numerals. The claims were not limited to any particular art or technology, to any particular apparatus or machinery, or to any particular end use. They purported to cover any use of the claimed method in a general-purpose digital computer of any type. Claims 8 and 13 [1] were rejected by the Patent Office but sustained by the Court of Customs and Patent Appeals, —— C. C. P. A. (Pat.) ——, 441 F. 2d 682. The case is here on a petition for a writ of certiorari. 405 U. S. 915.

The question is whether the method described and claimed is a "process" within the meaning of the Patent Act.[2]

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[1] They are set forth in the Appendix to this opinion.

[2] Title 35 U. S. C. § 100 (b) provides:

"The term 'process' means process, art or method, and includes a

A digital computer, as distinguished from an analog computer, operates on data expressed in digits, solving a problem by doing arithmetic as a person would do it by head and hand.[3] Some of the digits are stored as components of the computer. Others are introduced into the computer in a form which it is designed to recognize. The computer operates then upon both new and previously stored data. The general-purpose computer is designed to perform operations under many different programs.

The representation of numbers may be in the form of a time series of electrical impulses, magnetized spots on the surface of tapes, drums, or discs, charged spots on cathode-ray tube screens, the presence or absence of punched holes on paper cards, or other devices. The method or program is a sequence of coded instructions for a digital computer.

The patent sought is on a method of programming a general-purpose digital computer to convert signals from binary-coded decimal form into pure binary form. A procedure for solving a given type of mathematical problem is known as an "algorithm." The procedures set forth in the present claims are of that kind; that is to say, they are a generalized formulation for programs to solve mathematical problems of converting one form of numerical representation to another. From the generic formulation, programs may be developed as specific applications.

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new use of a known process, machine, manufacture, composition of matter, or material."

Title 35 U. S. C. § 101 provides:

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

[3] See R. Benrey, Understanding Digital Computers 4 (1964).

The decimal system uses as digits the 10 symbols 0, 1, 2, 3, 4, 5, 6, 7, 8, and 9. The value represented by any digit depends, as it does in any positional system of notation, both on its individual value and on its relative position in the numeral. Decimal numerals are written by placing digits in the appropriate positions or columns of the numerical sequence, *i. e.*, "unit" (10^0), "tens" (10^1), "hundreds" (10^2), "thousands" (10^3), etc. Accordingly, the numeral 1492 signifies $(1\times10^3)+(4\times10^2)+(9\times10^1)+(2\times10^0)$.

The pure binary system of positional notation uses two symbols as digits—0 and 1, placed in a numerical sequence with values based on consecutively ascending powers of 2. In pure binary notation, what would be the tens position is the twos position; what would be hundreds position is the fours position; what would be the thousands position is the eights. Any decimal number from 0 to 10 can be represented in the binary system with four digits or positions as indicated in the following table.

	Shown as the sum of powers of 2									
	2^3		2^2		2^1		2^0			
Decimal	(8)		(4)		(2)		(1)		Pure Binary	
0	= 0	+	0	+	0	+	0	=	0000	
1	= 0	+	0	+	0	+	2^0	=	0001	
2	= 0	+	0	+	2^1	+	0	=	0010	
3	= 0	+	0	+	2^1	+	2^0	=	0011	
4	= 0	+	2^2	+	0	+	0	=	0100	
5	= 0	+	2^2	+	0	+	2^0	=	0101	
6	= 0	+	2^2	+	2^1	+	0	=	0110	
7	= 0	+	2^2	+	2^1	+	2^0	=	0111	
8	= 2^3	+	0	+	0	+	0	=	1000	
9	= 2^3	+	0	+	0	+	2^0	=	1001	
10	= 2^3	+	0	+	2^1	+	0	=	1010	

The BCD system using decimal numerals replaces the character for each component decimal digit in the decimal numeral with the corresponding four-digit binary

numeral, shown in the righthand column of the table. Thus decimal 53 is represented as 0101 0011 in BCD, because decimal 5 is equal to binary 0101 and decimal 3 is equivalent to binary 0011. In pure binary notation, however, decimal 53 equals binary 110101. The conversion of BCD numerals to pure binary numerals can be done mentally through use of the foregoing table. The method sought to be patented varies the ordinary arithmetic steps a human would use by changing the order of the steps, changing the symbolism for writing the multiplier used in some steps, and by taking subtotals after each successive operation. The mathematical procedures can be carried out in existing computers long in use, no new machinery being necessary. And, as noted, they can also be performed without a computer.

The Court stated in *Mackay Co.* v. *Radio Corp.,* 306 U. S. 86, 94, that "[w]hile a scientific truth, or the mathematical expression of it, is not a patentable invention, a novel and useful structure created with the aid of knowledge of scientific truth may be." That statement followed the longstanding rule that "[a]n idea of itself is not patentable." *Rubber-Tip Pencil Co.* v. *Howard,* 20 Wall. 498, 507. "A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right." *Le Roy* v. *Tatham,* 14 How. 156, 175. Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work. As we stated in *Funk Bros. Seed Co.* v. *Kalo Co.,* 333 U. S. 127, 130, "He who discovers a hitherto unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes. If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end." We dealt there with a "product" claim, while the

present case deals with a "process" claim. But we think the same principle applies.

Here the "process" claim is so abstract and sweeping as to cover both known and unknown uses of the BCD to pure binary conversion. The end use may (1) vary from the operation of a train to verification of drivers' licenses to researching the law books for precedents and (2) be performed through any existing machinery or future-devised machinery or without any apparatus.

In *O'Reilly* v. *Morse,* 15 How. 62, Morse was allowed a patent for a process of using electromagnetism to produce distinguishable signs for telegraphy. *Id.,* at 111. But the Court denied the eighth claim in which Morse claimed the use of "electro magnetism, however developed for marking or printing intelligible characters, signs, or letters, at any distances." *Id.,* at 112. The Court in disallowing that claim said, "If this claim can be maintained, it matters not by what process or machinery the result is accomplished. For aught that we now know, some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff's specification. His invention may be less complicated—less liable to get out of order—less expensive in construction, and in its operation. But yet, if it is covered by this patent, the inventor could not use it, nor the public have the benefit of it, without the permission of this patentee." *Id.,* at 113.

In *The Telephone Cases,* 126 U. S. 1, 534, the Court explained the *Morse* case as follows: "The effect of that decision was, therefore, that the use of magnetism as a motive power, without regard to the particular process with which it was connected in the patent, could not be claimed, but that its use in that connection could." Bell's invention was the use of electric current to trans-

mit vocal or other sounds. The claim was not "for the use of a current of electricity in its natural state as it comes from the battery, but for putting a continuous current in a closed circuit into a certain specified condition suited to the transmission of vocal and other sounds, and using it in that condition for that purpose." *Ibid.* The claim, in other words, was not "one for the use of electricity distinct from the particular process with which it is connected in his patent." *Id.*, at 535. The patent was for that use of electricity "both for the magneto and variable resistance *methods.*" *Id.*, at 538. Bell's claim, in other words, was not one for all telephonic use of electricity.

In *Corning* v. *Burden,* 15 How. 252, 267–268, the Court said, "One may discover a new and useful improvement in the process of tanning, dyeing, etc., irrespective of any particular form of machinery or mechanical device." The examples given were the "arts of tanning, dyeing, making waterproof cloth, vulcanizing India rubber, smelting ores." *Id.*, at 267. Those are instances, however, where the use of chemical substances or physical acts, such as temperature control, changes articles or materials. The chemical process or the physical acts which transform the raw material are, however, sufficiently definite to confine the patent monopoly within rather definite bounds.

Cochrane v. *Deener,* 94 U. S. 780, involved a process for manufacturing flour so as to improve its quality. The process first separated the superfine flour and then removed impurities from the middlings by blasts of air, reground the middlings, and then combined the product with the superfine. *Id.*, at 785. The claim was not limited to any special arrangement of machinery. *Ibid.* The Court said,

> "That a process may be patentable, irrespective of the particular form of the instrumentalities used,

> cannot be disputed. If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar, or a mill. Either may be pointed out; but if the patent is not confined to that particular tool or machine, the use of the others would be an infringement, the general process being the same. A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing." *Id.*, at 787–788.

Transformation and reduction of an article "to a different state or thing" is the clue to the patentability of a process claim that does not include particular machines. So it is that a patent in the process of "manufacturing fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure" was sustained in *Tilghman* v. *Proctor,* 102 U. S. 707, 721. The Court said, "The chemical principle or scientific fact upon which it is founded is, that the elements of neutral fat require to be severally united with an atomic equivalent of water in order to separate from each other and become free. This chemical fact was not discovered by Tilghman. He only claims to have invented a particular mode of bringing about the desired chemical union between the fatty elements and water." *Id.*, at 729.

Expanded Metal Co. v. *Bradford,* 214 U. S. 366, sustained a patent on a "process" for expanding metal. A process "involving mechanical operations, and producing a new and useful result," *id.*, at 385–386, was held to be a patentable process, process patents not being limited to chemical action.

Smith v. *Snow,* 294 U. S. 1, and *Waxham* v. *Smith,* 294 U. S. 20, involved a process for setting eggs in staged in-

cubation and applying mechanically circulated currents of air to the eggs. The Court, in sustaining the function performed (the hatching of eggs) and the means or process by which that is done, said:

> "By the use of materials in a particular manner he secured the performance of the function by a means which had never occurred in nature, and had not been anticipated by the prior art; this is a patentable method or process. . . . A method, which may be patented irrespective of the particular form of the mechanism which may be availed of for carrying it into operation, is not to be rejected as 'functional,' merely because the specifications show a machine capable of using it." 294 U. S., at 22.

It is argued that a process patent must either be tied to a particular machine or apparatus or must operate to change articles or materials to a "different state or thing." We do not hold that no process patent could ever qualify if it did not meet the requirements of our prior precedents. It is said that the decision precludes a patent for any program servicing a computer. We do not so hold. It is said that we have before us a program for a digital computer but extend our holding to programs for analog computers. We have, however, made clear from the start that we deal with a program only for digital computers. It is said we freeze process patents to old technologies, leaving no room for the revelations of the new, onrushing technology. Such is not our purpose. What we come down to in a nutshell is the following.

It is conceded that one may not patent an idea. But in practical effect that would be the result if the formula for converting BCD numerals to pure binary numerals were patented in this case. The mathematical formula involved here has no substantial practical application except in connection with a digital computer, which

means that if the judgment below is affirmed, the patent would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself.

It may be that the patent laws should be extended to cover these programs, a policy matter to which we are not competent to speak. The President's Commission on the Patent System [4] rejected the proposal that these programs be patentable: [5]

> "Uncertainty now exists as to whether the statute permits a valid patent to be granted on programs. Direct attempts to patent programs have been rejected on the ground of nonstatutory subject matter. Indirect attempts to obtain patents and avoid the rejection, by drafting claims as a process, or a machine or components thereof programmed in a given manner, rather than as a program itself, have confused the issue further and should not be permitted.
>
> "The Patent Office now cannot examine applications for programs because of a lack of a classification technique and the requisite search files. Even if these were available, reliable searches would not be feasible or economic because of the tremendous volume of prior art being generated. Without this search, the patenting of programs would be tantamount to mere registration and the presumption of validity would be all but nonexistent.
>
> "It is noted that the creation of programs has undergone substantial and satisfactory growth in the absence of patent protection and that copyright protection for programs is presently available."

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[4] "To Promote the Progress of . . . Useful Arts," Report of the President's Commission on the Patent System (1966).

[5] *Id.*, at 13.

If these programs are to be patentable,[6] considerable problems are raised which only committees of Congress can manage, for broad powers of investigation are needed, including hearings which canvass the wide variety of views which those operating in this field entertain. The technological problems tendered in the many briefs before us [7] indicate to us that considered action by the Congress is needed.

Reversed.

MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

Claim 8 reads:

"The method of converting signals from binary coded decimal form into binary which comprises the steps of

"(1) storing the binary coded decimal signals in a reentrant shift register,

"(2) shifting the signals to the right by at least three places, until there is a binary '1' in the second position of said register,

"(3) masking out said binary '1' in said second position of said register,

"(4) adding a binary '1' to the first position of said register,

"(5) shifting the signals to the left by two positions,

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[6] See Wild, Computer Program Protection: The Need to Legislate a Solution, 54 Corn. L. Rev. 586, 604–609 (1969); Bender, Computer Programs: Should They Be Patentable?, 68 Col. L. Rev. 241 (1968); Buckman, Protection of Proprietory Interest in Computer Programs, 51 J. Pat. Off. Soc. 135 (1969).

[7] *Amicus* briefs of 14 interested groups have been filed on the merits in this case.

"(6) adding a '1' to said first position, and

"(7) shifting the signals to the right by at least three positions in preparation for a succeeding binary '1' in the second position of said register."

Claim 13 reads:

"A data processing method for converting binary coded decimal number representations into binary number representations comprising the steps of

"(1) testing each binary digit position '1,' beginning with the least significant binary digit position, of the most significant decimal digit representation for a binary '0' or a binary '1';

"(2) if a binary '0' is detected, repeating step (1) for the next least significant binary digit position of said most significant decimal digit representation;

"(3) if a binary '1' is detected, adding a binary '1' at the (i+1)th and (i+3)th least significant binary digit positions of the next lesser significant decimal digit representation, and repeating step (1) for the next least significant binary digit position of said most significant decimal digit representation;

"(4) upon exhausting the binary digit positions of said most significant decimal digit representation, repeating steps (1) through (3) for the next lesser significant decimal digit representation as modified by the previous execution of steps (1) through (3); and

"(5) repeating steps (1) through (4) until the second least significant decimal digit representation has been so processed."

JOHNSON ET AL. *v.* NEW YORK STATE EDUCATION DEPARTMENT ET AL.

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

No. 71–5685. Argued November 8, 1972—Decided November 20, 1972

449 F. 2d 871, vacated and remanded to the District Court to determine whether case has become moot.

Carl Jay Nathanson argued the cause and filed briefs for petitioners.

Joel Lewittes, Assistant Attorney General of New York, argued the cause for respondents. With him on the brief were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Iris A. Steel,* Assistant Attorney General. *Henry A. Weinstein* filed a brief for respondent the Board of Education, Union Free School District No. 27.

Briefs of *amici curiae* were filed by *J. Harold Flannery* for the Center for Law and Education, Harvard University, et al., and by *John E. Coons* for the American Federation of Teachers et al.

PER CURIAM.

We granted certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, 449 F. 2d 871 (1971), affirming the District Court's dismissal of petitioners' complaint challenging the constitutionality of New York Education Law § 701 *et seq.* (1971). 405 U. S. 916 (1972). However, respondents' brief states that "[o]n May 3, 1972, the qualified voters of the respondent school district elected by majority vote to assess a tax for the purchase of *all* textbooks

for grades one through six in the schools of the district." In light of this fact, and given the suggestion at oral argument that the books themselves have a life expectancy of five years, the judgment is vacated and the case is remanded to the United States District Court for the Eastern District of New York to determine whether this case has become moot.

MR. JUSTICE MARSHALL, concurring.

While I join the Court's decision, I feel obliged to state somewhat more fully what I view to be the reasons for and meaning of this remand.

The New York statutory scheme here under attack effectively denies textbooks to indigent elementary public school children unless the voters of their district approve a tax especially for the purpose of providing the books.[1] Petitioners who are indigent recipients of public assistance allege, *inter alia,* that the statute, as applied to their children, creates a wealth classification violative of the Equal Protection Clause.

When this action was initiated in September 1970, respondent Board of Education of Union Free School District No. 27 was not providing free textbooks to petitioners' children, although textbooks were available upon the payment of a fee, which petitioners were unable to afford.[2] The practical consequence of this situation was that indigent children were forced to sit " 'bookless, side by side in the same classroom with other more

[1] Under New York law, local school districts are required to loan textbooks free to students in grades seven through 12. N. Y. Educ. Law § 701 (1971). No such provision is made for children in grades one through six; free textbooks are to be made available to children in those grades only upon the vote of the majority of the district's eligible voters to levy a tax to provide funds for the purchase of the textbooks, N. Y. Educ. Law § 703 (1971).

[2] The fee imposed was $7.50 per child.

wealthy children learning with purchase[d] textbooks [thus engendering] a widespread feeling of inferiority and unfitness in poor children [which] is psychologically, emotionally and educationally disastrous to their well being.' " [3] Indeed, an affidavit submitted to the District Court indicated that in at least one case, an indigent child was told that "he will receive an 'F' for [each] day because he is without the required text-books. When the other pupils in the class read from text-books, the teacher doesn't let him share a book with another pupil, instead she gives him paper and tells him to draw." [4] Despite this evidence, the Court of Appeals, with one Judge dissenting, affirmed the District Court's dismissal of the complaint. We granted certiorari.[5]

This case obviously raises questions of large constitutional and practical importance. For two full school years children in elementary grades were denied access to textbooks solely because of the indigency of their families while these questions were being considered by the lower courts. After we had granted certiorari, however, a majority of the voters in respondent school district finally agreed to levy a tax for the purchase of textbooks for the elementary grades, and we are told that free textbooks have now been provided.

I join in the Court's decision to remand the case so that the District Court can assess the consequences of this new development. I do so because I believe that the Court acts out of a proper sense of our constitutional duty to decide only live controversies, and because I believe that the District Judge can best resolve the factual issues upon which proper resolution of the mootness question depends. Certainly, our mere act of re-

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[3] 449 F. 2d 871, 873 (CA2 1971) (quoting with approval petitioners' allegations).

[4] Affidavit of Carl Jay Nathanson, App. 28.

[5] 405 U. S. 916 (1972).

manding in no way suggests any particular view as to whether this case is in fact moot. That decision is for the District Judge in the first instance.

In reaching his decision, the District Judge will, of course, have to take into account the standards that we have previously articulated for resolving mootness problems. On the one hand, "[a] case [may be] moot if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203 (1968). See also *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972). But on the other, "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *United States* v. *Concentrated Phosphate Export Assn., supra,* at 203. In the context of constitutional questions involving electoral processes, these principles have generally found expression in the proposition that a case is not moot if "[t]he problem is . . . 'capable of repetition, yet evading review.'" *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969).[6]

In applying these standards to this case, the District Judge should ascertain the nature of the textbook problem for the elementary grades in respondent school district. Respondents have not suggested that the problem has been resolved once and for all by the recent purchases. To be sure, they do contend that the new textbooks have a useful life of five years. But does this adequately account for destruction by extraordinary

[6] These prior statements provide only rough guidance in this case, particularly since we deal here with an electoral process that is employed only on an irregular basis as new books are needed. Nevertheless, I think they are enlightening as to the appropriate inquiries for the District Court to make on remand.

events, for loss due to theft, and for obsolescence due to curriculum changes? And, even accepting the five-year figure, does this make the problem a non-recurring one insofar as the continuing viability of this litigation is concerned?

The District Judge should also investigate the posture in which the legal issues presented by this case might again arise when the books begin to wear out. Will the respondent school district delay holding a new election until the new books are actually needed? Is it possible that litigation would again have to proceed for an entire school year, or more, while indigent children are deprived of books, before the constitutionality of that deprivation is finally determined?

These seem to me essential questions for the District Court to consider on remand in disposing of the issue of mootness.[7]

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[7] Nor should the District Court overlook the fact that this is a class action brought by petitioners "on their own behalf and on behalf of their children and all other persons similarly aggrieved." Even if the case is now moot as to these particular petitioners, there may be other members of the class who remain aggrieved and thus the action may remain a viable one, see, *e. g., Cypress* v. *Newport News General & Nonsectarian Hospital Assn.,* 375 F. 2d 648, 657–658 (CA4 1967); *Gatling* v. *Butler,* 52 F. R. D. 389, 394–395 (Conn. 1971). Cf. *Brockington* v. *Rhodes,* 396 U. S. 41, 43 (1969).

UNITED STATES *v.* JIM ET AL.

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

No. 71–1509. Decided November 20, 1972*

A statute enlarged the class of beneficiaries of certain royalties from oil and gas leases in the Aneth Extension of the Navajo Indian Reservation in Utah by providing that the funds be used to benefit all Navajo Indians residing in San Juan County rather than only those residing in the Aneth Extension, as provided in an earlier statute. *Held:* As the earlier statute did not create constitutionally protected property rights in the residents of the Aneth Extension, the statutory change did not constitute a taking of property without just compensation.

Reversed.

PER CURIAM.

The motion of the Navajo Tribe of Indians for leave to file a brief as *amicus curiae* in No. 71–1509, is granted.

These cases are here on appeal from a judgment of the District Court for the District of Utah that declared an Act of Congress to be unconstitutional. Jurisdiction in this Court is conferred by 28 U. S. C. §§ 1252 and 2101 (a).

In 1933, the Congress withdrew certain lands in Utah, known as the "Aneth Extension," from the public domain and added them to the Navajo Reservation. Though no oil or gas was believed to be located on these lands, it was provided that should such mineral resources be produced in commercial quantities, "37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided,* That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children

*Together with No. 71–1612, *Utah et al.* v. *Jim et al.,* on appeal from the same court.

in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein." 47 Stat. 1418. The remaining 62½% of the royalties generated by any such tribal mineral leases were, by implication, to go to the Navajo tribe.

After the passage of the Act, oil and gas were discovered on the Aneth Extension, and royalties were divided pursuant to the statute. The State of Utah created an Indian Affairs Commission to manage and expend the funds received by the State under the Act. As time went on, the language of the 1933 Act came to create administrative problems regarding the expenditure of the funds channeled through the State. A report of the Senate Committee on Interior and Insular Affairs noted in 1967 that the word "tuition" in the 1933 Act had created uncertainty as to the breadth of the educational program the State was authorized to finance from the royalty funds. The report also noted a difficulty in discerning precisely who was properly a beneficiary of the funds, since "many Navajo families do not live permanently within the lands set aside in 1933, but move back and forth between this area and other locations." S. Rep. No. 710, 90th Cong., 1st Sess., 2 (1967).

To make the administration of these funds more flexible and to spread the benefits of the royalties more broadly among the Navajo community, the Congress enacted a statute in 1968 that directed the State to expend the 37½% of royalties "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." 82 Stat. 121. This statutory change expanded the pool of beneficiaries substantially, and a class action was brought on behalf of the residents of the Aneth Extension, seeking *inter alia* a declaration that the statute was an unconstitutional taking of property without just compensation. The District Court concluded that the

1933 Act vested certain property rights in the plaintiffs, and held the 1968 Act, with its changed pool of beneficiaries, to be unconstitutional.[1]

The judgment of the District Court is in error. Congress in 1933 did not create constitutionally protected property rights in the appellees. The Aneth Extension was added to a tribal reservation, and the leases which give rise to mineral royalties are tribal leases. It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307; *Delaware Indians* v. *Cherokee Nation,* 193 U. S. 127, 136. To be sure, the 1933 Act established a pattern of distribution which benefited the appellees more than other Indians on the Navajo Reservation.[2] But it was well within the power of Congress to alter that distributional scheme.[3] In *Gritts* v. *Fisher,* 224 U. S. 640, this Court approved a congressional enlargement of the pool of Indians who were to benefit from a distribution of tribal property. There, too, an earlier statute had established a more limited entitlement.

> "But it is said that the act of 1902 contemplated that they [the beneficiaries under the first enactment] alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt

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[1] The decision of the District Court is unreported.

[2] While the 1933 Act remained in effect, the District Court properly insisted that the Utah State Indian Affairs Commission comply with the statutory formula for disbursements. See *Sakezzie* v. *Utah Indian Affairs Comm'n,* 198 F. Supp. 218 (declaratory judgment); 215 F. Supp. 12 (supplemental relief).

[3] We intimate no view as to the rights a *tribe* might have if Congress were to deprive *it* of the value of mineral royalties generated by tribal lands.

> such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.' . . . It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress . . . ." *Id.*, at 648.

Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the 37½% of royalties which flow through the State in a more efficient and equitable manner. This was well within the power of Congress to do. As no "property," in a Fifth Amendment sense, was conferred upon residents of the Aneth Extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation. The judgment of the District Court is

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

Plaintiffs below are a class of Indians with a membership of 1,500. They are a mixture of Navajo and Piute and live in an area of the Navajo Reservation called the Aneth Extension, made part of that reservation in a 1933 Act of Congress. 47 Stat. 1418. In 1968 Congress amended that Act, 82 Stat. 121, and the District Court for the District of Utah declared the amendment unconstitutional.

Prior to 1933 the Extension was part of the public lands of the United States. The area was occupied by the direct ancestors of the appellees.

The Indians in the Aneth Extension number about 1,500 people who are primitive Navajos with some mixture of Piute blood. See *Sakezzie* v. *Utah Indian Affairs Comm'n*, 198 F. Supp. 218, 220. They live in a remote and relatively inaccessible area with an average annual income per family of $240. *Ibid.* The Aneth Extension is in San Juan County and the 1933 Act stated: "[N]o further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county."

The white man was unconcerned about this domain until oil was discovered; and then he became quite active. By June 30, 1970, the royalties owing the Aneth Extension Indians had increased to $7,039,022.32. Of this, $78,000 was used to pipe water from the Aneth Extension to the adjoining lands of a white man, an "improvement" that only incidentally aided the resident Indians. Another $27,000 of Indian funds was spent for the construction of an airport and connecting road, which substantially benefited a white man's private dude ranch operation. Some $10,000 or more was expended for administrative purposes by Utah. 198 F. Supp., at 221. When this suit was started, additional expenditures were about to be made: $175,000 to a federal agency to locate isolated water springs on the Aneth Extension and $500,000 to build a hard-surfaced road outside the boundaries of the Extension.

These primitive Navajos wanted the money used to purchase high-elevation ranges where they might have summer grazing for the livestock and thus realize a round-the-year livestock operation. Judge Christensen found that members of the Aneth Extension were the sole beneficiaries of the fund and that it should be administered with their wishes in mind.

But there are tensions and conflicts between these primitive Navajos who live on the Aneth Extension and other members of the tribe who live elsewhere. 198 F. Supp., at 221.

The State Commission did not comply with the District Court's order but sponsored legislation to extend the benefits of the fund to other Indians.[1] Judge Christensen ruled again that the fund was solely for the benefit of members of the Aneth Extension. *Sakezzie* v. *Utah State Indian Affairs Comm'n,* 215 F. Supp. 12. Neither opinion was appealed. But the State Commission promoted legislation to extend the benefits of the 1933 Act to other Indians. *Id.,* at 20.

The problems the Commission had in administering the fund reached Congress and in 1968 the contested amendment was passed. 82 Stat. 121. This amendment indicates that money must be used by the State of Utah "for the health, education, and general welfare of the Navajo Indians residing in San Juan County" and that "Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, *as may be determined by the State of Utah . . . .*" *Ibid.* (Emphasis added.)

The 1933 Act gave title to the land and right to the fund, *not* to the *tribe* of the Navajo, but to the Aneth

[1] The Act admitting Utah to the Union provided:

"That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." 28 Stat. 108.

community.[2] I do not believe that under the circumstances of this case Congress had the power to expand the class of beneficiaries to include the whole tribe.

The occupants of the Extension have been a separate community for many generations. Their claim of right by continuous possession precedes the transfer of title by the United States Government. Congress made provision for the Secretary of the Interior to place other tribes on the land and, if he did, their claim would be based on territory, not membership. Since the rights were vested in those who lived on the Aneth Extension, I do not see how they can be extended to outsiders.

In *Gritts* v. *Fisher,* 224 U. S. 640, the Court upheld the power of Congress to expand the beneficiaries of certain Indian land to the children of those who already enjoyed those rights. Here the expansion is not limited to those of the same blood line. But, more important, Congress had a different legal relation to the Cherokees than it does to the appellees. "[T]he members of this tribe were wards of the United States, which was fully empowered, whenever it seemed wise to do so, to assume full control

[2] That Act (47 Stat. 1418), after describing the Aneth Extension by metes and bounds, provided that those public lands "be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided,* That no further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U. S. C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided,* That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein."

over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds . . . ." *Id.*, at 642. The 1933 Act states that the lands "are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon." 47 Stat. 1418. That would seem to freeze the existing legal rights in that area of the Aneth Extension to the inhabitants. The legal effect seems like a disclaimer on the part of the United States of any right in either the land or the minerals. It is difficult for me to see how Congress has power to change the scheme without payment of just compensation. After all, Indians are beneficiaries of the Due Process Clause of the Fifth Amendment. *United States* v. *Creek Nation,* 295 U. S. 103; *Shoshone Tribe of Indians* v. *United States,* 299 U. S. 476. They too are people, not sheep or cattle that can be given or denied whatever their overseer decrees.

Indians are also beneficiaries of the Just Compensation Clause of the Fifth Amendment. *Chippewa Indians of Minnesota* v. *United States,* 305 U. S. 479; *United States* v. *Klamath and Moadoc Tribes,* 304 U. S. 119; *Sioux Tribe of Indians* v. *United States,* 316 U. S. 317. When there is a taking of Indian lands, the compensation must take into account the mineral rights which are part of the lands. *United States* v. *Shoshone Tribe of Indians,* 304 U. S. 111. What then constitutes a taking? The majority finds no taking because ownership already existed in the Navajo tribe. The 1933 Act states, however, that all lands are "permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon," 47 Stat. 1418. That Act plainly indicates that only those residing on that tract, not the tribe as a whole, were the beneficiaries.

If the royalty granted by the 1933 Act had been to the Standard Oil Co. or any other producer of oil, no one would dare say that the royalty could be assigned by a subsequent Congress to an oil consortium without payment of just compensation. Whenever we have made grants of public lands or interests therein to Indians the Court has held that the fact that Indians are wards and the United States a guardian does not make the Indian title defeasible. The Court in *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113, held that if the United States were allowed to take lands from Indians, "[t]hat would not be an exercise of guardianship, but an act of confiscation."

In *United States* v. *Creek Nation,* 295 U. S., at 109–110, the Court said:

> "The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them . . . ."

The present cases are close to *Shoshone Tribe of Indians* v. *United States,* 299 U. S. 476, where Congress repeatedly put Arapahoes on Shoshone lands acquired under a treaty. This Court, speaking through Mr. Justice Cardozo, allowed damages to the Shoshones:

> "Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their

> title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. . . . What those incidents are, it is needless to consider now. . . . The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land *pro tanto,* in substance, if not in form." *Id.,* at 496.

And quoting from *United States* v. *Cook,* 19 Wall. 591, Mr. Justice Cardozo added,

> "The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.' " *Id.,* at 497.

What power remains in Congress after the express purpose of the Act "permanently [to] withdraw" the lands from disposal?

Public lands are usually subject to disposition by patent and upon its issuance, control over the transaction ceases and the patent can only be set aside by judicial proceedings in the courts. *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589; *Moore* v. *Robbins,* 96 U. S. 530. Thus, when Congress passed legislation giving public lands to the railroads, it was considered a contract which could not be broken by Congress when it sought to use the lands as a water-power site, *Payne* v. *Central Pacific R. Co.,* 255 U. S. 228; nor could the Secretary reclaim the property. *United States* v. *Northern Pacific R. Co.,* 256 U. S. 51; *Santa Fe Pacific R. Co.* v. *Fall,* 259 U. S. 197, 199. An entryman on a homestead claim does not achieve title until certain time and work conditions are met. 43 U. S. C. §§ 161–165. Yet, during this period he has the right to exclusive possession and use, unless the patent was secured by fraud. Patents

are not issued in oil and gas exploration but leases are. 30 U. S. C. § 226. But that fact does not affect the power to cancel the leases. That can only be done by a failure of the lessee to comply with the lease, the statute, and regulations. 30 U. S. C. § 188. *Pan American Petroleum Corp.* v. *Pierson,* 284 F. 2d 649.

Until lands are patented, title remains in the United States. Yet even before a patent issues the claims are "valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met." *Best* v. *Humboldt Mining Co.,* 371 U. S. 334, 336.

The devices for doing the Indians in, when it comes to royalties in gas or oil lands, are numerous. See *White* v. *Sinclair Prairie Oil Co.,* 139 F. 2d 103. But the owners of oil and gas interests (whether those interests be legal or equitable) normally have an interest separate and apart from the land where the oil and gas are discovered. See *Lane* v. *Hughes,* 228 S. W. 2d 986; 3 E. Kuntz, Oil and Gas, cc. 38 and 42 (1967); V. Kulp, Oil and Gas Rights § 10.36 *et seq.* (1954). It is strange law, indeed, when the guardian (the United States) is allowed to do in the wards (the Indians) by depriving them of their equitable interest in the oil royalties which had been granted or by reducing their share of the royalties granted.

The problems of this case are typical of those that have plagued the Indians from the beginning. We should put the cases down for oral argument to make certain that these primitive Navajos receive the full benefit of the law.

EVCO, DBA EVCO INSTRUCTIONAL DESIGNS *v.* JONES, COMMISSIONER OF BUREAU OF REVENUE OF NEW MEXICO, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

No. 71–857. Argued November 8, 1972—Decided December 4, 1972

Proceeds from transactions whereby petitioner creates and designs reproducible instructional materials in New Mexico for delivery under contract to out-of-state clients, which the state court found involved sales of tangible personal property and not services performed in New Mexico, may not be subjected to New Mexico's gross receipts tax, the imposition of which upon such proceeds constitutes an impermissible burden on interstate commerce.

83 N. M. 110, 488 P. 2d 1214, reversed.

Kendall O. Schlenker argued the cause for petitioner. With him on the briefs was *James M. Parker.*

John C. Cook, Assistant Attorney General of New Mexico, argued the cause for respondents. With him on the brief was *David L. Norvell,* Attorney General.

PER CURIAM.

The petitioner, Evco, is a New Mexico corporation that employs writers, artists, and draftsmen to create and design instructional programs. It develops an educational idea into a finished product that generally consists of reproducible originals of books, films, and magnetic audio tapes. Typical of its contracts is Evco's agreement with the Department of Agriculture to develop camera-ready copies of programmed textbooks, notebooks, and manuals to be used in an orientation course for forest engineers. Evco's contracts are negotiated and entered into outside New Mexico; it creates the reproducible originals in New Mexico, and then delivers them to its out-of-state clients. The customers in turn use the orig-

inals to publish however many books and manuals are needed to implement the instructional program.

The Commissioner of Revenue for New Mexico levied the State's Emergency School Tax and its Gross Receipts Tax on the total proceeds Evco received from these contracts.[1] The company appealed this assessment to the Court of Appeals of New Mexico, arguing that these taxes on out-of-state sales imposed an unconstitutional burden on interstate commerce in violation of Art. I, § 8, of the Constitution. That court found that though the taxes were imposed on the proceeds of out-of-state sales of tangible personal property, rather than on the receipts from sales of services, such taxes were not an unconstitutional burden on commerce. 81 N. M. 724, 472 P. 2d 987.[2] The Supreme Court of New Mexico declined to review the judgment.

In his brief in opposition to the petition for certiorari, which sought our review of that judgment, the Attorney General of New Mexico conceded that the State could not tax the receipts from sales of tangible personal property outside the State. We granted certiorari, vacated the judgment, and remanded the case to the Court of Appeals for reconsideration in light of the position taken by the Attorney General. 402 U. S. 969.

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[1] Taxes were assessed for the period January 1, 1966, through December 31, 1968. From January 1, 1966, through June 30, 1967, the petitioner's receipts were subject to the Emergency School Tax Act. N. M. Stat. Ann. §§ 72–16–2 to 72–16–19, 1953 Compilation, repealed by N. M. Laws 1966, c. 47, § 22. From July 1, 1967, through December 31, 1968, the remainder of the taxable period, Evco's receipts were taxed under the Gross Receipts and Compensating Tax Act. N. M. Stat. Ann. §§ 72–16A–1 to 72–16A–19, 1953 Compilation (Supp. 1971).

[2] The court did find, however, that the receipts from sales of tangible personal property to government agencies and certain specified organizations were statutorily exempted from taxation. Those specific exemptions are not at issue here.

On remand, the Court of Appeals adhered to its prior findings that these taxes were imposed on out-of-state sales of tangible personal property, not services, but it concluded that the constitutionality of the taxes should not depend on that distinction. It reinstated and reaffirmed its prior opinion finding the taxes constitutional. 83 N. M. 110, 488 P. 2d 1214. The Supreme Court of New Mexico again declined to review the case, and we granted certiorari. 405 U. S. 953.

Our prior cases indicate that a State may tax the proceeds from services performed in the taxing State, even though they are sold to purchasers in another State. Hence, in *Department of Treasury* v. *Ingram-Richardson Mfg. Co.,* 313 U. S. 252, the Court upheld a state gross income tax imposed on a taxpayer engaged in the process of enameling metal parts for its customers. We accepted the finding of the court below that this was a tax on income derived from services, not from the sales of finished products, and we found irrelevant the fact that the sales were made to out-of-state customers. The tax was validly imposed on the service performed in the taxing State. See also *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250.

But a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce. In *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, we rejected as unconstitutional a State's attempt to impose a gross receipts tax on a taxpayer's sales of road machinery to out-of-state customers.

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States

> in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." *Id.*, at 311.

See also *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434.

As on the previous petition for certiorari, both parties accept these propositions, and both agree that if the findings of the Court of Appeals of New Mexico are accepted, its judgment must be reversed.

The only real dispute between the parties centers on the factual question of the nature and effect of the taxes. The State contends that these taxes were actually imposed on the receipts from services performed in the State, not on the income from the sale of property outside the State. It argues that the out-of-state purchasers actually paid for the educational programs developed in New Mexico, not for the camera-ready copies that were only incidental to the services purchased. But the Court of Appeals rejected this interpretation of the facts. It found in effect that the reproducible originals were the *sine qua non* of the contract and that it was the sale of that tangible personal property in another State that New Mexico had taxed. "There are no exceptional circumstances of any kind that would justify us in rejecting the . . . Court's findings; they are not without factual foundation, and we accept them." *Lloyd A. Fry Roofing Co.* v. *Wood,* 344 U. S. 157, 160. See also *Grayson* v. *Harris,* 267 U. S. 352, 357–358; *Portland Railway, Light & Power Co.* v. *Railroad Comm'n,* 229 U. S. 397, 411–412.

Accordingly, since the Court of Appeals approved the imposition of a tax on the proceeds of the out-of-state sales of tangible personal property, its judgment is

Reversed.

WEBB *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 71–6647. Decided December 4, 1972

Trial court's extended admonition to petitioner's only witness to refrain from lying, coupled with threats of dire consequences if witness did lie, effectively discouraged the witness from testifying at all and deprived petitioner of due process of law by denying him the opportunity to present witnesses in his own defense.

Certiorari granted; 480 S. W. 2d 398, reversed.

PER CURIAM.

The petitioner was convicted of burglary in the Criminal District Court of Dallas County, Texas, and was sentenced to a term of imprisonment for 12 years. He appealed, raising several claims of error, among them an allegation that the trial court had violated his constitutional rights by "threatening and harassing" the sole witness for his defense, so that the witness refused to testify. The Court of Criminal Appeals of Texas affirmed his conviction, 480 S. W. 2d 398 (1972). We grant the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari and reverse the petitioner's conviction.

The record shows that, after the prosecution had rested its case, the jury was temporarily excused. During this recess, the petitioner called his only witness, Leslie Max Mills, who had a prior criminal record and was then serving a prison sentence. At this point, the trial judge, on his own initiative, undertook to admonish the witness as follows:

> "Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you.

> If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood [*sic*] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking."

The petitioner's counsel objected to these comments, on the ground that the judge was exerting on the mind of the witness such duress that the witness could not freely and voluntarily decide whether or not to testify in the petitioner's behalf, and was thereby depriving the petitioner of his defense by coercing the only defense witness into refusing to testify. Counsel pointed out that none of the witnesses for the State had been so admonished. When the petitioner's counsel then indicated that he was nonetheless going to ask the witness to take the stand, the judge interrupted: "Counsel, you can state the facts, nobody is going to dispute it. Let him decline to testify." The witness then refused to testify for any purpose and was excused by the court. The petitioner's subsequent motion for a mistrial was overruled.

On appeal, the petitioner argued that the judge's conduct indicated a bias against the petitioner and deprived him of due process of law by driving his sole witness off the witness stand. The Court of Criminal Appeals rejected this contention, stating that, while it did not condone the manner of the admonition, the petitioner had made no objection until the admonition was completed, and there was no showing that the witness had been intimidated by the admonition or had refused to testify because of it.

We cannot agree. The suggestion that the petitioner or his counsel should have interrupted the judge in the middle of his remarks to object is, on this record, not a basis to ground a waiver of the petitioner's rights. The fact that Mills was willing to come to court to testify in the petitioner's behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of Mills' refusal to testify.

The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of perjury. But the judge did not stop at warning the witness of his right to refuse to testify and of the necessity to tell the truth.* Instead, the judge implied that he expected Mills to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole. At least some of these threats may have been beyond the power of this judge to

*Cf. *United States* v. *Winter,* 348 F. 2d 204, 210 (1965), where Judge Weinfeld, writing for the Second Circuit, stated:

"Once a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it."

carry out. Yet, in light of the great disparity between the posture of the presiding judge and that of a witness in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify.

In *Washington* v. *Texas*, 388 U. S. 14, 19 (1967), we stated:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment. The admonition by the Texas Court of Criminal Appeals might well have given the trial judge guidance for future cases, but it did not serve to repair the infringement of the petitioner's due process rights under the Fourteenth Amendment.

Accordingly, the judgment is

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The facts before us do not, in my opinion, justify the Court's summary disposition. Petitioner Webb (who, on a prior occasion, had been convicted on still another

burglary charge) was apprehended by the owner of a lumber business. The owner, armed with his shotgun, had driven to his office at three o'clock in the morning upon the activation of a burglar alarm. When he entered the building, the owner observed a broken window and an assortment of what he regarded as burglary tools on his desk. When men emerged from an adjacent room, a gun fight ensued. Two intruders escaped, but the owner, despite his having been shot twice, succeeded in holding the petitioner at gunpoint until police arrived.

Although the admonition given by the state trial judge to the sole witness proffered by the defense was obviously improper, sufficient facts have not been presented to this Court to demonstrate the depth of prejudice that requires a summary reversal. The admonition might prove far less offensive, and the conduct of the trial judge understandable, if, for example, as is indicated in petitioner's brief, p. 8, prepared by counsel and filed with the Texas Court of Criminal Appeals, the witness were known to have been called for the purpose of presenting an alibi defense. Against the backdrop of being caught on the premises and of apparently overwhelming evidence of guilt, offset only by a bare allegation of prejudice, I would deny the petition for certiorari and, as the Court so often has done, I would remit the petitioner to the relief available to him by way of a post-conviction proceeding with a full evidentiary hearing.*

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*Petitioner's counsel assured the Court of Criminal Appeals that the witness would not have been called "unless he had been previously interviewed and found to be helpful to the appellant's cause." Brief for Appellant on First Motion for Rehearing 7, *Webb* v. *Texas*, 480 S. W. 2d 398 (Ct. Crim. App. Tex. 1972). An evidentiary hearing would allow petitioner's trial counsel to outline the testimony that was expected from the witness.

A prior trial is mentioned in the record. An evidentiary hearing might reveal events at the prior trial that justified the trial judge's unusual concern about possible perjury.

COOL *v.* UNITED STATES

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

No. 72–72. Decided December 4, 1972

Trial court's "accomplice instruction," in effect requiring the jury to decide that a defense witness' testimony was "true beyond a reasonable doubt" before considering that testimony, impermissibly obstructed the right of a criminal defendant to present exculpatory testimony of an accomplice (*Washington* v. *Texas,* 388 U. S. 14); and it unfairly reduced the prosecution's burden of proof, since it is possible that the testimony would have created a reasonable doubt in the minds of the jury, but that it was not considered because the testimony itself was not believable beyond a reasonable doubt. Cf. *In re Winship,* 397 U. S. 358.

Certiorari granted; 461 F. 2d 521, reversed and remanded.

PER CURIAM.

The petition for a writ of certiorari is granted.

In this case, the court below held in effect that in a criminal trial, the jury may be instructed to ignore defense testimony unless it believes beyond a reasonable doubt that the testimony is true. That holding is fundamentally inconsistent with our prior decisions in *In re Winship,* 397 U. S. 358 (1970), and *Washington* v. *Texas,* 388 U. S. 14 (1967), and must therefore be reversed.

After a jury trial, petitioner was found guilty of possessing and concealing, with intent to defraud, counterfeit obligations of the United States. The evidence showed that on June 2, 1970, petitioner, her husband, and one Robert E. Voyles were traveling together by car between St. Louis, Missouri, and Brazil, Indiana. Upon reaching Brazil, Voyles left petitioner and her husband and passed two counterfeit bills at a local store. He was then arrested shortly after he entered the car in which petitioner and her husband were waiting.

After his arrest, Voyles was placed in the police car and taken to the station house. Petitioner and her hus-

band were told to follow in their own car. A Mr. Baumunk testified that he saw petitioner throw a paper sack out of the car window as petitioner was following the police car. The bag was subsequently found to contain counterfeit bills. Police also found three counterfeit bills crumpled up under the right seat of petitioner's car.

Although petitioner testified in her own defense, she relied primarily on the testimony of Voyles. Voyles freely admitted his own guilt,[1] but steadfastly insisted that neither petitioner nor her husband had anything to do with the crime. He testified that petitioner had merely agreed to give him a ride and knew nothing about the counterfeit bills that he carried with him. When the car stopped in Brazil, Voyles allegedly removed some of the counterfeit bills from his satchel which he kept in petitioner's trunk, and concealed the rest of the bills in a sack which he placed under the front bumper by the headlight. The defense argued that it was this sack that Baumunk saw fall to the ground as petitioner drove to the police station. Voyles also stated that after he had rejoined petitioner, he saw police approaching the car and threw the remaining bills on his person onto the car floor, again without the knowledge of petitioner. Petitioner thus asserts that she was not in knowing possession of the bills on the car floor.

With the case in this posture, the Government's position clearly depended upon its ability to discredit Voyles, since his testimony was completely exculpatory. Over strenuous defense objection,[2] the trial judge gave the jury

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[1] At the time of his testimony, Voyles had already pleaded guilty to a charge of complicity in the possession and concealment of counterfeit notes.

[2] The dissent suggests that the defendant objected to the accomplice instruction solely on the ground that use of the word "accomplice" suggested that the defendant was guilty. Although the defense objection was not a model of clarity, it seems apparent that it was grounded more broadly on the trial judge's decision to give the stand-

a lengthy "accomplice instruction" to be used in evaluating Voyles' testimony. After first defining the word "accomplice" and warning that an accomplice's testimony is "open to suspicion," the judge made the following statement: "However, I charge you that the testimony of an accomplice is competent evidence and it is for you to pass upon the credibility thereof. If the testimony carries conviction and you are convinced it is true *beyond a reasonable doubt,* the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source." (Emphasis added.)

The clear implication of this instruction was that the jury should disregard Voyles' testimony unless it was "convinced it is true beyond a reasonable doubt." [3] Such

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ard accomplice instruction despite the fact that the accomplice was a defense witness. The defense attorney stated: "I take exception to Instruction No. 16, as it's misleading. *I don't think it belongs in this cause. There was no accomplice testified* [*sic*] *for the Government,* and this could mislead them as to the person who was accused of this crime and has already pled guilty, as making an accomplice of him, when actually he is not an accomplice, because they are not involved in the crime." (Emphasis added.) Certainly, the trial judge understood this objection to be directed to his decision to give the standard cautionary instruction even though the alleged accomplice was called by the defendant. In colloquy with the defense attorney, the judge stated: "The next, 'accomplice,' the evidence of both the Government and the defendants may be considered by the jury in determining the guilt or innocence, *no matter who produces the witness.* . . . Now there's a lot of inferences can be drawn from one item of evidence or another, and that's for the jury to decide. So long as there is some evidence, the instruction must be given. *It hits both ways on that point.*" (Emphasis added.) Nor did the Court of Appeals indicate any doubt that defendant's objection was sufficient to preserve the point on appeal.

[3] True, the instruction was couched in positive terms. It told the jury to *consider* the evidence if it believed it true beyond a reason-

an instruction places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt.[4]

Accomplice instructions have long been in use and have been repeatedly approved. See, *e. g., Holmgren* v. *United States,* 217 U. S. 509, 523–524 (1910). In most instances, they represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity. See, *e. g., Crawford* v. *United States,* 212 U. S. 183, 204 (1909). But in most of the recorded cases, the instruction has been used when the accomplice turned State's evidence and testified against the defendant. See generally *McMillen* v. *United States,* 386 F. 2d 29 (CA1 1967), and cases cited therein. No constitutional problem is posed when the judge instructs a jury to receive the prosecution's accomplice testimony "with care and caution." See, *e. g., United States* v. *George,* 319 F. 2d 77, 80 (CA6 1963). Cf. *United States* v. *Nolte,* 440 F. 2d 1124 (CA5 1971).

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able doubt. But the statement contained a negative pregnant as well. There is an unacceptable risk that jurors might have thought they were to reject the evidence—"throw [it] out," in the words of the trial judge—if they had a reasonable doubt as to its veracity.

[4] In the next paragraph of his instruction, the judge stated: "I further instruct you that testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment against the defendants." In light of the fact that the only accomplice testimony in the case was exculpatory, this instruction was confusing to say the least. But even if it is assumed that Voyles' testimony was to some extent inculpatory, the instruction was still fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis. Even had there been no other error, the conviction would have to be reversed on the basis of this instruction alone.

But there is an essential difference between instructing a jury on the care with which it should scrutinize certain evidence in determining how much weight to accord it and instructing a jury, as the judge did here, that as a predicate to the consideration of certain evidence, it must find it true beyond a reasonable doubt.

In *Washington* v. *Texas, supra,* we held that a criminal defendant has a Sixth Amendment right to present to the jury exculpatory testimony of an accomplice. The instruction given below impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable.

Moreover, the instruction also has the effect of substantially reducing the Government's burden of proof. We held in *In re Winship, supra,* that the Constitution requires proof of guilt beyond a reasonable doubt. It is possible that Voyles' testimony would have created a reasonable doubt in the minds of the jury, but that it was not considered because the testimony itself was not believable beyond a reasonable doubt. By creating an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence, the trial judge reduced the level of proof necessary for the Government to carry its burden. Indeed, where, as here, the defendant's case rests almost entirely on accomplice testimony, the effect of the judge's instructions is to require the defendant to establish his *innocence* beyond a reasonable doubt.

Because such a requirement is plainly inconsistent with the constitutionally rooted presumption of innocence, the conviction must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN concur, dissenting.

I believe that the Court's fine-spun parsing of the trial judge's charge to the jury turns the appellate review of this case into the sort of "quest for error" which was said in *Bihn* v. *United States,* 328 U. S. 633, 638 (1946), to be forbidden by Rule 52 (a) of the Federal Rules of Criminal Procedure,[1] and by 28 U. S. C. § 2111.[2]

The testimony of the witness Voyles, called by petitioner as a witness in her behalf, presented the trial judge with something of a dilemma in determining how he should charge the jury. Much of Voyles' testimony tended to exculpate petitioner, but there were significant aspects of it that did not. He substantiated the fact that the petitioner and her husband [3] had traveled with him from St. Louis to Brazil, Indiana. He corroborated prosecution evidence that both petitioner and her husband gave the same false last name of Gibbs when booked at the police station in Brazil. He also suggested a closeness to petitioner's husband which was scarcely helpful to their defense when he testified that "I was a little sore at Mike [petitioner's husband], because I thought Mike should help me [get out on bond]."

The trial judge made clear in his colloquy with counsel, while dealing with their objections to the charge, that he

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[1] "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. Rule Crim. Proc. 52 (a).

[2] "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U. S. C. § 2111.

[3] The petitioner and her husband were tried and convicted together on the counterfeiting charges. Both appealed their convictions to the Seventh Circuit, which affirmed both. Petitioner's husband has not sought certiorari to have his conviction reviewed.

was concerned about the ambivalence of Voyles' testimony and felt it necessary to give the charge relating to accomplices. Petitioner's counsel in objecting to that portion of the charge did so on a quite different ground from that now sustained by the Court; the ground of objection stated to the trial court was apparently that the mention of the term "accomplice" to the jury suggested that petitioner and her husband were in fact guilty. Such a ground of objection was wholly without merit, since, as the Court of Appeals pointed out in its opinion in this case, the instruction left it entirely to the jury to determine whether or not the facts existed that would make Voyles an accomplice.

The trial court gave 36 separate instructions to the jury, which covered some 52 pages of the transcript in this case. The instruction in question covers two pages, and the Court reverses the conviction on the basis of one sentence in that one instruction. The trial judge repeatedly emphasized to the jury that the Government was obligated to prove guilt beyond a reasonable doubt. Typical is the following statement, which is repeated throughout the instructions in at least half a dozen places:

> "The entire burden of proof is upon the Government from the beginning to the end of the trial and this burden of proof never shifts from the Government to the defendants, and the defendants are not bound to prove their innocence, offer any excuse, or explain anything . . . ."

The record before us does not indicate that either counsel so much as mentioned the accomplice instruction in his argument to the jury. Nonetheless, the Court concludes that because the instruction contained a "negative pregnant" that could be taken to mean that the jurors should reject Voyles' testimony if they had a reasonable

doubt as to its veracity, the conviction is to be reversed.

I had thought the day long past when even appellate courts of the first instance, such as the Court of Appeals in this case, parsed instructions and engaged in nice semantic distinctions in the absence of any showing that would satisfy an ordinary lawyer or layman that substantial rights of one of the parties had been prejudiced by the supposed error. If the nuance of the instruction upon which reversal is now based did not suggest itself to petitioner's trial counsel, it seems doubtful that it suggested itself to the jury either:

> "A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions. . . . '. . . [J]ustice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception.'" *Allis* v. *United States,* 155 U. S. 117, 122 (1894), quoting *Harvey* v. *Tyler,* 2 Wall. 328, 339 (1865).

Nor, as pointed out above, did this particular instruction of the trial court stand alone; it was incorporated into a series of instructions that had as their predominant theme that the burden of proof was upon the Government at every stage to prove guilt beyond a reasonable doubt. The trial court's instructions are to be taken as a whole, and even if an isolated passage might be error if standing by itself, that alone is not a sufficient ground

for reversal. *Boyd* v. *United States,* 271 U. S. 104, 107 (1926).

The Court's reversal on the ground that one of the instructions contained a "negative pregnant" smacks more of the scholastic jurisprudence whose shortcomings led to the enactment of 28 U. S. C. § 2111 than it does of the commonsense approach to appellate review that that section mandates.

CALIFORNIA ET AL. *v.* LaRUE ET AL.

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

No. 71–36. Argued October 10, 1972—Decided December 5, 1972

Following hearings, the California Department of Alcoholic Beverage Control issued regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. A three-judge District Court held the regulations invalid under the First and Fourteenth Amendments, concluding that under standards laid down by this Court some of the proscribed entertainment could not be classified as obscene or lacking a communicative element. *Held:* In the context, not of censoring dramatic performances in a theater, but of licensing bars and nightclubs to sell liquor by the drink, the States have broad latitude under the Twenty-first Amendment to control the manner and circumstances under which liquor may be dispensed, and here the conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable. Pp. 114–119.

326 F. Supp. 348, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 119. DOUGLAS, J., *post*, p. 120, BRENNAN, J., *post*, p. 123, and MARSHALL, J., *post*, p. 123, filed dissenting opinions.

L. Stephen Porter, Deputy Attorney General of California, argued the cause for appellants. With him on the brief was *Evelle J. Younger,* Attorney General.

Harrison W. Hertzberg and *Kenneth Scholtz* argued the cause for appellees. With them on the brief was *Warren I. Wolfe.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant Kirby is the director of the Department of Alcoholic Beverage Control, an administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that State, and with the authority to suspend or revoke any such license if it determines that its continuation would be contrary to public welfare or morals. Art. XX, § 22, California Constitution. Appellees include holders of various liquor licenses issued by appellant, and dancers at premises operated by such licensees. In 1970 the Department promulgated rules regulating the type of entertainment that might be presented in bars and nightclubs that it licensed. Appellees then brought this action in the United States District Court for the Central District of California under the provisions of 28 U. S. C. §§ 1331, 1343, 2201, 2202, and 42 U. S. C. § 1983. A three-judge court was convened in accordance with 28 U. S. C. §§ 2281 and 2284, and the majority of that court held that substantial portions of the regulations conflicted with the First and Fourteenth Amendments to the United States Constitution.[1]

Concerned with the progression in a few years' time from "topless" dancers to "bottomless" dancers and other forms of "live entertainment" in bars and nightclubs that it licensed, the Department heard a number of witnesses on this subject at public hearings held prior to the promulgation of the rules. The majority opinion

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[1] Appellees in their brief here suggest that the regulations may exceed the authority conferred upon the Department as a matter of state law. As the District Court recognized, however, such a claim is not cognizable in the suit brought by these appellees under 42 U. S. C. § 1983.

of the District Court described the testimony in these words:

> "Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers. . . ." 326 F. Supp. 348, 352.

References to the transcript of the hearings submitted by the Department to the District Court indicated that in licensed establishments where "topless" and "bottomless" dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

At the conclusion of the evidence, the Department promulgated the regulations here challenged, imposing standards as to the type of entertainment that could be presented in bars and nightclubs that it licensed. Those portions of the regulations found to be unconstitutional by the majority of the District Court prohibited the following kinds of conduct on licensed premises:

> (a) The performance of acts, or simulated acts, of "sexual intercourse, masturbation, sodomy,

bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law";

(b) The actual or simulated "touching, caressing or fondling on the breast, buttocks, anus or genitals";

(c) The actual or simulated "displaying of the pubic hair, anus, vulva or genitals";

(d) The permitting by a licensee of "any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus"; and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4.[2]

Shortly before the effective date of the Department's regulations, appellees unsuccessfully sought discretionary review of them in both the State Court of Appeal and the Supreme Court of California. The Department then joined with appellees in requesting the three-judge District Court to decide the merits of appellees' claims that the regulations were invalid under the Federal Constitution.[3]

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[2] In addition to the regulations held unconstitutional by the court below, appellees originally challenged Rule 143.2 prohibiting topless waitresses, Rule 143.3 (2) requiring certain entertainers to perform on a stage at a distance away from customers, and Rule 143.5 prohibiting any entertainment that violated local ordinances. At oral argument in that court they withdrew their objections to these rules, conceding "that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid." 326 F. Supp. 348, 350–351.

[3] Mr. Justice Douglas in his dissenting opinion suggests that the District Court should have declined to adjudicate the merits of appellees' contention until the appellants had given the "generalized

The District Court majority upheld the appellees' claim that the regulations in question unconstitutionally abridged the freedom of expression guaranteed to them by the First and Fourteenth Amendments to the United States Constitution. It reasoned that the state regulations had to be justified either as a prohibition of obscenity in accordance with the *Roth* line of decisions in this Court (*Roth* v. *United States,* 354 U. S. 476 (1957)), or else as a regulation of "conduct" having a communicative element in it under the standards

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provisions of the rules . . . particularized meaning." Since parties may not confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does not foreclose our inquiry into the existence of an "actual controversy" within the meaning of 28 U. S. C. § 2201 and Art. III, § 2, cl. 1, of the Constitution.

By pretrial stipulation, the appellees admitted they offered performances and depictions on their licensed premises that were proscribed by the challenged rules. Appellants stipulated they would take disciplinary action against the licenses of licensees violating such rules. In similar circumstances, this Court held that where a state commission had "plainly indicated" an intent to enforce an act that would affect the rights of the United States, there was a "present and concrete" controversy within the meaning of 28 U. S. C. § 2201 and of Art. III. *California Comm'n* v. *United States,* 355 U. S. 534, 539 (1958). The District Court therefore had jurisdiction of this action.

Whether this Court should develop a nonjurisdictional limitation on actions for declaratory judgments to invalidate statutes on their face is an issue not properly before us. Cf. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341 (1936) (Brandeis, J., concurring). Certainly a number of our cases have permitted attacks on First Amendment grounds similar to those advanced by the appellees, see, *e. g., Zwickler* v. *Koota,* 389 U. S. 241 (1967); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), and we are not inclined to reconsider the procedural holdings of those cases in the absence of a request by a party to do so.

laid down by this Court in *United States* v. *O'Brien,* 391 U. S. 367 (1968). Concluding that the regulations would bar some entertainment that could not be called obscene under the *Roth* line of cases, and that the governmental interest being furthered by the regulations did not meet the tests laid down in *O'Brien,* the court enjoined the enforcement of the regulations. 326 F. Supp. 348. We noted probable jurisdiction. 404 U. S. 999.

The state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink. In *Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 41 (1966), this Court said:

> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' "

While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." Still

earlier, the Court stated in *State Board* v. *Young's Market Co.,* 299 U. S. 59, 64 (1936):

> "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. In *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), the fundamental notice and hearing requirement of the Due Process Clause of the Fourteenth Amendment was held applicable to Wisconsin's statute providing for the public posting of names of persons who had engaged in excessive drinking. But the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment:

> "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Liquor Corp., supra,* at 332.

A common element in the regulations struck down by the District Court appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence from the hearings that it cited to the District Court, and mindful of the principle that in legislative rulemaking the agency may reason from the particular to the general, *Assigned Car Cases,* 274 U. S. 564, 583 (1927), we do

not think it can be said that the Department's conclusion in this respect was an irrational one.

Appellees insist that the same results could have been accomplished by requiring that patrons already well on the way to intoxication be excluded from the licensed premises. But wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment. *Seagram & Sons* v. *Hostetter, supra,* at 48. Nothing in the record before us or in common experience compels the conclusion that either self-discipline on the part of the customer or self-regulation on the part of the bartender could have been relied upon by the Department to secure compliance with such an alternative plan of regulation. The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot, therefore, be deemed an unreasonable one under the holdings of our prior cases. *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 487–488 (1955).

We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under *Roth* and subsequent decisions of this Court. See, *e. g., Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372 (1958), rev'g *per curiam,* 101 U. S. App. D. C. 358, 249 F. 2d 114 (1957). But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in *O'Brien, supra.*

Our prior cases have held that both motion pictures and theatrical productions are within the protection of

the First and Fourteenth Amendments. In *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952), it was held that motion pictures are "included within the free speech and free press guaranty of the First and Fourteenth Amendments," though not "necessarily subject to the precise rules governing any other particular method of expression." *Id.,* at 502–503. In *Schacht* v. *United States,* 398 U. S. 58, 63 (1970), the Court said with respect to theatrical productions:

> "An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance."

But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action," *Hughes* v. *Superior Court,* 339 U. S. 460 (1950); *Giboney* v. *Empire Storage Co.,* 336 U. S. 490 (1949).[4] In *O'Brien, supra,* the Court suggested that the extent to which "conduct" was protected by the First Amendment depended on the presence of a "communicative element," and stated:

> "We cannot accept the view that an apparently

[4] Similarly, States may validly limit the manner in which the First Amendment freedoms are exercised, by forbidding sound trucks in residential neighborhoods, *Kovacs* v. *Cooper,* 336 U. S. 77 (1949), and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare first obtain a permit. *Cox* v. *New Hampshire,* 312 U. S. 569 (1941). Other state limitations on the "time, manner and place" of the exercise of First Amendment rights have been sustained. See, *e. g., Cameron* v. *Johnson,* 390 U. S. 611 (1968), and *Cox* v. *Louisiana,* 379 U. S. 559 (1965).

limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U. S., at 376.

The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first

Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.[5]

The contrary holding of the District Court is therefore

Reversed.

MR. JUSTICE STEWART, concurring.

A State has broad power under the Twenty-first Amendment to specify the times, places, and circumstances where liquor may be dispensed within its borders. *Seagram & Sons* v. *Hostetter,* 384 U. S. 35; *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324, 330; *Dept. of Revenue* v. *James Beam Co.,* 377 U. S. 341, 344, 346; *California* v. *Washington,* 358 U. S. 64; *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401; *State Board* v. *Young's Market Co.,* 299 U. S. 59. I should suppose, therefore, that nobody would question the power of California to prevent the sale of liquor by the drink in places where food is not served, or where dancing is permitted, or where gasoline is sold. But here California has provided that liquor by the drink shall not be sold in places where certain grossly sexual exhibitions are performed; and that action by the State, say the appellees, violates the First and Fourteenth Amendments. I cannot agree.

Every State is prohibited by these same Amendments from invading the freedom of the press and from im-

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[5] Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in *Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 52 (1966), is equally in point here: "Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid."

pinging upon the free exercise of religion. But does this mean that a State cannot provide that liquor shall not be sold in bookstores, or within 200 feet of a church? I think not. For the State would not thereby be interfering with the First Amendment activities of the church or the First Amendment business of the bookstore. It would simply be controlling the distribution of liquor, as it has every right to do under the Twenty-first Amendment. On the same premise, I cannot see how the liquor regulations now before us can be held, on their face, to violate the First and Fourteenth Amendments.*

It is upon this constitutional understanding that I join the opinion and judgment of the Court.

MR. JUSTICE DOUGLAS, dissenting.

This is an action for a declaratory judgment, challenging Rules and Regulations of the Department of Alcoholic Beverage Control of California. It is a challenge of the constitutionality of the rules on their face; no application of the rules has in fact been made to appellees by the institution of either civil or criminal proceedings. While the case meets the requirements of "case or controversy" within the meaning of Art. III of the Constitution and therefore complies with *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, the case does not mark the precise impact of these rules against licensees who sell alcoholic beverages in California. The opinion

*This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution. See *Wisconsin* v. *Constantineau,* 400 U. S. 433; *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324, 329–334; *Dept. of Revenue* v. *James Beam Co.,* 377 U. S. 341.

of the Court can, therefore, only deal with the rules in the abstract.

The line which the Court draws between "expression" and "conduct" is generally accurate; and it also accurately describes in general the reach of the police power of a State when "expression" and "conduct" are closely brigaded. But we still do not know how broadly or how narrowly these rules will be applied.

It is conceivable that a licensee might produce in a garden served by him a play—Shakespearean perhaps or one in a more modern setting—in which, for example, "fondling" in the sense of the rules appears. I cannot imagine that any such performance could constitutionally be punished or restrained, even though the police power of a State is now buttressed by the Twenty-first Amendment.[1] For, as stated by the Court, that Amendment did not supersede all other constitutional provisions "in the area of liquor regulations." Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden.

Chief Justice Hughes stated the controlling principle in *Electric Bond & Share Co.* v. *SEC*, 303 U. S. 419, 443:

> "Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts. . . . By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the

[1] Section 2 of the Twenty-first Amendment reads as follows:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation. . . ."

The same thought was expressed by Chief Justice Stone in *Federation of Labor* v. *McAdory,* 325 U. S. 450, 470–471. Some provisions of an Alabama law regulating labor relations were challenged as too vague and uncertain to meet constitutional requirements. The Chief Justice noted that state courts often construe state statutes so that in their application they are not open to constitutional objections. *Id.,* at 471. He said that for us to decide the constitutional question "by anticipating such an authoritative construction" would be either "to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow." [2] *Ibid.* He added:

"In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." *Ibid.*

Those precedents suggest to me that it would have been more provident for the District Court to have de-

[2] Even in cases on direct appeal from a state court, when the decision below leaves unresolved questions of state law or procedure which bear on federal constitutional questions, we dismiss the appeal. *Rescue Army* v. *Municipal Court,* 331 U. S. 549.

clined to give a federal constitutional ruling, until and unless the generalized provisions of the rules were given particularized meaning.

MR. JUSTICE BRENNAN, dissenting.

I dissent. The California regulation at issue here clearly applies to some speech protected by the First Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, and also, no doubt, to some speech and conduct which are unprotected under our prior decisions. See *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966); *Roth* v. *United States,* 354 U. S. 476 (1957). The State points out, however, that the regulation does not prohibit speech directly, but speaks only to the conditions under which a license to sell liquor by the drink can be granted and retained. But, as MR. JUSTICE MARSHALL carefully demonstrates in Part II of his dissenting opinion, by requiring the owner of a nightclub to forgo the exercise of certain rights guaranteed by the First Amendment, the State has imposed an unconstitutional condition on the grant of a license. See *Perry* v. *Sindermann,* 408 U. S. 593 (1972); *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Speiser* v. *Randall,* 357 U. S. 513 (1958). Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression. For that reason, I would affirm the judgment of the District Court.

MR. JUSTICE MARSHALL, dissenting.

In my opinion, the District Court's judgment should be affirmed. The record in this case is not a pretty one, and it is possible that the State could constitutionally punish some of the activities described therein

under a narrowly drawn scheme. But appellees challenge these regulations[1] on their face, rather than as applied to a specific course of conduct.[2] Cf. *Gooding*

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[1] Rule 143.3 (1) provides in relevant part:

"No licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals."

Rule 143.4 prohibits: "The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

"(1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(3) Scenes wherein a person displays the vulva or the anus or the genitals.

"(4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above."

[2] This is not an appropriate case for application of the abstention doctrine. Since these regulations are challenged on their face for overbreadth, no purpose would be served by awaiting a state court construction of them unless the principles announced in *Younger* v. *Harris,* 401 U. S. 37 (1971), govern. See *Zwickler* v. *Koota,* 389 U. S. 241, 248–250 (1967). Thus far, however, we have limited the applicability of *Younger* to cases where the plaintiff has an adequate remedy in a pending *criminal* prosecution. See *Younger* v. *Harris, supra,* at 43–44. Cf. *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943). But cf. *Berryhill* v. *Gibson,* 331 F. Supp. 122, 124 (MD Ala. 1971), probable jurisdiction noted, 408 U. S. 920 (1972). The California licensing provisions are, of course, civil in nature. Cf. *Hearn* v. *Short,* 327 F. Supp. 33 (SD Tex. 1971). Moreover, the *Younger* doctrine has been held to "have little force in the absence of a *pending* state proceeding." *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498, 509 (1972) (emphasis added). There are at present no proceedings of any kind pending against these

v. *Wilson,* 405 U. S. 518 (1972). When so viewed, I think it clear that the regulations are overbroad and therefore unconstitutional. See, *e. g., Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965).[3] Although the State's broad power to regulate the distribution of liquor and to enforce health and safety regulations is not to be doubted, that power may not be exercised in a manner that broadly stifles First Amendment freedoms. Cf. *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960). Rather, as this Court has made clear, "[p]recision of regulation

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appellees. Finally, since the *Younger* doctrine rests heavily on federal deference to state administration of its own statutes, see *Younger* v. *Harris, supra,* at 44–45, it is waivable by the State. Cf. *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324, 329 (1964). Appellants have nowhere mentioned the *Younger* doctrine in their brief before this Court, and when the case was brought to the attention of the attorney for the appellants during oral argument, he expressly eschewed reliance on it. In the court below, appellants specifically asked for a federal decision on the validity of California's regulations and stated that they did not think the court should abstain. See 326 F. Supp. 348, 351 (CD Cal. 1971).

[3] I am startled by the majority's suggestion that the regulations are constitutional on their face even though "specific future applications of [the statute] may engender concrete problems of constitutional dimension." (Quoting with approval *Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 52 (1966). *Ante,* at 119 n. 5.) Ever since *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), it has been thought that statutes which trench upon First Amendment rights are facially void even if the conduct of the party challenging them could be prohibited under a more narrowly drawn scheme. See, *e. g., Baggett* v. *Bullitt,* 377 U. S. 360, 366 (1964); *Coates* v. *City of Cincinnati,* 402 U. S. 611, 616 (1971); *NAACP* v. *Button,* 371 U. S. 415, 432–433 (1963).

Nor is it relevant that the State here "sought to prevent [bacchanalian revelries]" rather than performances by "scantily clad ballet troupe[s]." Whatever the State "sought" to do, the fact is that these regulations cover both these activities. And it should be clear that a praiseworthy legislative motive can no more rehabilitate an unconstitutional statute than an illicit motive can invalidate a proper statute.

must be the touchstone" when First Amendment rights are implicated. *NAACP* v. *Button,* 371 U. S. 415, 438 (1963). Because I am convinced that these regulations lack the precision which our prior cases require, I must respectfully dissent.

I

It should be clear at the outset that California's regulatory scheme does not conform to the standards which we have previously enunciated for the control of obscenity.[4] Before this Court's decision in *Roth* v. *United States,* 354 U. S. 476 (1957), some American courts followed the rule of *Regina* v. *Hicklin,* L. R. 3 Q. B. 360 (1868), to the effect that the obscenity *vel non* of a piece of work could be judged by examining isolated aspects of it. See, *e. g., United States* v. *Kennerley,* 209 F. 119 (1913); *Commonwealth* v. *Buckley,* 200 Mass. 346, 86 N. E. 910 (1909). But in *Roth* we held that "[t]he *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." 354 U. S., at 489. Instead, we held that the material must

[4] Indeed, there are some indications in the legislative history that California adopted these regulations for the specific purpose of evading those standards. Thus, Captain Robert Devin of the Los Angeles Police Department testified that the Department favored adoption of the new regulations for the following reason: "While statutory law has been available to us to regulate what was formerly considered as antisocial behavior, the federal and state judicial system has, through a series of similar decisions, effectively emasculated law enforcement in its effort to contain and to control the growth of pornography and of obscenity and of behavior that is associated with this kind of performance." See also testimony of Roy E. June, City Attorney of the City of Costa Mesa; testimony of Richard C. Hirsch, Office of Los Angeles County District Attorney. App. 117.

be "taken as a whole," *ibid.*, and, when so viewed, must appeal to a prurient interest in sex, patently offend community standards relating to the depiction of sexual matters, and be utterly without redeeming social value.[5] See *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418 (1966).

Obviously, the California rules do not conform to these standards. They do not require the material to be judged as a whole and do not speak to the necessity of proving prurient interest, offensiveness to community standards, or lack of redeeming social value. Instead of the contextual test approved in *Roth* and *Memoirs*, these regulations create a system of *per se* rules to be applied regardless of context: Certain acts simply may not be depicted and certain parts of the body may under no circumstances be revealed. The regulations thus treat on the same level a serious movie such as "Ulysses" and a crudely made "stag film." They ban not only obviously pornographic photographs, but also great sculpture from antiquity.[6]

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[5] I do not mean to suggest that this test need be rigidly applied in all situations. Different standards may be applicable when children are involved, see *Ginsberg* v. *New York*, 390 U. S. 629 (1968); when a consenting adult possesses putatively obscene material in his own home, see *Stanley* v. *Georgia*, 394 U. S. 557 (1969); or when the material by the nature of its presentation cannot be viewed as a whole, see *Rabe* v. *Washington*, 405 U. S. 313, 317 n. 2 (1972) (BURGER, C. J., concurring). Similarly, I do not mean to foreclose the possibility that even the *Roth-Memoirs* test will ultimately be found insufficient to protect First Amendment interests when consenting adults view putatively obscene material in private. Cf. *Redrup* v. *New York*, 386 U. S. 767 (1967). But cf. *United States* v. *Reidel*, 402 U. S. 351 (1971). But I do think that, at very least, *Roth-Memoirs* sets an absolute limit on the kinds of speech that can be altogether read out of the First Amendment for purposes of consenting adults.

[6] Cf. Fuller, Changing Society Puts Taste to the Test, The National Observer, June 10, 1972, p. 24: "Context is the essence of esthetic judgment . . . . There is a world of difference between

Roth held 15 years ago that the suppression of serious communication was too high a price to pay in order to vindicate the State's interest in controlling obscenity, and I see no reason to modify that judgment today. Indeed, even the appellants do not seriously contend that these regulations can be justified under the *Roth-Memoirs* test. Instead, appellants argue that California's regulations do not concern the control of pornography at all. These rules, they argue, deal with *conduct* rather than with *speech* and as such are not subject to the strict limitations of the First Amendment.

To support this proposition, appellants rely primarily on *United States* v. *O'Brien,* 391 U. S. 367 (1968), which upheld the constitutionality of legislation punishing the destruction or mutilation of Selective Service certificates. *O'Brien* rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," and held that Government regulation of speech-related conduct is permissible "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.,* at 376, 377.

Playboy and less pretentious girly magazines on the one hand, and on the other, *The Nude,* a picture selection from the whole history of art, by that fine teacher and interpreter of civilization, Kenneth Clark. People may be just as naked in one or the other, the bodies inherently just as beautiful, but the context of the former is vulgar, of the latter, esthetic.

"The same words, the same actions, that are cheap and tawdry in one book or play may contribute to the sublimity, comic universality, or tragic power of others. For a viable theory of taste, context is all."

While I do not quarrel with these principles as stated in the abstract, their application in this case stretches them beyond the breaking point.[7] In *O'Brien,* the Court began its discussion by noting that the statute in question "plainly does not abridge free speech on its face." Indeed, even O'Brien himself conceded that facially the statute dealt "with conduct having no connection with speech."[8] *Id.,* at 375. Here, the situation is quite different. A long line of our cases makes clear that motion pictures, unlike draft-card burning, are a form of expression entitled to prima facie First Amendment protection. "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 501 (1952) (footnote omitted). See also *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676 (1968); *Jacobellis* v. *Ohio,* 378 U. S.

[7] Moreover, even if the *O'Brien* test were here applicable, it is far from clear that it has been satisfied. For example, most of the evils that the State alleges are caused by appellees' performances are already punishable under California law. See n. 11, *infra.* Since the less drastic alternative of criminal prosecution is available to punish these violations, it is hard to see how "the incidental restriction on alleged First Amendment freedoms is no greater than is essential" to further the State's interest.

[8] The Court pointed out that the statute "does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views . . . . A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." 391 U. S., at 375.

184 (1964); *Pinkus* v. *Pitchess,* 429 F. 2d 416 (CA9 1970), aff'd by equally divided court *sub nom. California* v. *Pinkus,* 400 U. S. 922 (1970). Similarly, live performances and dance have, in recent years, been afforded broad prima facie First Amendment protection. See, *e. g., Schacht* v. *United States,* 398 U. S. 58 (1970); *P. B. I. C., Inc.* v. *Byrne,* 313 F. Supp. 757 (Mass. 1970), vacated to consider mootness, 401 U. S. 987 (1971); *In re Giannini,* 69 Cal. 2d 563, 446 P. 2d 535 (1968), cert. denied *sub nom. California* v. *Giannini,* 395 U. S. 910 (1969).

If, as these many cases hold, movies, plays, and the dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is "speech" within the meaning of the First Amendment, but that the individual gestures of the actors are "conduct" which the State may prohibit. The State may no more allow movies while punishing the "acts" of which they are composed than it may allow newspapers while punishing the "conduct" of setting type.

Of course, I do not mean to suggest that anything which occurs upon a stage is automatically immune from state regulation. No one seriously contends, for example, that an actual murder may be legally committed so long as it is called for in the script, or that an actor may inject real heroin into his veins while evading the drug laws that apply to everyone else. But once it is recognized that movies and plays enjoy prima facie First Amendment protection, the standard for reviewing state regulation of their component parts shifts dramatically. For while "[m]ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, [they are] insufficient to justify such as diminishes the exercise of rights so vital" as freedom

of speech. *Schneider* v. *State,* 308 U. S. 147, 161 (1939). Rather, in order to restrict speech, the State must show that the speech is "used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that [the State] has a right to prevent." *Schenck* v. *United States,* 249 U. S. 47, 52 (1919). Cf. *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969); *Dennis* v. *United States,* 341 U. S. 494 (1951).[9]

When the California regulations are measured against this stringent standard, they prove woefully inadequate. Appellants defend the rules as necessary to prevent sex crimes, drug abuse, prostitution, and a wide variety of other evils. These are precisely the same interests that have been asserted time and again before this Court as justification for laws banning frank discussion of sex and that we have consistently rejected. In fact, the empirical link between sex-related entertainment and the criminal activity popularly associated with it has never been proved and, indeed, has now been largely discredited. See, *e. g.,* Report of the Commission on Obscenity and Pornography 27 (1970); Cairns, Paul, & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962). Yet even if one were to concede that such a link existed, it would hardly justify a broad-scale attack on First Amendment freedoms. The only way to stop murders and drug abuse is to punish them directly. But the State's interest in controlling material

[9] Of course, the State need not meet the clear and present danger test if the material in question is obscene. See *Roth* v. *United States,* 354 U. S. 476 (1957). But, as argued above, the difficulty with California's rules is that they do not conform to the *Roth* test and therefore regulate material that is not obscene. See *supra,* at 126–127.

dealing with sex is secondary in nature.[10] It can control rape and prostitution by punishing those acts, rather than by punishing the speech that is one step removed from the feared harm.[11] Moreover, because First Amendment rights are at stake, the State must adopt this "less restrictive alternative" unless it can make a compelling demonstration that the protected activity and criminal conduct are so closely linked that only through regulation of one can the other be stopped. Cf. *United States* v. *Robel,* 389 U. S. 258, 268 (1967). As we said in *Stanley* v. *Georgia,* 394 U. S. 557, 566–567 (1969), "if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to pre-

[10] This case might be different if the State asserted a primary interest in stopping the very acts performed by these dancers and actors. However, I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults. Cf. *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Moreover, it is unnecessary to reach that question in this case since the State's regulations are plainly not designed to stop the acts themselves, most of which are in fact legal when done in private. Rather, the State punishes the acts only when done in public as part of a dramatic presentation. Cf. *United States* v. *O'Brien, supra,* at 375. It must be, therefore, that the asserted state interest stems from the effect of the acts on the audience rather than from a desire to stop the acts themselves. It should also be emphasized that this case does not present problems of an unwilling audience or of an audience composed of minors.

[11] Indeed, California already has statutes controlling virtually all of the misconduct said to flow from appellees' activities. See Calif. Penal Code § 647 (b) (Supp. 1972) (prostitution); Calif. Penal Code §§ 261, 263 (1970) (rape); Calif. Bus. & Prof. Code § 25657 (Supp. 1972) ("B-Girl" activity); Calif. Health & Safety Code §§ 11500, 11501, 11721, 11910, 11912 (1964 and Supp. 1972) (sale and use of narcotics).

vent crime are education and punishment for violations of the law . . . .' *Whitney* v. *California,* 274 U. S. 357, 378 (1927) (Brandeis, J., concurring). . . . Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." [12]

II

It should thus be evident that, under the standards previously developed by this Court, the California regulations are overbroad: They would seem to suppress not only obscenity outside the scope of the First Amendment, but also speech that is clearly protected. But California contends that these regulations do not involve suppression at all. The State claims that its rules are not regulations of obscenity, but are rather merely regulations of the sale and consumption of liquor. Appellants point out that California does not punish establishments which provide the proscribed entertainment, but only requires that they not serve alcoholic beverages on their premises. Appellants vigorously argue that such regulation falls within the State's general police power as augmented, when alcoholic beverages are involved, by the Twenty-first Amendment.[13]

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[12] Of course, it is true that *Stanley* does not govern this case, since *Stanley* dealt only with the private possession of obscene materials in one's own home. But in another sense, this case is stronger than *Stanley*. In *Stanley,* we held that the State's interest in the prevention of sex crimes did not justify laws restricting possession of certain materials, even though they were conceded to be obscene. It follows *a fortiori* that this interest is insufficient when the materials are not obscene and, indeed, are constitutionally protected.

[13] The Twenty-first Amendment, in addition to repealing the Eighteenth Amendment, provides: "The transportation or importa-

I must confess that I find this argument difficult to grasp. To some extent, it seems premised on the notion that the Twenty-first Amendment authorizes the States to regulate liquor in a fashion which would otherwise be constitutionally impermissible. But the Amendment by its terms speaks only to state control of the *importation* of alcohol, and its legislative history makes clear that it was intended only to permit "dry" States to control the flow of liquor across their boundaries despite potential Commerce Clause objections.[14] See generally *Seagram & Sons* v. *Hostetter,* 384 U. S. 35 (1966); *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S. 324 (1964). There is not a word in that history which indicates that Congress meant to tamper in any way with First Amendment rights. I submit that the framers of the Amendment would be astonished to

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tion into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[14] The text of the Amendment is based on the Webb-Kenyon Act, 37 Stat. 699, which antedated prohibition. The Act was entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," and was designed to allow "dry" States to regulate the flow of alcohol across their borders. See, *e. g., McCormick & Co.* v. *Brown,* 286 U. S. 131, 140–141 (1932); *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 324 (1917). The Twenty-first Amendment was intended to embed this principle permanently into the Constitution. As explained by its sponsor on the Senate floor "to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

"[T]he pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141 (remarks of Sen. Blaine).

discover that they had inadvertently enacted a *pro tanto* repealer of the rest of the Constitution. Only last Term, we held that the State's conceded power to license the distribution of intoxicating beverages did not justify use of that power in a manner that conflicted with the Equal Protection Clause. See *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 178–179 (1972). Cf. *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971); *Hornsby* v. *Allen,* 326 F. 2d 605 (CA5 1964). I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth.

To be sure, state regulation of liquor is important, and it is deeply embedded in our history. See, *e. g., Colonnade Catering Corp.* v. *United States,* 397 U. S. 72, 77 (1970). But First Amendment values are important as well. Indeed, in the past they have been thought so important as to provide an independent restraint on every power of Government. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115 (1943). Thus, when the Government attempted to justify a limitation on freedom of association by reference to the war power, we categorically rejected the attempt. "[The] concept of 'national defense' " we held, "cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which

makes the defense of the Nation worthwhile." *United States* v. *Robel,* 389 U. S., at 264. Cf. *New York Times Co.* v. *United States,* 403 U. S. 713, 716–717 (1971) (Black, J., concurring); *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426 (1934). If the First Amendment limits the means by which our Government can ensure its very survival, then surely it must limit the State's power to control the sale of alcoholic beverages as well.

Of course, this analysis is relevant only to the extent that California has in fact encroached upon First Amendment rights. Appellants argue that no such encroachment has occurred, since appellees are free to continue providing any entertainment they choose without fear of criminal penalty. Appellants suggest that this case is somehow different because all that is at stake is the "privilege" of serving liquor by the drink.

It should be clear, however, that the absence of criminal sanctions is insufficient to immunize state regulation from constitutional attack. On the contrary, "this is only the beginning, not the end, of our inquiry." *Sherbert* v. *Verner,* 374 U. S. 398, 403–404 (1963). For "[i]t 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." *Id.,* at 404. As we pointed out only last Term, "[f]or at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally pro-

tected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry* v. *Sindermann,* 408 U. S. 593, 597 (1972).

Thus, unconstitutional conditions on welfare benefits,[15] unemployment compensation,[16] tax exemptions,[17] public employment,[18] bar admissions,[19] and mailing privileges [20] have all been invalidated by this Court. In none of these cases were criminal penalties involved. In all of them, citizens were left free to exercise their constitutional rights so long as they were willing to give up a "gratuity" that the State had no obligation to provide. Yet in all of them, we found that the discriminatory provision of a privilege placed too great a burden on constitutional freedoms. I therefore have some difficulty in understanding why California nightclub proprietors should be singled out and informed that they alone must sacrifice their constitutional rights before gaining the "privilege" to serve liquor.

Of course, it is true that the State may in proper circumstances enact a broad regulatory scheme that incidentally restricts First Amendment rights. For example, if California prohibited the sale of alcohol altogether, I do not mean to suggest that the proprietors

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[15] See *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). But cf. *Wyman* v. *James,* 400 U. S. 309 (1971).

[16] See *Sherbert* v. *Verner,* 374 U. S. 398 (1963).

[17] See *Speiser* v. *Randall,* 357 U. S. 513 (1958).

[18] See, *e. g., Pickering* v. *Board of Education,* 391 U. S. 563 (1968); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964).

[19] See, *e. g., Baird* v. *State Bar of Arizona,* 401 U. S. 1 (1971); *Konigsberg* v. *State Bar,* 353 U. S. 252 (1957); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957). But cf. *Law Students Civil Rights Research Council* v. *Wadmond,* 401 U. S. 154 (1971); *Konigsberg* v. *State Bar,* 366 U. S. 36 (1961).

[20] See, *e. g., Blount* v. *Rizzi,* 400 U. S. 410 (1971); *Hannegan* v. *Esquire Inc.,* 327 U. S. 146, 156 (1946).

of theaters and bookstores would be constitutionally entitled to a special dispensation. But in that event, the classification would not be speech related and, hence, could not be rationally perceived as penalizing speech. Classifications that discriminate against the exercise of constitutional rights *per se* stand on an altogether different footing. They must be supported by a "compelling" governmental purpose and must be carefully examined to insure that the purpose is unrelated to mere hostility to the right being asserted. See, *e. g., Shapiro* v. *Thompson,* 394 U. S. 618, 634 (1969).

Moreover, not only is this classification speech related; it also discriminates between otherwise indistinguishable parties on the basis of the *content* of their speech. Thus, California nightclub owners may present live shows and movies dealing with a wide variety of topics while maintaining their licenses. But if they choose to deal with sex, they are treated quite differently. Classifications based on the content of speech have long been disfavored and must be viewed with the gravest suspicion. See, *e. g., Cox* v. *Louisiana,* 379 U. S. 536, 556–558 (1965). Whether this test is thought to derive from equal protection analysis, see *Police Department of Chicago* v. *Mosley,* 408 U. S. 92 (1972); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951), or directly from the substantive constitutional provision involved, see *Cox* v. *Louisiana, supra; Schneider* v. *State,* 308 U. S. 147 (1939), the result is the same: any law that has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them . . . [is] patently unconstitutional." *United States* v. *Jackson,* 390 U. S. 570, 581 (1968).

As argued above, the constitutionally permissible purposes asserted to justify these regulations are too remote to satisfy the Government's burden when First Amendment rights are at stake. See *supra,* at 131–133.

It may be that the Government has an interest in suppressing lewd or "indecent" speech even when it occurs in private among consenting adults. Cf. *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 376 (1971). But cf. *Stanley* v. *Georgia*, 394 U. S. 557 (1969). That interest, however, must be balanced against the overriding interest of our citizens in freedom of thought and expression. Our prior decisions on obscenity set such a balance and hold that the Government may suppress expression treating with sex only if it meets the three-pronged *Roth-Memoirs* test. We have said that "[t]he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Roth* v. *United States*, 354 U. S., at 488. Because I can see no reason why we should depart from that standard in this case, I must respectfully dissent.

UNION OIL CO. OF CALIFORNIA *v.* THE SAN JACINTO ET AL.

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

No. 71–900. Argued October 17, 1972—Decided December 5, 1972

Implicit in that portion of Art. 16 of the Inland Rules of Navigation that directs a moderate speed for vessels proceeding in foggy weather, and in the concomitant half-distance rule, is the assumption that vessels can reasonably be expected to be traveling on intersecting courses. On the facts of this case, it was totally unrealistic to anticipate the possibility that the vessels were on intersecting courses and the rule was not applicable. Pp. 144–146.

451 F. 2d 1369, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 147.

Kenneth E. Roberts argued the cause and filed briefs for petitioner.

Erskine B. Wood argued the cause and filed briefs for respondents.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

While proceeding up the Columbia River, the oil tanker S. S. *Santa Maria,* bareboat chartered by petitioner, was struck by a barge owned by respondent Oliver J. Olson & Co. The barge was being towed by the tugboat *San Jacinto,* owned by respondent Star & Crescent Towboat Co. Both vessels were damaged. Petitioner commenced this admiralty action for damages to the *Santa Maria,* and respondent cross-libeled for damages to the barge. The District Court found the collision resulted solely from

negligence on the part of the crew of the *San Jacinto,* and dismissed the cross-libel. 304 F. Supp. 519 (Ore. 1969). The Ninth Circuit affirmed the finding that the *San Jacinto* had been negligent, but determined that the *Santa Maria* was also negligent in violating the "half-distance" rule, 30 Stat. 99, 33 U. S. C. § 192. That court therefore reversed with directions that the District Court determine the amount of damage sustained by the barge and assess damages under the divided-damages rule. See *The Schooner Catherine* v. *Dickinson,* 17 How. 170 (1855). We granted certiorari, 405 U. S. 954 (1972), principally to consider petitioner's request that we abandon the divided-damages rule. The orderly disposition of the issues presented by the petition for certiorari, however, requires that we address ourselves to the issue of liability before reaching the question of damages. Since in so doing we conclude that the Court of Appeals was wrong in holding the *Santa Maria* liable at all, we do not reach the issue of damages.

I

On the evening of December 24, 1967, the *Santa Maria,* loaded with 17,000 tons of petroleum products, was proceeding up the Columbia River toward Portland. The ship was steaming on the Oregon side of the channel, with clear visibility. At the same time, the *San Jacinto* was proceeding downriver, towing a 275-foot barge, fully loaded with lumber, by a 250-foot towline. Proceeding on the Washington side of the channel, it had encountered foggy weather conditions upriver. As the *San Jacinto* approached Cooper Point, the *Santa Maria,* steaming upstream, sighted the tug both visually and by radar. The two vessels were more than a mile apart and on opposite sides of the 500-foot-wide shipping channel. There was heavy fog, described as "tule fog," around Cooper Point, but the fog was localized on the Washing-

ton side of the channel. Although there was haze and drizzle, there was no fog on the Oregon side of the channel; the visibility from the bridge of the *Santa Maria* upstream was between one and one-half and two miles.

As the *San Jacinto* entered the fog on the Washington side off Cooper Point, the *Santa Maria* lost visual contact with the tug and barge. The *Santa Maria*'s pilot did not track the *San Jacinto* on radar, believing that the tug would remain on the Washington side of the channel and knowing that there was ample room for a port-to-port passage. At this time, the *Santa Maria* was proceeding at half-speed making approximately seven knots.

The watch on the *San Jacinto* had not sighted the *Santa Maria* when the tug entered the heavy fog off Cooper Point. The tug's captain testified that, after entering the fog, he cut speed to three or three and one-half knots, and the visibility dead ahead was approximately 50 yards. The *San Jacinto*'s navigators were "navigating by visual sight of the Washington coast," and the captain estimated that the tug passed between 50 and 75 yards off Cooper Point. At that point, the crew of the *San Jacinto* heard one blast of a ship's horn (later discovered to have been that of the *Santa Maria*), and responded with the fog signal for a tug with a barge in tow. No visual sighting of a ship was made, however. Shortly thereafter, the captain sighted range lights, which, he testified, he thought were 20 degrees off his *starboard* bow. To avoid what he anticipated to be a momentary collision, the captain swung the *San Jacinto* to port—towards the Oregon side of the channel—and executed a U-turn, hoping to run upriver and thus avoid a collision.

The *San Jacinto* started the U-turn while still in the heavy fog, and the execution of the turn brought the tug on a course directly across that of the *Santa Maria.* The *Santa Maria* sighted the *San Jacinto* emerging from the fog, at right angles to the *Santa Maria,* at a distance of

approximately 900 feet. Full astern was immediately ordered. The *San Jacinto,* quickly completing the turn, headed safely upriver. Before the *Santa Maria* could completely stop, however, the barge in tow sideslipped across the channel, crashing into the port bow of the *Santa Maria;* the force of that blow drove the tanker aground.

The District Court found that the *San Jacinto* and the barge, and those in charge of navigation, were negligent in eight respects, including navigating at excessive speed, failing to maintain a proper lookout, and "acting hastily and without sufficient cause in pulling the tow across the channel when there was adequate clearance for the tug and barge to pass port to port." The court found that "the collision was proximately caused by the sole fault and negligence" of the *San Jacinto* and the barge, and that the acts of negligence allegedly committed by the *Santa Maria* did not "proximately [contribute] to the collision and resulting damage." 304 F. Supp., at 521, 522.

The Ninth Circuit partially reversed, holding that the *Santa Maria* was proceeding at an immoderate speed in traveling at three to seven knots "while approaching the edge of the fog bank." That court reasoned that the *San Jacinto* was only 900 feet from the *Santa Maria* when the tug emerged from the fog bank, and the *Santa Maria*'s speed was such that she could not stop within half that distance. The court, relying on *The Silver Palm,* 94 F. 2d 754 (CA9), cert. denied *sub nom. United States* v. *Silver Line, Ltd.,* 304 U. S. 576 (1937), deemed it immaterial that the visibility up the Oregon side of the channel—the direction in which the *Santa Maria* was headed—was almost two miles, because in its view the "relevant distance" for calculating the proper speed under the half-distance rule was the distance between the tanker and the fog bank—to port of the *Santa Maria.* Finding

statutory fault, and ruling that petitioner had failed to prove that that fault could not have possibly contributed to the collision, see *The Pennsylvania,* 19 Wall. 125 (1874), the Court of Appeals held the *Santa Maria* liable for half the total damages.

II

The question of the liability of the *Santa Maria* turns on the application of Art. 16 of the Inland Rules of Navigation, 33 U. S. C. § 192. That Rule provides in pertinent part:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at *a moderate speed,* having careful regard to the existing circumstances and conditions." (Emphasis added.)

Although the statutory test for determining the proper speed at which a vessel should proceed in a fog is phrased in general terms, our decisions have attached a well-recognized gloss to that phrase. This gloss on the statutory rule, variously referred to as the half-distance rule or the "rule of sight," is that, in a fog, "a moderate speed" is that

> "rate of speed as would enable [the vessel] to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog." *The Nacoochee,* 137 U. S. 330, 339 (1890).

See also *The Colorado,* 91 U. S. 692, 702 (1876); *The Umbria,* 166 U. S. 404, 417 (1897). As stated in *The Chattahoochee,* 173 U. S. 540, 548 (1899), "[t]he principal reason for such reduction of speed is that it will give [both] vessels time to avoid a collision after coming in sight of each other." If two vessels, upon sighting each other, are proceeding at rates of speed such that

each can stop before it reaches the point at which the courses of the two intersect, collision is impossible.

There can be no quarrel with the salutary purpose of this "rule of thumb." It is premised on the notion that when a ship is traveling under foggy weather conditions in waters in which other ships might be proceeding on intersecting courses, the speed of each ship must be such as to enable her to stop within half the distance separating the ships when they first sight each other. Implicit in the rule, however, is the assumption that vessels can reasonably be expected to be traveling on intersecting courses. If, on the facts of the case, it is totally unrealistic to anticipate the possibility that a vessel will travel on a particular heading that would intersect the course of another ship, the reason for the rule is rather clearly not present.

Those cases in which this Court has upheld a finding of statutory fault because of a violation of the half-distance rule involved ships proceeding in fog on established coastal shipping lanes, *The City of New York,* 147 U. S. 72 (1893); *The Nacoochee, supra;* cf. *The Colorado, supra* (Lake Huron), or ships traveling near or in a harbor, *The Umbria, supra;* cf. *The Ludvig Holberg,* 157 U. S. 60 (1895) (no fault). We do not imply that because a vessel is running near fog, as opposed to running in it, the vessel is not required to proceed at "a moderate speed" in relation to the distance to the fog cover. That was, indeed, the circumstance in *The Silver Palm, supra,* upon which the Ninth Circuit relied. But there a naval cruiser was traveling, with clear visibility ahead but with fog banks on each side, on the busy coastal shipping lane between San Francisco and Los Angeles. On such a course it is reasonable to expect that another ship might steam out of the fog at right angles to, and on a collision course with, the first vessel.

The rule of sight was applicable there precisely because of the reasonable possibility that such an event might occur.

The facts of our case were significantly different. The *Santa Maria* and the *San Jacinto* were proceeding on opposite sides of a well-defined and relatively narrow channel. The *Santa Maria* had last sighted the tug only a mile ahead, proceeding along the Washington coast. Those in charge of the navigation of the tanker cannot be faulted for not anticipating the tug's totally unorthodox maneuver in darting across such a channel. *The Victory & The Plymothian,* 168 U. S. 410 (1897). The visibility in the direction in which the *Santa Maria* was headed was almost two miles. There is no evidence in the record suggesting that the speed of the tanker would have prevented her from coming to a complete halt within half the distance of sighting a vessel that was either proceeding on a remotely foreseeable intersecting course or else being overtaken by her. The tug emerged from a fog bank only 900 feet from the tanker on a course and for reasons that no seaman could, under the circumstances, have anticipated.

The District Court's finding that any negligence on the part of the *Santa Maria* did not "proximately [contribute] to the collision" was but another way of saying that fault based on the half-distance rule must have some relationship to the dangers against which that rule was designed to protect. Here it did not. We believe that the District Court, and not the Court of Appeals, reached the correct result on the issue of liability.

Since in our view respondents alone were at fault, there is no occasion to consider how damages should be apportioned were both vessels at fault.

Reversed.

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

On a misty Christmas Eve the petitioner's oil tanker—the *Santa Maria*—was moving upstream along the Oregon side of the channel of the Columbia River. The vessel was proceeding at half speed with forward visibility of one and a half to two miles. Both visually and by radar, the tanker's pilot sighted the respondent tug, the *San Jacinto,* which was moving downstream along the Washington side of the channel more than a mile ahead. The tug, with a heavily laden barge in tow, disappeared from sight into a patch of fog. The inexperienced crew of the tug became disoriented in the fog and mistakenly thought the tanker had veered to the Washington side of the channel. To avoid what he believed would be a collision, the master of the tug executed a sharp leftward U–turn directly into the path of the oncoming tanker. While the tug successfully completed its turn, the barge swung around and smashed into the tanker, damaging her forward left side and driving her aground.

In a complaint and cross-complaint the owners of both vessels sued, each charging the other with sole blame. The District Court found that the collision was entirely the fault of the tug—in navigating at an unreasonable speed in fog, in failing to maintain a proper lookout, in failing to sound fog signals, in failing to ascertain the risk of collision and sound the danger signal, in failing to reduce speed or take any evasive action, in failing to keep the tow in control, and in turning directly into the path of the tanker. 304 F. Supp. 519. Finding that the tanker was also at fault in proceeding at a rate in excess of that which would have allowed her to stop in one-half the visibility before her, the Court of Appeals for the Ninth Circuit modified the judgment of the District Court. 451 F. 2d 1369. Though the tug's fault was

"more flagrant and shocking," *id.*, at 1374, the tanker was held liable for half the damages, since she was unable to prove that her fault could not possibly have contributed to the collision.[1]

I would reaffirm the continued vitality of the "half-distance" rule and approve its application in this case. I cannot concur in the Court's decision, which, while apparently approving the "salutary purpose" of the rule, guts its certainty by making its application turn on elusive concepts such as the reasonable possibility of collision, or the particular bearing that a vessel might be expected to take on emerging from a fog bank. In short, the Court today allows a vessel to proceed at an immoderate speed, provided that its crew does not expect a collision. I cannot agree.

The half-distance rule is a rational interpretation of the command of Art. 16 of the Inland Rules that vessels shall proceed at a "moderate speed" in fog with a "careful regard to the existing circumstances and conditions." 33 U. S. C. § 192. The rule does not simply require a vessel to be able to stop in one-half the distance of her forward visibility, but rather "to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog." *The Nacoochee,* 137 U. S. 330, 339.[2] As one scholar phrased the rule: "the vessels must be able to stop, not within the distance of visibility, but

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[1] See *The Pennsylvania,* 19 Wall. 125, 136; *O/Y Finlayson-Forssa A/B* v. *Pan Atlantic S. S. Corp.,* 259 F. 2d 11, 22.

[2] "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law." *The Umbria,* 166 U. S. 404, 417.

before they collide." J. Griffin, The American Law of Collision 295 (1949).

In this case, the crew of the *Santa Maria* knew that the *San Jacinto* had disappeared into a fog bank over a mile ahead on the Washington side of the narrow channel. The tanker nevertheless steamed ahead at half-speed as it approached the edge of the fog bank. When the *Santa Maria* sighted the tug emerging from the fog and cutting directly across her course, no more than 900 feet separated the vessels. The Court of Appeals found a violation of the half-distance rule in that the tanker could not stop within 450 feet.[3] Indeed, since the tug had turned back upstream at the time of the tanker's collision with the barge, the *Santa Maria* covered considerably more than half the distance that initially separated the vessels.

I agree with the Court of Appeals that the half-distance rule correctly applies to the facts of this case. Not only was the *Santa Maria* navigating near a fog bank in a narrow, heavily traveled shipping channel, but she actually knew that a tug was in the fog bank off the port bow; the tug might become disoriented in the fog and emerge on a collision course. And for that reason the *Santa Maria* should not have been proceeding at a rate in excess of the speed which would have allowed her to stop in half the distance ahead. The tug emerged from the fog and cut directly across the path of the tanker, approximately 900 feet ahead. But surely the half-distance rule does not apply only to head-on collisions. See *The Silver Palm,* 94 F. 2d 754. Moreover, the tanker here should not be any less at fault because the tug emerged tangentially to her course rather than on a

[3] The District Court appears to have assumed as much:

"It is my view that any possible violation of Article 16 of the Inland Rules by the SS *Santa Maria,* or those in charge of her navigation, were technical in nature and were not a contributing cause of the collision." 304 F. Supp. 519, 522.

head-on collision course. If the tug had altered her course in the fog and emerged steaming head on into the tanker rather than across her course—which would have been quite possible since the channel was only 500 feet wide at this point—the *Santa Maria* would still have had to stop within 450 feet. Since the tug was not closing the distance between the vessels, the tanker actually had more distance within which to stop than she would have had if the tug had followed a more orthodox collision course. The half-distance rule cannot mean that a ship can travel in the direction of a fog bank, oblivious to the possibility that another vessel might become lost there and steam out across or into the first vessel's path.

Concepts such as "reasonable expectancy," "anticipated possibility," and "reasonable possibility," do little service to the half-distance rule. "[T]he genius of the Rules for Prevention of Collision is their certainty." *Hess Shipping Corp.* v. *S. S. Charles Lykes,* 417 F. 2d 346, 351 (Brown, J., dissenting). The half-distance rule is effective precisely because it is a measurable rule of thumb, a nautical speed limit. Speed limits would serve no useful purpose if they applied only when there was a foreseeable probability that an accident might occur.

Since I cannot say that the Court of Appeals for the Ninth Circuit incorrectly concluded that the *Santa Maria* had violated the half-distance rule, and that she was unable to prove that her fault could not have contributed to the collision, I would reach the question that we granted certiorari in this case to consider—the continued validity of the divided-damages rule. The Court, however, does not address that question, and I therefore refrain from expressing my views upon it.

TIDEWATER OIL CO. *v.* UNITED STATES ET AL.

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

No. 71-366. Argued October 11, 1972—Decided December 6, 1972

The Expediting Act, providing that in a civil antitrust action brought by the United States in a federal district court an appeal from that court's final judgment will lie only to this Court, lodged exclusive appellate jurisdiction over such actions in this Court and thus bars the courts of appeals from asserting jurisdiction over interlocutory orders covered by 28 U. S. C. § 1292 (b), as well as over other interlocutory orders specified in § 1292 (a). The legislative history of those provisions contains no indication of a congressional intent to impair the original exclusivity of this Court's jurisdiction under the Expediting Act. Pp. 154–174.

Affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a concurring statement, *post,* p. 174. DOUGLAS, J., filed a dissenting opinion, *post,* p. 174. STEWART, J., filed a dissenting opinion, which REHNQUIST, J., joined, and DOUGLAS, J., joined in part, *post,* p. 178.

Moses Lasky argued the cause for petitioner. With him on the briefs was *C. Lansing Hays, Jr.*

A. Raymond Randolph, Jr., argued the cause for the United States *pro hac vice.* With him on the brief were *Solicitor General Griswold* and *Assistant Attorney General Kauper.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

On July 13, 1966, the United States filed a civil antitrust suit against Phillips Petroleum Co. (Phillips) and petitioner Tidewater Oil Co. (Tidewater). The complaint alleged that Phillips' acquisition of certain

assets and operations of Tidewater violated § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18. The District Court denied the United States' motion for a temporary restraining order to prevent consummation of the acquisition,[1] and its subsequent motion for a preliminary injunction to require either rescission of the acquisition or maintenance by Phillips of the going-concern value of the transferred assets and operations.

Petitioner continued as a party to the suit during some five years of pretrial discovery and preparation.[2] Then in April 1971, following the Government's announcement that it was ready for trial, petitioner moved to be dismissed as a party.[3] The District Court denied the motion, but found that it involved "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 this litigation." It therefore certified "its order denying defendant's motion to dismiss for interlocutory appeal under Section 1292 (b) of Title 28 of the United States Code." As required by the statute, Tidewater then applied to the Court of Appeals for the Ninth Circuit for leave to prosecute the appeal. That court, however, denied the application relying solely on its previous

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[1] Tidewater then transferred title to its Western Marketing and Manufacturing Division to Phillips.

[2] Tidewater merged with Getty Oil Co. on September 30, 1967. It has never been contended that that merger altered Tidewater's legal status in this case.

[3] In its motion to be dismissed, Tidewater contended "that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate."

decision in *United States* v. *FMC Corp.*, 321 F. 2d 534 (1963). There an attempt was made to appeal an interlocutory order denying a preliminary injunction in a Government civil antitrust case. Notwithstanding that 28 U. S. C. § 1292 (a)(1) provides for an appeal of right to the courts of appeals from an order granting or denying preliminary injunctions, the Ninth Circuit held that it lacked jurisdiction over such an appeal in a Government civil antitrust case because of § 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, which provides that "[i]n every civil action brought in any district court of the United States under any of [the Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court." In this case, then, the Court of Appeals extended its prior ruling to interlocutory orders within § 1292 (b). Because this decision raises an important question of federal appellate jurisdiction and because a conflict among the circuits subsequently developed on this question,[4] we granted certiorari.[5] For the reasons that follow, we affirm the decision of the Court of Appeals.

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[4] Subsequent to the decision by the Ninth Circuit in this case, the Court of Appeals for the Seventh Circuit held that § 1292 (b) could be used to take an interlocutory appeal in a Government civil antitrust case. See *Fisons Ltd.* v. *United States,* 458 F. 2d 1241, 1244–1248, cert. denied, 405 U. S. 1041 (1972). The only other court of appeals to consider the question, the Court of Appeals for the District of Columbia Circuit, reached the same result as the Ninth Circuit in this case. See *Farbenfabriken Bayer, A. G.* v. *United States,* 1968 CCH Trade Cas. ¶ 72,570, cert. denied, 393 U. S. 959 (1968); *Glaxo Group, Ltd.* v. *United States,* Misc. No. 3261 (June 25, 1968).

[5] 405 U. S. 986 (1972). We had originally denied certiorari, 404 U. S. 941 (1971).

I

To determine the relevance of 28 U. S. C. § 1292 (b) for Government civil antitrust cases, it is necessary first to consider the original purpose of § 2 of the Expediting Act and the over half-century of experience with that section in the context of interlocutory appeals provisions that preceded the enactment of § 1292 (b) in 1958.[6]

In an effort to "expedite [certain] litigation of great and general importance," 36 Cong. Rec. 1679 (remarks of Sen. Fairbanks),[7] Congress enacted § 2 of the Expediting Act in 1903[8] to withdraw *all* intermediate appellate jurisdiction in Government civil antitrust

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[6] Act of Sept. 2, 1958, Pub. L. 85–919, 72 Stat. 1770.

[7] See also *Shenandoah Valley Broadcasting* v. *ASCAP*, 375 U. S. 39, 40 (1963), modified, 375 U. S. 994 (1964).

Section 1 of the Expediting Act, 15 U. S. C. § 28, requires that a three-judge district court be convened to hear any Government civil antitrust case that the Attorney General certifies to be of "general public importance." See also 49 U. S. C. § 44. This three-judge court provision is also a reflection of the "great importance" attached to Government civil antitrust cases and was intended to provide a mechanism for full consideration of such cases by a panel of judges "before presentation to the Supreme Court as if heard by the United States circuit court of appeals." H. R. Rep. No. 3020, 57th Cong., 2d Sess., 2 (1903). But this provision has been seldom used.

[8] Act of Feb. 11, 1903, § 2, 32 Stat. 823, as amended, Act of Mar. 3, 1911, § 291, 36 Stat. 1167; Act of June 9, 1944, c. 239, 58 Stat. 272; Act of June 25, 1948, § 17, 62 Stat. 989. As originally enacted, the statute read in relevant part as follows:

"That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, . . . an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof . . . ."

There is no contention here that the very minor changes in wording effected by the subsequent amendments and codifications of the statute in any way altered the original meaning of the Act.

cases. At the time of the passage of the Expediting Act, the then recently established circuit courts of appeals [9] had jurisdiction under the Evarts Act over an appeal not only from a "final decision" [10] but also from "an interlocutory order or decree" granting or continuing an injunction or appointing a receiver *"in a cause in which an appeal from a final decree may be taken . . . to the circuit court of appeals."* [11] Hence, by lodging exclusive appellate jurisdiction over the "final judgment of the district court" in this Court, the Expediting Act necessarily eliminated court of appeals jurisdiction over appeals from interlocutory, as well as final, decrees in Government civil antitrust cases.

Congress thus initially determined to speed appellate review by channeling appeals in Expediting Act cases directly to this Court and to avoid the delay inherent in piecemeal appeal by conditioning appeal upon the presence of a "final judgment." [12] But mere speed in

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[9] Act of Mar. 3, 1891, § 2, 26 Stat. 826.

[10] Act of Mar. 3, 1891, § 6, 26 Stat. 828.

[11] Act of June 6, 1900, c. 803, 31 Stat. 660, amending Act of Mar. 3, 1891, § 7, 26 Stat. 828, as amended, Act of Feb. 18, 1895, 28 Stat. 666 (emphasis added).

[12] In *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558 (1929), Mr. Justice Brandeis, speaking for the Court, detailed the causes of delay that prompted the Expediting Act:

"Congress sought by the Expediting Act to ensure speedy disposition of suits in equity brought by the United States under the Anti-Trust Act. Before the passage of the Expediting Act the opportunities for delay were many. From a final decree in the trial court under the Anti-Trust Act an appeal lay to the Circuit Court of Appeals; and six months were allowed for taking the appeal. From the judgment of the Court of Appeals an appeal lay to this Court; and one year was allowed for taking that appeal. Act of March 3, 1891, c. 517, §§ 6, 11, 26 Stat. 826, 828, 829. See *United States* v. *E. C. Knight Co.*, 60 Fed. 306; 60 Fed. 934; 156 U. S. 1; *United States* v. *Trans-Missouri Freight Association*, 53 Fed. 440; 58 Fed. 58; 166 U. S. 290. Moreover, there might

the disposition of Government civil antitrust cases was not Congress' only concern; that result might have been achieved simply by establishing procedures for the expeditious handling of such cases in the courts of appeals. Congress was also intent upon facilitating review by this Court "of a class of antitrust cases deemed particularly important." [13] Because of the importance of uniform interpretation of the antitrust law,[14] which was still in its infancy in 1903, it is understandable that Congress chose to establish this special appellate procedure for Government civil antitrust cases, which were thought generally to involve issues of wide importance.[15]

During the 25 years following the enactment of the Expediting Act, Congress amended the Evarts Act provision governing interlocutory appeals to the courts of

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be an appeal to the Circuit Court of Appeals from a decree granting or denying an interlocutory injunction, Act of June 6, 1900, c. 803, 31 Stat. 660."

See also *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 203 (1945).

[13] *United States* v. *Cities Service Co.,* 410 F. 2d 662, 664 (CA1 1969); see *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 364 (1962) (Harlan, J., dissenting in part and concurring in part); 36 Cong. Rec. 1679 (remarks of Sen. Fairbanks); cf. n. 7, *supra.*

[14] Act of July 2, 1890, c. 647, 26 Stat. 209.

[15] In saying this, we are not to be understood as necessarily accepting today an important premise that underlies § 2—namely, that the courts of appeals, subject to review on certiorari in this Court, are incapable of providing the uniformity of interpretation necessary to the administration of the antitrust laws. See *infra,* at 170. In 1903, the courts of appeals had been in existence for only 12 years and various reservations about them had not yet been dispelled. See F. Frankfurter & J. Landis, The Business of the Supreme Court 258 (1927). Since that time, we have had over a half-century of experience with the courts of appeals—including experience in the field of private antitrust litigation—which has resolved any initial doubts. See *ibid.*

appeals on four separate occasions—in 1906,[16] 1911,[17] 1925,[18] and 1928.[19] It can be argued that on its face the very first of these amendments once again made interlocutory appeals available to the courts of appeals in Government civil antitrust cases and that the language of each successive amendment, where relevant, perpetuated that state of affairs.[20] But, while the clear meaning of statutory language is not to be ignored, "words are inexact tools at best," *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943), and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history. Nowhere is this better illustrated than in this case. For we find it in-

[16] Act of Apr. 14, 1906, c. 1627, 34 Stat. 116.

[17] Act of Mar. 3, 1911, § 129, 36 Stat. 1134.

[18] Act of Feb. 13, 1925, amending § 129, 43 Stat. 937.

[19] Act of Apr. 11, 1928, c. 354, 45 Stat. 422.

[20] The 1906 amendment removed the limitation on interlocutory appeal to causes "in which an appeal from a final decree may be taken . . . to the circuit court of appeals" and provided simply that such an appeal may be taken to the court of appeals "in any cause." Act of Apr. 14, 1906, c. 1627, 34 Stat. 116. In codifying the Evarts Act interlocutory appeals provision in 1911, "in any cause" was struck, and the provision was amended to allow the courts of appeals to entertain appeals from interlocutory orders "notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court." Act of Mar. 3, 1911, § 129, 36 Stat. 1134. Finally, the famous Judges' Bill of 1925, in turn struck the "notwithstanding" language, with the result that the codified provision, § 129, simply allowed an appeal to be "taken from [an] interlocutory order or decree [granting or denying an injunction or appointing a receiver] to the circuit court of appeals . . . ." Act of Feb. 13, 1925, amending § 129, 43 Stat. 937.

The 1928 amendment is completely without relevance here since it merely extended the applicability of the statute to interlocutory orders issued by the District Courts of Alaska, Hawaii, the Virgin Islands, and the Canal Zone. Act of Apr. 11, 1928, c. 354, 45 Stat. 422.

conceivable that Congress, having purposefully withdrawn the jurisdiction of the courts of appeals in certain antitrust cases in 1903, would re-establish it in the same cases—but only for interlocutory orders—just three years later in 1906, without making any reference to that purpose. Yet no mention of either the Expediting Act or Government civil antitrust cases is to be found in the legislative history of the 1906 amendment to the interlocutory appeals provision [21]—or, for that matter, in that of the successive amendments insofar as they are relevant; [22] rather, for each amendment some purpose wholly unrelated to Expediting Act cases is apparent from the relevant legislative materials.[23] In light of this, we find

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[21] See S. Rep. No. 2192, 59th Cong., 1st Sess. (1906): H. R. Rep. No. 542, 59th Cong., 1st Sess. (1906); 40 Cong. Rec. 1723, 1742, 4429, 4856–4857, 5056.

[22] As to the 1911 amendment, see S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1, p. 53 (1910); H. R. Doc. No. 783, 61st Cong., 2d Sess., 57 (1910); H. R. Rep. No. 818, 61st Cong., 2d Sess. (1910); S. Doc. No. 848, 61st Cong., 3d Sess. (1911); 45 Cong. Rec. 4001. As to the 1925 amendment, see S. Rep. No. 362, 68th Cong., 1st Sess., 3 (1924); H. R. Rep. No. 1075, 68th Cong., 2d Sess., 4–5 (1925); Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 12 (1924).

[23] Thus, the 1906 amendment, see n. 20, *supra*, was intended to render ineffective certain evasive pleading tactics that had theretofore been employed to take advantage of the fact that under the Evarts Act an interlocutory appeal could be taken where only a nonconstitutional issue was at stake but not where a constitutional issue was involved. See H. R. Rep. No. 542, 59th Cong., 1st Sess., 2–3 (1906); 40 Cong. Rec. 1723 (remarks of Rep. Brantley); *id.*, at 4856 (remarks of Sen. Bacon).

The legislative history concerning the 1911 amendment, see n. 20, *supra*, indicates that the "notwithstanding" language was designed to "remove any doubt" that the limitation—initially struck by the 1906 amendment—on interlocutory appeals to those cases in which an appeal might be taken to the court of appeals after a final decree had been eliminated. But this merely suggests an intent finally to resolve with even more specific language the problem of

it impossible to ascribe to Congress an intent to impair the original exclusivity of this Court's jurisdiction under § 2 through any of these amendments to the interlocutory appeals provision.

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evasive pleading which had motivated the 1906 amendment. See S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1, p. 53 (1910). Thus, in response to inquiry whether this amendment constituted "a change in the existing law," Senator Heyburn, a sponsor of the legislation, said on the Senate floor, "This is the existing law." 45 Cong. Rec. 4001.

As to the 1925 version of the interlocutory appeals provision, see n. 20, *supra,* the analysis prepared by the committee of this Court which drafted it explained that the "notwithstanding" language was "eliminated as having no further application in view of the repeal of" the provisions that had necessitated the initial 1906 amendment. Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 12 (1924). And if the addition of the "notwithstanding" language in 1911 did not establish court of appeals jurisdiction over interlocutory orders in Expediting Act cases, we fail to see how dropping that language in 1925 did so. At the same time, elsewhere in the Judges' Bill, § 2 of the Expediting Act was carried forward without alteration. See Act of Feb. 13, 1925, amending § 238 (1), 43 Stat. 938. In doing so, it was stated: "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, *and not otherwise:* (1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust . . . laws . . . ." *Ibid.* (emphasis added). Section 2, of course, has never contained a provision allowing appeal of interlocutory orders. Moreover, Mr. Justice Van Devanter, a member of this Court's committee that prepared the bill, testified before the Senate Committee that the character of Expediting Act cases "suggest[s] that they should go directly to the Supreme Court rather than through the circuit courts of appeals" without any indication that an exception was being introduced for interlocutory appeals to the courts of appeals. Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 33 (1924). See also S. Rep. No. 362, 68th Cong., 1st Sess., 3 (1924).

This clearly was the view of the seven members of the unanimous Court in *United States* v. *California Cooperative Canneries*, 279 U. S. 553 (1929). There, in rejecting the argument that an appeal lay to the court of appeals from an order denying a motion to intervene in a Government civil antitrust case, the Court stated: [24]

> "[The Evarts Act] provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. *Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters . . . ; and it precluded the possibility of an appeal to either [this Court or the court of appeals] from an interlocutory decree.*" *Id.*, at 558 (emphasis added).

And a decade and a half later, in *Allen Calculators* v. *National Cash Register Co.*, 322 U. S. 137, 142 (1944), the Court reiterated "that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and [the Expediting Act] limited the right of appeal to final decrees." It is true that interlocutory orders in Government civil antitrust cases were subsequently held reviewable by way of extraordinary writs under the All Writs Act, 28 U. S. C. § 1651 (a), but application for the extraordinary writ must be made to this Court where "sole appellate jurisdiction lies" in such cases. *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, 201–203 (1945);

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[24] Certainly the Court spoke fully cognizant of at least the amendment contained in the Judges' Bill of just four years before, see n. 20, *supra*, since all seven sitting Justices had been on the Court when its committee submitted the bill to Congress.

De Beers Consolidated Mines v. *United States,* 325 U. S. 212, 217 (1945).[25]

The wording of the interlocutory appeals provision was again altered in the 1948 revision of the Judicial Code.[26] The result—after certain subsequent minor changes not here relevant[27]—was the present 28 U. S. C. § 1292 (a) (1), which allows "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refus-

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[25] In *Alkali Export Assn.,* the Court went on to say:

"[Extraordinary] writs may not be used as a substitute for an authorized appeal; and where, as here, *the statutory scheme* [*the Expediting Act*] *permits appellate review of interlocutory orders only on appeal from the final judgment,* review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews." 325 U. S., at 203 (emphasis added).

Nevertheless, the Court found that exigent circumstances associated with the District Court's denial of the defendant's motion to dismiss the action justified immediate review by common-law certiorari in the particular case. *Id.,* at 203–204.

The Court in *De Beers,* stating that "[w]hat is . . . said [in *Alkali Export Assn.*] applies in this instance," 325 U. S., at 217, granted review under the All Writs Act of a preliminary injunction, although normally review would have been to the court of appeals under what is now 28 U. S. C. § 1292 (a)(1).

Of course, nothing we say today signifies a retreat from our previous statements that *appeals* of interlocutory orders in Government civil antitrust cases cannot be taken even to this Court.

[26] Act of June 25, 1948, 62 Stat. 929.

[27] In 1951 reference to the District Court of Guam was inserted in the section, Act of Oct. 31, 1951, § 49, 65 Stat. 726, and reference to the District Court for the Territory of Alaska was removed from the section effective upon the admission of Alaska into the Union in 1959, Act of July 7, 1958, § 12 (e), 72 Stat. 348. Finally, when subsection (b) was added to the section, the former entire section was designated subsection (a). Act of Sept. 2, 1958, Pub. L. 85–919, 72 Stat. 1770.

ing or dissolving injunctions . . ." [28] to be appealed to the courts of appeals *"except where a direct review may be had in the Supreme Court."* (Emphasis added.) This final clause is susceptible of two plausible constructions that yield opposite results in cases subject to the Expediting Act. A direct review of interlocutory orders in Government civil antitrust cases clearly may be had in this Court, thus barring resort to § 1292 (a)(1)—or so it would seem. But direct review may not be had when the interlocutory order is entered since there is no "final judgment," the predicate of an appeal under the Expediting Act. Therefore, were the final clause construed as directed only at the present availability of review in this Court, it would not, on its face, bar an interlocutory appeal. However, the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification.[29] Consequently, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that "no change is to be presumed unless clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 228 (1957). We find no such clear expression here. To the contrary, the Revisers' Notes fail to reveal any intention to expand the scope of the pre-existing jurisdiction of the courts of appeals over interlocutory appeals; the new § 1292 is described merely as a consolidation of a number of previously separate code provisions—including the gen-

[28] The portion of the provision governing appeal of interlocutory orders appointing receivers and related matters became 28 U. S. C. § 1292 (2) (1946 ed., Supp. II), now 28 U. S. C. § 1292 (a)(2).

[29] See S. Rep. No. 1559, 80th Cong., 2d Sess., 1–2 (1948) ("great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval"); H. R. Rep. No. 308, 80th Cong., 1st Sess., 1–8 (1947).

eral interlocutory appeals provision—"with necessary changes in phraseology to effect the consolidation." [30]

In sum, then, our examination of the history and evolution of the present § 1292 (a)(1)—the direct descendant of the original interlocutory appeals provision contained in the Evarts Act—has convinced us that at least up to the passage of § 1292 (b) in 1958, Congress had not impaired the original exclusivity of this Court's jurisdiction under § 2 of the Expediting Act. As is usually true of questions of statutory construction, the issue is not totally free from doubt.[31] Yet, in the last analysis, whatever ambiguity may exist in the lengthy history of the original interlocutory appeals provision relative to the Expediting Act, it results primarily from the absence of any consideration of Government civil antitrust cases in that history and thus emphasizes the extent to which appellate jurisdiction in such cases has long been viewed as a peculiarly distinct matter. Cf. *United States Alkali Export Assn.* v. *United States,* 325 U. S., at 202–203. Certainly, this conclusion finds substantial support in our prior decisions in which we have consistently interpreted our appellate jurisdiction under § 2 as exclusive.[32]

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[30] H. R. Rep. No. 2646 of the Committee on Revision of the Laws of the House of Representatives to accompany H. R. 7124, 79th Cong., 2d Sess., App. A107–108 (1946). See also H. R. Rep. No. 308 of the Committee on the Judiciary of the House of Representatives to accompany H. R. 3214, 80th Cong., 1st Sess., App. A110–111 (1947).

[31] Compare n. 20, *supra,* with n. 23, *supra.*

[32] See *supra,* at 160–161. Similarly, two of three courts of appeals which have considered the question have concluded that an interlocutory appeal does not lie under § 1292 (a)(1) in Expediting Act cases. See *United States* v. *Cities Service Co.,* 410 F. 2d 662 (CA1 1969); *United States* v. *FMC Corp.,* 321 F. 2d 534 (CA9 1963). But see *United States* v. *Ingersoll-Rand Co.,* 320 F. 2d 509, 511–517 (CA3 1963).

II

With this background, the question becomes what effect, if any, the enactment of § 1292 (b) in 1958 had upon this Court's theretofore exclusive appellate jurisdiction in Government civil antitrust cases. Section 1292 (b) provides in relevant part:

> "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 . . . ."

At the outset petitioner contends that there is simply no conflict between this provision and § 2 of the Expediting Act. It suggests that "civil action" must be read as an all-inclusive phrase that covers, *inter alia,* Government civil antitrust cases. At the same time, it points out that § 1292 (b) is concerned only with interlocutory orders, while the Expediting Act deals only with final judgments. Thus, petitioner concludes that the enactment of § 1292 (b) made discretionary interlocutory appeals available where none had previously existed, and that the two statutes are in complete harmony with one another.

Such a facile argument could also be made to support the contention that § 1292 (a)(1) can be invoked in Expediting Act cases—were it not for the fact that, as we have already seen, § 2 does not merely apply solely to a "final judgment" but also *limits* the right of appeal to a

"final judgment." Likewise, we can hardly accept petitioner's suggestion that when Congress enacted § 1292 (b), it wrote upon a clean slate insofar as appeals from interlocutory orders in Expediting Act cases are concerned. Nor do we find in § 1292 (b) the "sharp break with the traditional policy" of limited availability of interlocutory appeal so apparent to the dissent. The new provision hardly created a general right of interlocutory appeal; rather, it only extended the availability of such appeals to a limited group of orders—not previously covered by § 1292 (a)—that involve "a controlling question of law" the immediate appeal of which "may materially advance the ultimate termination of the litigation." [33] In short, the consistent construction that had been accorded § 2 prior to the enactment of § 1292 (b) [34] cannot simply be ignored in determining the impact of that section on Government civil antitrust cases, cf. *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U. S. 186, 191–194 (1968). Acceptance of petitioner's contention would require us to conclude that § 1292 (b) was intended to revise the policies underlying the Expediting Act for the first time—that it was intended as the first departure from the purposes of avoiding piecemeal appeal and of limiting review of important questions of antitrust law to this Court. We have been unable to discern any such intention.

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[33] Cf. S. Rep. No. 2434, 85th Cong., 2d Sess., 3 (1958); H. R. Rep. No. 1667, 85th Cong., 2d Sess., 2 (1958).

[34] It was only subsequent to the enactment of § 1292 (b) that a single Court of Appeals concluded—despite the unqualified statements by this Court since *United States* v. *California Cooperative Canneries*, 279 U. S., at 558, to the contrary—that an interlocutory appeal would lie under § 1292 (a)(1) in a Government civil antitrust case. See *United States* v. *Ingersoll-Rand Co.*, 320 F. 2d, at 511–517. See also *Fisons Ltd.* v. *United States*, 458 F. 2d, at 1244–1248, cert. denied, 405 U. S. 1041 (1972) (§ 1292 (b)).

The legislative history associated with § 1292 (b) contains no mention of cases within the Expediting Act.[35] Reference, to be sure, was made to antitrust cases, but it is clear on the face of these statements[36] that they refer only to private treble-damages actions.[37] In fact, rather than indicating that § 1292 (b) was intended to apply to antitrust cases subject to final review in this Court under the Expediting Act, the legislative history strongly suggests an essentially contrary conclusion: the subsection was intended to apply *only* to interlocutory orders, "not otherwise appealable under" § 1292 (a), in civil actions in which the courts of appeals would have jurisdiction over an appeal from the final judg-

[35] See S. Rep. No. 2434, 85th Cong., 2d Sess. (1958); H. R. Rep. No. 1667, 85th Cong., 2d Sess. (1958); Hearings on H. R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess. (1958); 104 Cong. Rec. 8002 (remarks of Rep. Keating). See also Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 32–33 (1951); Report of the Proceedings of a Special Meeting of the Judicial Conference of the United States 7 (1952); Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 27–28 (1953).

[36] The Senate Report suggests the denial of a motion to dismiss an antitrust action as barred by the statute of limitations as one instance in which an interlocutory appeal might be desirable. But it goes on to state:

"Disposition of antitrust cases may take considerable time, *yet upon appeal following final disposition of such cases, the court of appeals may well determine* that the statute of limitations had run and for that reason the district court did not have jurisdiction." S. Rep. No. 2434, 85th Cong., 2d Sess., 3 (1958) (emphasis added). The reference to antitrust cases in Chief Judge John J. Parker's testimony at the hearings on § 1292 (b) was also clearly limited to private treble-damages actions. See Hearings on H. R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess., 9 (1958).

[37] 38 Stat. 731, 15 U. S. C. § 15.

ment under 28 U. S. C. § 1291. For instance, in explaining the proposed statute, the Senate Report on § 1292 (b) states: [38]

> "The bill results from a growing awareness of the need for expedition of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, *result in a final order which would then be appealable to the circuit courts of appeals of the United States.* However, *such motions,* if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable."

This is hardly supportive of petitioner's position, and yet throughout the legislative materials the focus similarly remains on interlocutory orders in civil cases that would be appealable to the courts of appeals upon final judgment.[39]

Petitioner's case is further weakened by the extraordinary result that acceptance of its position would yield. Section 1292 (a) provides for an appeal as a matter of right from a number of specified types of interlocutory orders—in particular, interlocutory orders granting or denying injunctions. Those interlocutory orders not within subsection (a), however, were made appealable in § 1292 (b), subject to the judgment and discretion of the district court and the court of appeals. Greater importance obviously was attached to those

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[38] S. Rep. No. 2434, 85th Cong., 2d Sess., 2 (1958) (emphasis added).

[39] See *id.,* at 2–3; H. R. Rep. No. 1667, 85th Cong., 2d Sess., 1 (1958); Hearings on H. R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess., 8 (1958).

types of interlocutory orders specified in subsection (a) than to those covered by (b).[40] Nevertheless, petitioner would have us conclude that Congress intended to establish court of appeals jurisdiction for all interlocutory orders in Expediting Act cases, *except* those orders for which an appeal of right is provided in § 1292 (a)(1).[41] As the Government notes, such a result would effectively turn § 1292 on its head.[42] Consistent with the evident thrust of the statute's legislative history, the much more sensible conclusion is that § 1292 (b) was intended to establish jurisdiction in the courts of appeals to review interlocutory orders, other than those specified in § 1292 (a), in civil cases in which they would have jurisdiction were the judgments final.[43]

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[40] Cf. H. R. Rep. No. 1667, 85th Cong., 2d Sess., 1–2 (1958).

[41] Petitioner suggests two avenues of escape from this anomalous situation: (1) that under § 1292 (a)(1) an interlocutory appeal may in fact lie from an injunctive order in a Government civil antitrust case; (2) that if an appeal from such an order cannot be taken under § 1292 (a), it may nevertheless be taken under § 1292 (b) since, the argument goes, the latter applies to all orders not appealable under the former, "whatever the nature of the order and whatever the reason for its non-appealability." Reply Brief for Petitioner 7–8. Our discussion in Part I of this opinion is sufficient to dispose of petitioner's first contention. As to the second argument, while the language of § 1292 (b) is unqualified on its face, the legislative history indicates that Congress was concerned only with orders of types other than those specified in § 1292 (a); in other words, § 1292 (b) was intended to supplement § 1292 (a), not to provide a substitute for it. See n. 35, *supra*. Moreover, it would be, to say the least, extraordinary for Congress to have resorted to such a subtle method of establishing for the first time in Government civil antitrust cases interlocutory appeals for orders of the type specified in § 1292 (a) without giving any hint whatsoever that this was its purpose.

[42] Brief for United States 18.

[43] Nor can it be ignored that subsequent to both the 1948 revision which resulted in § 1292 (a) and the enactment of § 1292 (b), we have reaffirmed that a final judgment is an essential prerequisite

At the foundation of the petitioner's position in this case is the contention that § 1292 (b) is the panacea for the special burdens imposed on this Court by § 2 of the Expediting Act. Both the Court and various individual Members have on occasion commented that "[w]hatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory," for "[d]irect appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." *United States* v. *Singer Mfg. Co.,* 374 U. S. 174, 175 n. 1 (1963); see *Ford Motor Co.* v. *United States,* 405 U. S. 562, 595 n. 5 (1972) (BURGER, C. J., concurring in part and dissenting in part); *United States* v. *Borden Co.,* 370 U. S. 460, 477n. (1962) (Harlan, J., dissenting); *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 355 (1962) (Clark, J., concurring); *id.,* at 364–365 (Harlan, J., dissenting in part and concurring in part). Further, in light of the present size of our docket, direct review "seldom results in much expedition" since we normally must examine the entire record and resolve all questions however unsubstantial. *Id.,* at 355 (Clark, J., concurring); see *id.,* at 364 (Harlan, J., dissenting in part and concurring in part); *United States* v. *Borden Co., supra,* at 477 n. (Harlan, J., dissent-

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to an appeal of an order issued in a government civil antitrust case since "Congress . . . limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree." *Brown Shoe Co.* v. *United States,* 370 U. S., at 305 n. 9. Section 1292 was not, to be sure, specifically at issue in *Brown Shoe.* But in holding, as it did, that the District Court's decree was appealable only because it was "final," *id.,* at 306–309, the Court necessarily foreclosed the possibility of an interlocutory appeal to *any* court, and thus its remark concerning the preclusion of interlocutory appeals cannot be lightly dismissed.

ing). Our action today should not be construed as a retreat from these previous remarks. On the contrary, we remain convinced that under present circumstances the Expediting Act fails to hasten substantially the final disposition of important antitrust actions while it unjustifiably burdens this Court with inadequately sifted records and with cases that could be disposed of by review in the courts of appeals. Uniformity in the interpretation and administration of the antitrust laws continues to be an important consideration. But such uniformity could be adequately ensured by the availability of review in this Court on certiorari of cases involving issues of general importance—together with the "[l]imited expediting of such cases, under the discretion of this Court," *Ford Motor Co.* v. *United States, supra,* at 595 n. 5 (BURGER, C. J., concurring in part and dissenting in part), where time is a factor. The simple fact is that "[t]he legal issues in most [Government] civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law," *Brown Shoe Co.* v. *United States, supra,* at 364 (Harlan, J., dissenting in part and concurring in part). Yet, despite all of these criticisms, our personal views as to the wisdom of § 2 are, of course, no basis for disregarding what we are bound to recognize as the plain and unaltered intent of Congress to require that appeals in Government civil antitrust cases be taken only from final judgments and only to this Court.

In any event, petitioner has failed to convince us that permitting appeals under § 1292 (b) would provide a meaningful solution—if any solution at all—to the various problems created for the Court by the Expediting Act. In the first place, the availability of interlocutory appeals under § 1292 (b) would not reduce the number of Government civil antitrust cases that could be brought

to this Court on direct appeal upon the entrance of a final judgment. Nor would it reduce the number of issues subject to review by this Court; any issue determined on interlocutory appeal would normally be open to consideration on final appeal,[44] and doubtless some party would raise an issue appealed under § 1292 (b) since it must have involved "a controlling question of law." Also, there would be the added problem of applications for certiorari following a certified appeal in Expediting Act cases. By definition, the issue will be a substantial one and, where the appellate decision is questionable, it would be necessary to decide whether to grant certiorari, which might require the Court to consider a particular case, on two separate occasions,[45] or to deny certiorari, which might mean allowing the district court to proceed to final judgment on an erroneous basis. Given the potential waste of limited judicial resources—those either of this Court or of the district court—associated with each choice, neither can be considered attractive. Finally, in emphasizing the value of the screening function that court of appeals review would provide in Expediting Act cases, we have consistently focused upon the lengthy records and complex factual issues common to such cases. Yet, as is illustrated by this very case, in which the certified question relates to a motion to dismiss a party, questions that would be presented to the courts of appeals under § 1292 (b) would often involve threshold procedural issues not

[44] The sole exception to this would be if the certified question had previously been considered by way of certiorari.

[45] Only if we were to dispose of a controlling question in such a way as to end all proceedings would the possibility of a subsequent appeal be foreclosed. A threshold issue of jurisdiction might present such a controlling question; but even that type of issue will often not end an entire Government civil antitrust case which might involve a number of parties—as is true in this case where the certified question relates to only one of the two defendants.

requiring extensive analysis of the record.[46] With respect to such issues the screening function performed by intermediate appellate review is of far less significance than it would be with respect to questions of, say, relevant market, competition, or agreement. But these latter questions can be properly decided only after full development of the evidence, and it is therefore doubtful at best that interlocutory appeals would aid this Court in dealing with them on final review.[47]

Nor are we even certain that the expeditious termination of litigation in the district courts—the express purpose of § 1292 (b) [48]—would be materially advanced in the context of Government civil antitrust cases by acceptance of petitioner's contention. Permitting interlocutory appeals under § 1292 (b) in Expediting Act

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[46] See also *Fisons Ltd.* v. *United States*, 458 F. 2d 1241 (CA7), cert. denied, 405 U. S. 1041 (1972) (service of process); *Farbenfabriken Bayer, A. G.* v. *United States*, 1968 CCH Trade Cas. ¶ 72,570 (CADC), cert. denied, 393 U. S. 959 (1968) (quasi *in rem* jurisdiction).

[47] Other than threshold procedural issues, the question consistently sought to be raised on interlocutory appeal has been the propriety of orders granting or denying preliminary injunctions with respect to proposed acquisitions. See *United States* v. *Cities Service Co.*, 410 F. 2d 662 (CA1 1969); *United States* v. *FMC Corp.*, 321 F. 2d 534 (CA9 1963); *United States* v. *Ingersoll-Rand Co.*, 320 F. 2d 509 (CA3 1963). Although appeals of such orders would involve the merits of the antitrust actions, the fact is that permitting interlocutory appeal under § 1292 (b) would not bring these orders and the related evidence before the courts of appeals since they come within § 1292 (a)(1). Cf. n. 41, *supra*. Moreover, because of the need for speed if an acquisition is to be enjoined before accomplished, requests for such interlocutory orders must be determined after, at most, only an initial hearing and without full development of the record. Consequently, appeals from such orders would not necessarily bring before the courts of appeals the lengthy records and numerous documents with which we have often been forced to deal after final judgment.

[48] See S. Rep. No. 2434, 85th Cong., 2d Sess., 1–2 (1958).

cases would result in an anomalous situation: the court of appeals would have jurisdiction over certain interlocutory orders but not over the final judgment, which would be appealable only to this Court. An interlocutory appeal taken under § 1292 (b) must, of course, involve "a controlling question of law" the immediate appeal of which "may materially advance the ultimate termination of the litigation." In the normal case, the decision of such a question on interlocutory appeal is final since the same court reviews the final judgment, and the likelihood of review in this Court on certiorari is very small. Here, however, the decision of the court of appeals on the interlocutory order would essentially be only an advisory opinion to the district court since the issue would usually be open to relitigation on appeal of the final judgment to this Court.[49] The net result would be added work for the courts of appeals,[50] with no assurance that there would ultimately be a saving of district court time.

III

Hence, we conclude that § 1292 (b) did not establish jurisdiction in the Court of Appeals over interlocutory orders in Expediting Act cases. The exclusive nature of

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[49] Of course, this problem would not exist if the interlocutory decision were reviewed immediately on certiorari in this Court; but, as we have already seen, this alternative entails serious problems of its own.

[50] In this respect, it must be recalled that interlocutory appeal under § 1292 (b) is subject to the decision of the court of appeals in the exercise of its discretion, to allow appeal of the question certified by the district court. Thus, the effectiveness of § 1292 (b) in Government civil antitrust cases would be dependent upon the willingness of the courts of appeals to assume this new burden aware of the limited import of their decisions and of the fact that interlocutory appeals in such cases would represent only added work for them, since they would not otherwise consider any appeal.

the jurisdiction created in § 2 of the Expediting Act has consistently been recognized by this Court, and we hold today that that exclusivity remains unimpaired. Despite our interest in a restructuring of our jurisdiction under the Expediting Act, we are neither willing nor able to adopt the ungainly half measure offered by the petitioner in this case.

Affirmed.

MR. JUSTICE WHITE joins the Court's opinion except for the advisory to Congress reflecting one view of the relative merits of the Expediting Act.

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE STEWART that the appeal of the interlocutory order in this case to the Court of Appeals under 28 U. S. C. § 1292 (b) was not barred by the Expediting Act. But I disagree with the intimations in both the majority opinion and the other dissenting opinion that because of our overwork the antitrust cases should first be routed to the courts of appeals and only then brought here.[1]

The case for our "overwork" is a myth. The total number of cases filed has increased from 1063 cases in the 1939 Term to 3643 in the 1971 Term. That increase has largely been in the *in forma pauperis* cases, 117 being filed in the 1939 Term and 1930 in the 1971 Term. But we grant certiorari or note probable jurisdiction in very few cases. The signed opinions of the Court (which are only in argued cases) totaled 137 in the 1939 Term with

[1] It is true that several Justices over the years have expressed the desire that the antitrust cases come to us only by certiorari to the courts of appeals. So far as I am aware the only opinion speaking for the Court containing that suggestion is *United States* v. *Singer Mfg. Co.*, 374 U. S. 174. But there the idea was contained only in a footnote (*id.*, at 175 n. 1); and as Mr. Chief Justice Hughes was wont to say, "Footnotes do not really count."

six *per curiams* [2] or a total of 143 Court opinions, while in the 1971 Term we had 129 signed opinions of the Court and 20 *per curiams* [3] or a total of 149 Court opinions. So in terms of petitions for certiorari granted and appeals noted and set for argument our load today is substantially what it was 33 years ago.

The load of work so far as processing cases is concerned has increased. That work is important; and in many ways it is the most important work we do. For the selection of cases across the broad spectrum of issues presented is the very heart of the judicial process. Once our jurisdiction was largely mandatory and the backlog of cases piled high. The 1925 Act [4] changed all that, leaving to the Court the selection of those certiorari cases which seem important to the public interest. The control of the docket was left to the minority, only four votes out of nine being necessary to grant a petition. The review or sifting of these petitions is in many respects the most important and, I think, the most interesting of all our functions. Across the screen each Term come the worries and concerns of the American people—high and low—presented in concrete, tangible form. Most of these cases have been before two or more courts already; and it is seldom important that a third or fourth review be granted. But we have national standards for many of our federal-state problems and it is important, where they control, that the national standards be uniform; and it is equally important where state law is supreme, that the States be allowed to experiment with various approaches and solutions.

Neither taking that jurisdiction from us nor the device of reducing our jurisdiction is necessary for the perform-

[2] Not including orders of dismissal or affirmance.

[3] Including orders of dismissal or affirmance.

[4] Judiciary Act of Feb. 13, 1925, 43 Stat. 936.

ance of our duties. We are, if anything, underworked, not overworked. Our time is largely spent in the fascinating task of reading petitions for certiorari and jurisdictional statements. The number of cases taken or put down for oral argument has not materially increased in the last 30 years.

The Expediting Act, 15 U. S. C. §§ 28, 29, involved in the present case, does not contribute materially to our caseload. In the 1967 Term we had 12 such cases but only three of them were argued, the others being disposed of summarily. In the 1968 Term we had eight, but only three were argued. In the 1969 Term we had four; only two being argued. In the 1970 Term only two such cases reached us and each was argued. In the 1971 Term four such cases reached us, two of them being argued.[5]

If there are any courts that are surfeited, they are the courts of appeals. In my Circuit—the Ninth—it is not uncommon for a judge to write over 50 opinions for the court in one term. That Circuit has at the present time a 15-month backlog of civil cases, while we are current. The average number of signed opinions for the Court in

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[5] *Ford Motor Co.* v. *United States,* 405 U. S. 562; *United States* v. *Topco Associates,* 405 U. S. 596.

The antitrust cases not argued in the 1967–1971 Terms were either reversed out of hand or affirmed out of hand (some of these being companion cases to those that were argued), or dismissed as moot, or dismissed for want of jurisdiction. There were three dismissed for want of jurisdiction.

Farbenfabriken Bayer A. G. v. *United States,* 393 U. S. 216, involved an interlocutory order in which we ruled that we had no jurisdiction. *Standard Fruit & S. S. Co.* v. *United Fruit Co.,* 393 U. S. 406, involved an effort of a corporation, not a party, to inspect the divestiture plans being submitted to the District Court pursuant to a consent judgment. *Garrett Freightlines* v. *United States,* 405 U. S. 1035, involved an appeal from a defendant dismissed from the antitrust case because of the primary jurisdiction of the Interstate Commerce Commission over the acquisition in question.

this Court is close to 12 per Justice; only occasionally does anyone write even as many as 18; and we have no backlog.

Separate opinions—including dissents and concurring opinions—multiply. If they are added to the total of 149 for the 1971 Term, the overall number would be 328. But the writing of concurrences, dissents, or separate opinions is wholly in the discretion of the Justice. It is not mandatory work; it is writing done in the vast leisure time we presently have.

The antitrust cases are only small fractions of our caseload. Yet they represent large issues of importance to the economy, to consumers, and to the maintenance of the free-enterprise system. Congress has expressed in the Sherman Act,[6] the Clayton Act,[7] the Robinson-Patman Act,[8] and the Celler-Kefauver Act [9] a clear policy to keep the avenues of business open, to bar monopolies, and to save the country from the cartel system which is the product of gargantuan growth.

It is of course for Congress and Congress alone to determine whether the Expediting Act [10] should bring the

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[6] Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. §§ 1–7.

[7] Clayton Act of Oct. 15, 1914, 38 Stat. 730, 15 U. S. C. § 12 *et seq.*, § 44.

[8] Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. §§ 13, 13a, 13b, 21a, 1013.

[9] Celler-Kefauver Act of Dec. 29, 1950, 64 Stat. 1125, 15 U. S. C. §§ 18, 21.

[10] For the legislative history of the Act see H. R. Rep. No. 3020, 57th Cong., 2d Sess.

Senator Fairbanks, leading exponent of the Act, said in reporting it to the Senate: "The far-reaching importance of the cases arising under antitrust laws now upon the statute books or hereafter to be enacted, and the general public interest therein, are such that every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object." 36 Cong. Rec. 1679.

antitrust cases directly here. While I join the statutory construction in MR. JUSTICE STEWART'S dissent, I do not join that part which expresses to me an inaccurate account of the "overwork" of the Court. We are vastly underworked. One interested in history will discover that once upon a time Hugo Black wrote over 30 opinions for the Court in a Term where only 135 opinions were written for the Court, a few more than we all wrote last Term.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST concurs, and MR. JUSTICE DOUGLAS concurs in part, dissenting.

The Expediting Act, enacted in 1903, provides that in civil antitrust actions brought by the United States "an appeal from the *final judgment* of the district court will lie only to the Supreme Court." (Emphasis added.) Section 1292 (b), enacted in 1958, provides that when a district court, "in making in a civil action an order not otherwise appealable under this section," shall appropriately certify the question involved, the court of appeals has discretionary jurisdiction to hear an interlocutory appeal from that order. Thus, the Expediting Act, by its terms, relates only to appeals from *final* judgments in a limited category of cases, while § 1292 (b) applies to appeals from certain *interlocutory* orders in *all* civil actions. The Expediting Act does not prohibit court of appeals jurisdiction under § 1292 (b), for the former applies only to final judgments, while the latter applies only to interlocutory orders. To find any inconsistency whatever between the two statutes thus requires rejection of the plain meaning of each of them—rejection, in short, of a most basic principle of statutory construction. As the Court of Appeals for the Seventh Circuit recognized in *Fisons Ltd.* v. *United States,* 458 F. 2d 1241, 1245 (1972), "the language of each [can] be given full effect without limiting the scope of the other."

Moreover, the purpose of § 1292 (b) is wholly consistent with that of the Expediting Act. The 1903 statute was motivated by the view that Government antitrust actions are so important that they should be expedited. *Shenandoah Valley Broadcasting* v. *ASCAP*, 375 U. S. 39, 40 (1963).[1] So, too, the motivation behind § 1292 (b), enacted 55 years later, was the contemporary view that interlocutory appeals involving important and controlling questions of law are a useful means of expediting litigation. Although § 1292 (b) authorizes a departure from the general rule against interlocutory appeals, it does so only for the purpose of materially advancing the ultimate termination of the litigation.[2] Thus, the Ex-

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[1] In reporting the bill that became the Expediting Act, Senator Fairbanks stated that:

"[E]very reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object." 36 Cong. Rec. 1679.

[2] The Senate Report on the bill that became § 1292 (b) stated:

"This legislation results from a considerable study by committees of the Judicial Conference. The legislation itself was introduced at the request of the Administrative Office of the United States Courts pursuant to the direction of the Judicial Conference of the United States. . . . The bill results from a growing awareness of the need for expedition of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, result in a final order which would then be appealable to the circuit courts of appeals of the United States. However, such motions, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable. . . .

. . . .

"The committee believes that this legislation constitutes a desirable addition to the existing authority to appeal from interlocutory orders of the district courts of the United States. . . . Any legislation, therefore, appropriately safeguarded, which might aid in the

pediting Act and § 1292 (b) are animated by precisely the same objectives and warranted by precisely the same circumstances, and they should be read together as supplementing one another, not as antagonistic.

The legislative history of § 1292 (b) indicates that its primary benefit was expected to occur in the protracted or "big" cases, including civil antitrust litigation.[3] Yet, if no appeal can be taken to a court of appeals under § 1292 (b) in a civil antitrust suit where the Government is plaintiff, then the purpose behind the statute cannot be served at all in these cases, for no statute provides for such an interlocutory appeal directly to this Court. It seems to me that if Congress had wanted to exclude cases like this one from the beneficent provisions of § 1292 (b), it would have said so.[4]

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disposition of cases before the district courts of the United States by saving useless expenditure of court time is such as to require the approbation of all those directly concerned with the administration of justice in the United States." S. Rep. No. 2434, 85th Cong., 2d Sess., 2, 4 (1958).

[3] The Senate Report stated:

"There are many civil actions from which similar illustrations could be furnished. For example, in an antitrust action a plea may be entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. Disposition of antitrust cases may take considerable time, yet upon appeal following final disposition of such cases, the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." *Id.*, at 3.

[4] Although the antitrust cases referred to in the Senate Committee Report on § 1292 (b) were apparently private cases, rather than Government litigation, the proposed legislation was introduced, after considerable study, at the direction of the Judicial Conference of the United States (n. 2, *supra*), whose members—all eminent federal judges—were surely familiar with the appellate procedure in civil antitrust cases brought by the Government.

The Expediting Act originally provided that Government antitrust cases would be heard by a panel of judges upon the certification of the Attorney General. That provision is now 15 U. S. C. § 28, which provides for a panel of three. The purpose of the provision was to ensure that cases would receive full consideration by a panel of judges before presentation to this Court.[5] The Expediting Act, of course, has been criticized because it routes complex cases directly here without benefit of screening by the courts of appeals. As we stated in *United States* v. *Singer Mfg. Co.,* 374 U. S. 174, 175 n. 1 (1963):

> "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. . . . Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals."

See also *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 355 (1962) (Clark, J., concurring); *id.,* at 364–365 (Harlan, J., dissenting in part and concurring in part); *United States* v. *Borden Co.,* 370 U. S. 460, 477 n. (1962) (Har-

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[5] The House Report on the bill explains this provision by quoting a letter of the Attorney General as follows:

"There are a number of cases now provided by statute where appeals may be made directly to the Supreme Court from the district and circuit courts . . . .

"The class of cases that I suggest should be brought within this rule, it seems to me, is of as great importance as any of those referred to. The suggested provision requiring a full bench of the circuit judges would insure the cases receiving as full consideration before presentation to the Supreme Court as if heard by the United States circuit court of appeals." H. R. Rep. No. 3020, 57th Cong., 2d Sess., 2 (1903).

lan, J., dissenting); *Ford Motor Co.* v. *United States,* 405 U. S. 562, 595 n. 5 (1972) (BURGER, C. J., concurring in part and dissenting in part). Interlocutory appeals under § 1292 (b) in Government antitrust cases would provide screening of at least some issues in at least some cases by courts of appeals before those issues reach this Court; and this, as shown above, would be consistent with the original policy of the Expediting Act. The Court's decision today precludes, in cases like this, both the useful expediting effect of § 1292 (b) and the equally desirable potential of intermediate review by the courts of appeals of important legal issues.

It is said that a ban on court of appeals jurisdiction under § 1292 (b) in Government antitrust cases is to be derived from the provisions of § 1292 (a)(1). The latter section provides that the courts of appeals shall have jurisdiction of appeals from interlocutory orders of district courts granting or denying injunctions "except where a direct review may be had in the Supreme Court." The argument is that that language expressly excludes court of appeals jurisdiction in Expediting Act cases; and since there is nothing in the language of § 1292 (b) that contradicts this express exclusion, interlocutory orders in Expediting Act cases are likewise not appealable under § 1292 (b). If § 1292 (b) did allow court of appeals jurisdiction in this case, it is said, the result would be that an interlocutory order in a Government antitrust case could be appealed to a court of appeals only if it did not involve an injunction; and that result would effectively turn § 1292 on its head, because in non-Expediting Act cases, § 1292 gives priority to injunctive orders, which may be appealed as of right.

There are several answers to this argument. At the outset, it is not clear that the major premise—that § 1292 (a)(1) expressly excludes court of appeals jurisdiction in Expediting Act cases—is valid. On that question, the

Circuits are divided, the First and the Ninth denying their jurisdiction,[6] and the Third upholding appealability.[7] We have never before faced the question nor resolved the conflict.

But even if the Expediting Act does bar court of appeals jurisdiction to review interlocutory injunctive orders under § 1292 (a)(1) in Government antitrust cases, it does not follow that there must be a similar bar to § 1292 (b) jurisdiction. The very fact that § 1292 (a)(1) contains express language which at least arguably creates an exception to court of appeals jurisdiction, while § 1292 (b) contains no such language, is reason enough to treat the two differently. Beyond that, § 1292 (a)(1) has a history dramatically different from § 1292 (b). That history was thoroughly reviewed in *United States* v. *Cities Service Co.*, 410 F. 2d 662 (CA1 1969), in *United States* v. *Ingersoll-Rand Co.*, 320 F. 2d 509 (CA3 1963), and in the Court's opinion today, *ante*, at 155–163, and need not be discussed in detail here. Suffice it to say that the original version of § 1292 (a)(1) was

[6] *United States* v. *Cities Service Co.*, 410 F. 2d 662 (CA1 1969); *United States* v. *FMC Corp.*, 321 F. 2d 534 (CA9 1963).

[7] *United States* v. *Ingersoll-Rand Co.*, 320 F. 2d 509 (CA3 1963). The reasoning of the Third Circuit in this case was as follows: Section 1292 (a)(1) permits an appeal to a court of appeals of interlocutory injunctive orders "except where a direct review may be had in the Supreme Court." Since the Supreme Court has direct review in Expediting Act cases *only* from final judgments, it has none from interlocutory orders. Hence, the exception in § 1292 (a)(1) does not bar court of appeals jurisdiction over interlocutory injunctive orders in Government antitrust cases. The court then concluded:

"In fact, it is extremely difficult and requires doing violence to the language of the statute to escape the conclusion that interlocutory orders, such as the one at bar, are reviewable by a court of appeals excepting and only excepting those types of cases in which an interlocutory order is directly reviewable by the Supreme Court." 320 F. 2d, at 517.

enacted in 1891, and that the provision went through several changes in language in succeeding years, during which its relationship to the 1903 Expediting Act was often unclear. See *United States* v. *Cities Service Co.*, 410 F. 2d, at 666–669. The provision was finally codified in its present form in 1948, although, as the above-mentioned conflict among the circuits demonstrates, that codification did not make its relationship to the Expediting Act any clearer. Section 1292 (b), on the other hand, was an entirely new statute, written on a clean slate in 1958, and representing a sharp break with the traditional policy against appeals from noninjunctive interlocutory orders. At that time, there was already growing doubt about the wisdom of the Expediting Act; and the fact that Congress conferred § 1292 (b) jurisdiction without making any express exception for cases where direct review may be had in this Court—such as had been in § 1292 (a)(1) for some years—is surely some indication that Congress in 1958 was expressing the contemporary view that interlocutory appeals to the courts of appeals on controlling questions of law provide a desirable tool that should not be denied even in Expediting Act cases.

As to the point that this interpretation would "turn § 1292 on its head," it is certainly arguable that if an appeal from an injunctive order in an Expediting Act case cannot be had under § 1292 (a)(1), it may still be taken under § 1292 (b). Section 1292 (b) relates to orders "not otherwise appealable under this section," whatever the nature of the order and whatever the reason for its nonappealability. Hence, if, in Government antitrust cases, courts of appeals have no jurisdiction under § 1292 (a)(1), then an interlocutory injunctive order would be an order "not otherwise appealable," and § 1292 (b)'s discretionary jurisdiction might well be held to apply.

In short, there is no validity to the argument that the terms of § 1292 (a)(1), whatever they may mean, have any bearing upon the proper interpretation of § 1292 (b).

It is also argued that the basic policy of the Expediting Act was to remove *all* court of appeals jurisdiction in Government antitrust cases. According to this argument, although the Act speaks only of final judgments, it must be understood to include interlocutory appeals, since, at the time the Act was passed, the courts of appeals could review interlocutory orders only in cases where they could review final judgments. From *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 558 (1929), to *Brown Shoe Co.* v. *United States,* 370 U. S., at 305 n. 9, the argument goes, this Court has consistently indicated that courts of appeals may not exercise jurisdiction in Expediting Act cases, regardless of whether the appeal is from a final or interlocutory order; and it should not be assumed that Congress in 1958 repealed this longstanding interpretation by legislation that is not addressed specifically to appeals in these cases.

I fail to see how we effect anything like a repealer of the Expediting Act by construing § 1292 (b) to permit court of appeals jurisdiction thereunder in Expediting Act cases. As demonstrated above, there is no inconsistency whatever between this construction of § 1292 (b) and the plain language of the Expediting Act. It is equally clear that the reason why in 1903, and indeed for 55 years thereafter, courts of appeals could not review noninjunctive interlocutory orders in cases where they could not review the final judgment is not that the Expediting Act forbade such review, but that there was no statutory authority for such review in any cases whatsoever. In 1958, however, Congress broke with the old policy against interlocutory appeals from noninjunctive orders and specifically provided that such appeals

may be taken to the courts of appeals in their discretion in *all* civil actions, where the question is properly certified. I see no reason, in the absence of some statutory prohibition, to refrain from applying that clear language, whether or not the court of appeals can review the final judgment.

The cases cited by the Government do not persuade me otherwise. *California Canneries,* of course, was decided 29 years before the enactment of § 1292 (b); and whatever was said there was a judgment on what Congress had done, not on what it could do or on the meaning of what it was to do 29 years later. *Brown Shoe* does postdate the enactment of § 1292 (b); but that case involved a direct appeal to this Court, and the only question about appealability was whether the appealed order was final. The issue of court of appeals jurisdiction under § 1292 (b) was not involved there, nor was the 1958 Act even mentioned in the short footnote dictum so heavily relied on by the Government. That dictum did little more than quote the language of *California Canneries,* and it surely cannot be understood to decide the issue now before us.

Finally, it is said that it would be anomalous for a court of appeals that is without jurisdiction to entertain an appeal from a final judgment to decide an interlocutory issue that could control the outcome of the case. But there is *no* case in which the judgment of a court of appeals is necessarily final. Whenever a court of appeals decides a controlling question of law in any litigation, its views are subject to review here. Far from being anomalous, interlocutory review of potentially dispositive questions by the courts of appeals in Government antitrust cases would be helpful to this Court, giving us the benefit of intermediate appellate consideration in these cases. We could then exercise our certiorari power informed by the reasoning of an appellate

court, and there might be no later direct appeal at all from the final judgment. And surely interlocutory appeals under § 1292 (b) in Government antitrust cases would serve to lighten the burden on trial courts and litigants alike.

We cannot, of course, create an appellate jurisdiction not created by Congress, however desirable. But what Congress has conferred, we should not reject.

I would reverse the order of the Court of Appeals denying Tidewater's petition to appeal under § 1292 (b) for lack of jurisdiction, and I would remand this case to that court with directions to consider the merits of the petition to appeal.

NEIL, WARDEN *v.* BIGGERS

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

No. 71–586. Argued October 18–19, 1972—
Decided December 6, 1972

Respondent was convicted of rape on evidence that consisted in part of testimony concerning the victim's visual and voice identification of respondent at a station-house showup that occurred seven months after the rape. The victim, who had been in the presence of her assailant a considerable time and had directly observed him indoors and under a full moon outdoors, testified that she had "no doubt" that respondent was her assailant. She had previously given the police a description of her assailant, which was confirmed by a police officer. Before the showup where she identified respondent, the victim had made no identification of others who were presented at previous showups, lineups, or through photographs. The police asserted that they used the showup technique because they had difficulty in finding for a lineup other individuals generally fitting respondent's description as given by the victim. The Tennessee Supreme Court's affirmance of the conviction was affirmed here by an equally divided Court. 390 U. S. 404. Respondent then brought a habeas corpus action in District Court. After rejecting the petitioner's contention that this Court's affirmance constituted an actual adjudication within the meaning of 28 U. S. C. § 2244 (c) and thus barred further review of the showup identification in a federal habeas corpus proceeding, the District Court, noting that a lineup is relatively more reliable than a showup, held that the confrontation here was so suggestive as to violate due process. The Court of Appeals affirmed. *Held:*

1. This Court's equally divided affirmance of respondent's state court conviction does not, under 28 U. S. C. § 2244 (c), bar further federal relief by habeas corpus, since such an affirmance merely ends the process of direct review but settles no issue of law. Pp. 190–192.

2. While the station-house identification may have been suggestive, under the totality of the circumstances the victim's identification of respondent was reliable and was properly allowed to go to the jury. Pp. 196–201.

448 F. 2d 91, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and STEWART, JJ., joined, *post*, p. 201. MARSHALL, J., took no part in the consideration or decision of the case.

Bart C. Durham III, Assistant Attorney General of Tennessee, argued the cause for petitioner. With him on the brief was *David M. Pack*, Attorney General.

Michael Meltsner argued the cause for respondent. With him on the brief were *Jack Greenberg, Anthony G. Amsterdam, Avon N. Williams, Jr.*, and *Z. Alexander Looby*.

Louis J. Lefkowitz, Attorney General of New York, *pro se, Samuel A. Hirshowitz*, First Assistant Attorney General, and *Maria L. Marcus*, Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging reversal.

Shirley Fingerhood, Richard G. Green, Burt Neuborne, and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1965, after a jury trial in a Tennessee court, respondent was convicted of rape and was sentenced to 20 years' imprisonment. The State's evidence consisted in part of testimony concerning a station-house identification of respondent by the victim. The Tennessee Supreme Court affirmed. *Biggers* v. *State*, 219 Tenn. 553, 411 S. W. 2d 696 (1967). On certiorari, the judgment of the Tennessee Supreme Court was affirmed by an equally divided Court. *Biggers* v. *Tennessee*, 390 U. S. 404 (1968) (MARSHALL, J., not participating). Respondent then brought a federal habeas corpus action raising several claims. In reply,

petitioner contended that the claims were barred by 28 U. S. C. § 2244 (c), which provides in pertinent part:

> "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein . . . ."

The District Court held that the claims were not barred and, after a hearing, held in an unreported opinion that the station-house identification procedure was so suggestive as to violate due process. The Court of Appeals affirmed. 448 F. 2d 91 (1971). We granted certiorari to decide whether an affirmance by an equally divided Court is an actual adjudication barring subsequent consideration on habeas corpus, and, if not, whether the identification procedure violated due process. 405 U. S. 954 (1972).

I

The intended scope of the phrase "actually adjudicated by the Supreme Court" must be determined by reference to the peculiarities of federal court jurisdiction and the context in which § 2244 (c) was enacted. Jurisdiction to hear state prisoner claims on habeas corpus was first expressly conferred on the federal courts by the Judiciary Act of 1867, c. 28, 14 Stat. 385. Thereafter, decisions of this Court established not only that *res judicata* was inapplicable, *e. g., Salinger* v. *Loisel,* 265 U. S. 224, 230 (1924); *Fay* v. *Noia,* 372 U. S. 391, 423

(1963), but also that federal courts were obliged in appropriate cases to redetermine issues of fact and federal law. By the same token, the Court developed a number of limiting principles to restrain open-ended relitigation, among them that a successive habeas corpus application raising grounds rejected in a previous application might be denied without reaching the merits. *Salinger* v. *Loisel, supra,* at 231.

In 1948, Congress codified a version of the *Salinger* rule in 28 U. S. C. § 2244. As redesignated and amended in 1966, § 2244 (b) shields against senseless repetition of claims by state prisoners without endangering the principle that each is entitled, other limitations aside, to a redetermination of his federal claims by a federal court on habeas corpus. With this in mind, the purpose of § 2244 (c), also enacted in 1966, becomes clear. This subsection embodies a recognition that if this Court has "actually adjudicated" a claim on direct appeal or certiorari, a state prisoner has had the federal redetermination to which he is entitled. A subsequent application for habeas corpus raising the same claims would serve no valid purpose and would add unnecessarily to an already overburdened system of criminal justice.[1]

In this light, we review our cases explicating the disposition "affirmed by an equally divided Court." On what was apparently the first occasion of an equal di-

[1] The legislative history adds little. The Senate Report states, cryptically, that "[t]his subsection is intended to give a conclusive presumption only to actual adjudications of Federal rights, by the Supreme Court, and not to give such a presumption to mere denials of writs of certiorari." S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966). We conclude from this only that Congress did not expressly address itself to the effect of an affirmance by an equally divided Court. Nor is this surprising in view of the rarity of such divided affirmances in criminal cases.

vision, *The Antelope,* 10 Wheat. 66 (1825), the Court simply affirmed on the point of division without much discussion. *Id.,* at 126–127. Faced with a similar division during the next Term, the Court again affirmed, Chief Justice Marshall explaining that "the principles of law which have been argued, cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it." *Etting* v. *Bank of the United States,* 11 Wheat. 59, 78 (1826). As was later elaborated, in such cases it is the appellant or petitioner who asks the Court to overturn a lower court's decree.

> "If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed." *Durant* v. *Essex Co.,* 7 Wall. 107, 112 (1869).

Nor is an affirmance by an equally divided Court entitled to precedential weight. *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263, 264 (1960). We decline to construe § 2244 (c)'s bar as extending to claims on which the judgment of a state court stands because of the absence of a majority position in this Court, and accordingly conclude that the courts below properly reached the merits.[2]

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[2] We have been aided, and are confirmed in this view, by the thoughtful opinion of Judge Mansfield in *United States ex rel. Radich* v. *Criminal Ct. of City of New York,* 459 F. 2d 745 (CA2 1972), pet. for cert. pending *sub nom. Ross* v. *Radich,* No. 71–1510.

II

We proceed, then, to consider respondent's due process claim.[3] As the claim turns upon the facts, we must first review the relevant testimony at the jury trial and at the habeas corpus hearing regarding the rape and the identification. The victim testified at trial that on the evening of January 22, 1965, a youth with a butcher knife grabbed her in the doorway to her kitchen:

> "A. [H]e grabbed me from behind, and grappled—twisted me on the floor. Threw me down on the floor.
>
> "Q. And there was no light in that kitchen?

[3] The dissent would have us decline to address the merits because the District Court, after an evidentiary hearing, found due process to have been violated, and the Court of Appeals—after reviewing the entire record—found that "the conclusions of fact of the District Judge are [not] clearly erroneous." 448 F. 2d 91, 95. It is said that we should not depart from "our long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous." *Post,* at 202. This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them. Moreover, this is a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below) and where the evidentiary hearing in the District Court purported to be "confined" to two specific issues which we deem not controlling. Of the nine cases cited in the dissenting opinion in support of the rule of practice urged upon us, eight of them involved civil litigation in the federal system. Only one of the cases cited, *Boulden* v. *Holman,* 394 U. S. 478 (1969), involved a habeas corpus review and the Court simply held—on the basis of "an independent study of the entire record"—that the conclusion reached by the District Court and the Court of Appeals "was justified." *Id.,* at 480, 481.

"A. Not in the kitchen.

"Q. So you couldn't have seen him then?

"A. Yes, I could see him, when I looked up in his face.

"Q. In the dark?

"A. He was right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was.

"Q. You could see? No light? And you could see him and know him then?

"A. Yes." Tr. of Rec. in No. 237, O. T. 1967, pp. 33–34.

When the victim screamed, her 12-year-old daughter came out of her bedroom and also began to scream. The assailant directed the victim to "tell her [the daughter] to shut up, or I'll kill you both." She did so, and was then walked at knifepoint about two blocks along a railroad track, taken into a woods, and raped there. She testified that "the moon was shining brightly, full moon." After the rape, the assailant ran off, and she returned home, the whole incident having taken between 15 minutes and half an hour.

She then gave the police what the Federal District Court characterized as "only a very general description," describing him as "being fat and flabby with smooth skin, bushy hair and a youthful voice." Additionally, though not mentioned by the District Court, she testified at the habeas corpus hearing that she had described her assailant as being between 16 and 18 years old and between five feet ten inches and six feet tall, as weighing between 180 and 200 pounds, and as having a dark brown complexion. This testimony was substantially corroborated by that of a police officer who was testifying from his notes.

On several occasions over the course of the next seven months, she viewed suspects in her home or at the police

station, some in lineups and others in showups, and was shown between 30 and 40 photographs. She told the police that a man pictured in one of the photographs had features similar to those of her assailant, but identified none of the suspects. On August 17, the police called her to the station to view respondent, who was being detained on another charge. In an effort to construct a suitable lineup, the police checked the city jail and the city juvenile home. Finding no one at either place fitting respondent's unusual physical description, they conducted a showup instead.

The showup itself consisted of two detectives walking respondent past the victim. At the victim's request, the police directed respondent to say "shut up or I'll kill you." The testimony at trial was not altogether clear as to whether the victim first identified him and then asked that he repeat the words or made her identification after he had spoken.[4] In any event, the victim testified that she had "no doubt" about her identification. At the habeas corpus hearing, she elaborated in response to questioning.

> "A. That I have no doubt, I mean that I am sure that when I—see, when I first laid eyes on him, I

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[4] At trial, one of the police officers present at the identification testified explicitly that the words were spoken after the identification. The victim testified:

"Q. What physical characteristics, if any, caused you to be able to identify him?

"A. First of all,—uh—his size,—next I could remember his voice.

"Q. What about his voice? Describe his voice to the Jury.

"A. Well, he has the voice of an immature youth—I call it an immature youth. I have teen-age boys. And that was the first thing that made me think it was the boy." Tr. of Rec. in No. 237, O. T. 1967, p. 17.

The colloquy continued, with the victim describing the voice and other physical characteristics. At the habeas corpus hearing, the victim and all of the police witnesses testified that a visual identification preceded the voice identification. App. 80, 123, 134.

knew that it was the individual, because his face—well, there was just something that I don't think I could ever forget. I believe——

"Q. You say when you first laid eyes on him, which time are you referring to?

"A. When I identified him—when I seen him in the courthouse when I was took up to view the suspect." App. 127.

We must decide whether, as the courts below held, this identification and the circumstances surrounding it failed to comport with due process requirements.

III

We have considered on four occasions the scope of due process protection against the admission of evidence deriving from suggestive identification procedures. In *Stovall* v. *Denno,* 388 U. S. 293 (1967), the Court held that the defendant could claim that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Id.,* at 301–302. This, we held, must be determined "on the totality of the circumstances." We went on to find that on the facts of the case then before us, due process was not violated, emphasizing that the critical condition of the injured witness justified a showup in her hospital room. At trial, the witness, whose view of the suspect at the time of the crime was brief, testified to the out-of-court identification, as did several police officers present in her hospital room, and also made an in-court identification.

Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:

"[W]e hold that each case must be considered on its own facts, and that convictions based on eye-

> witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States,* 390 U. S. 377, 384 (1968).

Again we found the identification procedure to be supportable, relying both on the need for prompt utilization of other investigative leads and on the likelihood that the photographic identifications were reliable, the witnesses having viewed the bank robbers for periods of up to five minutes under good lighting conditions at the time of the robbery.

The only case to date in which this Court has found identification procedures to be violative of due process is *Foster* v. *California,* 394 U. S. 440, 442 (1969). There, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a showup, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a lineup, the witness was able to muster a definite identification. We held all of the identifications inadmissible, observing that the identifications were "all but inevitable" under the circumstances. *Id.,* at 443.

In the most recent case of *Coleman* v. *Alabama,* 399 U. S. 1 (1970), we held admissible an in-court identification by a witness who had a fleeting but "real good look" at his assailant in the headlights of a passing car. The witness testified at a pretrial suppression hearing that he identified one of the petitioners among the participants in the lineup before the police placed the participants in a formal line. MR. JUSTICE BRENNAN for four members of the Court stated that this evidence could support a finding that the in-court identification was

"entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup." *Id.*, at 5–6.

Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U. S., at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.[5] It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process.

What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness

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[5] See *Clemons* v. *United States*, 133 U. S. App. D. C. 27, 47, 408 F. 2d 1230, 1250 (1968) (McGowan, J., for the court *en banc*), cert. denied, 394 U. S. 964 (1969). In the present case, there has been controversy, in our view irrelevant, over whether, as she testified at the habeas corpus hearing, the victim actually made an in-court identification. While we think it evident from the many testimonial links between her out-of-court identification and "the defendant" before her in court that the answer is "yes," we recognize that if the testimony concerning the out-of-court identification was inadmissible, the conviction must be overturned.

alone requires the exclusion of evidence.[6] While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process. *Clemons* v. *United States,* 133 U. S. App. D. C. 27, 48, 408 F. 2d 1230, 1251 (1968) (Leventhal, J., concurring); cf. *Gilbert* v. *California,* 388 U. S. 263, 273 (1967); *Mapp* v. *Ohio,* 367 U. S. 643 (1961). Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall* v. *Denno, supra,* when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time

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[6] The District Court stated:

"In this case it appears to the Court that a line-up, which both sides admit is generally more reliable than a show-up, could have been arranged. The fact that this was not done tended needlessly to decrease the fairness of the identification process to which petitioner was subjected." App. 42.

between the crime and the confrontation. Applying these factors, we disagree with the District Court's conclusion.

In part, as discussed above, we think the District Court focused unduly on the relative reliability of a lineup as opposed to a showup, the issue on which expert testimony was taken at the evidentiary hearing. It must be kept in mind also that the trial was conducted before *Stovall* and that therefore the incentive was lacking for the parties to make a record at trial of facts corroborating or undermining the identification. The testimony was addressed to the jury, and the jury apparently found the identification reliable. Some of the State's testimony at the federal evidentiary hearing may well have been self-serving in that it too neatly fit the case law, but it surely does nothing to undermine the state record, which itself fully corroborated the identification.

We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes.[7] Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had "no doubt" that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited

[7] See *United States ex rel. Phipps* v. *Follette*, 428 F. 2d 912, 915–916 (CA2) (Friendly, J.), cert. denied, 400 U. S. 908 (1970).

opportunity of observation.[8] The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face "I don't think I could ever forget." App. 127.

There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.[9]

Affirmed in part, reversed in part, and remanded.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART concur, concurring in part and dissenting in part.

We granted certiorari in this case to determine whether our affirmance by an equally divided Court of respondent's state conviction constitutes an actual adjudication

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[8] Respondent attaches some weight to the failure of the victim's daughter to identify him. Apart from the fact that this does not bear directly on the reliability of her mother's identification, the girl was only 12 years old and had, as best we can tell, only a very brief view of the assailant from across the room.

[9] Respondent's habeas corpus petition raised a number of other claims, including one challenging the legality of his detention at the time he was viewed by the victim. The courts below did not address these claims, nor do we.

within the meaning of 28 U. S. C. § 2244 (c), and thus bars subsequent consideration of the same issues on federal habeas corpus. The Court holds today that such an affirmance does not bar further federal relief, and I fully concur in that aspect of the Court's opinion. Regrettably, however, the Court also addresses the merits and delves into the factual background of the case to reverse the District Court's finding, upheld by the Court of Appeals, that under the "totality of the circumstances," the pre-*Stovall* showup was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. This is an unjustified departure from our long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous. See, *e. g., Blau* v. *Lehman,* 368 U. S. 403, 408–409 (1962); *Faulkner* v. *Gibbs,* 338 U. S. 267, 268 (1949); *United States* v. *Dickinson,* 331 U. S. 745, 751 (1947); *United States* v. *Commercial Credit Co.,* 286 U. S. 63, 67 (1932); *United States* v. *Chemical Foundation,* 272 U. S. 1, 14 (1926); *Baker* v. *Schofield,* 243 U. S. 114, 118 (1917); *Towson* v. *Moore,* 173 U. S. 17, 24 (1899); cf. *Boulden* v. *Holman,* 394 U. S. 478, 480–481 (1969).

As the Court recognizes, a pre-*Stovall* identification obtained as a result of an unnecessarily suggestive showup may still be introduced in evidence if, under the "totality of the circumstances," the identification retains strong indicia of reliability. After an extensive hearing and careful review of the state court record, however, the District Court found that, under the circumstances of this case, there existed an intolerable risk of misidentification. Moreover, in making this determination, the court specifically found that "the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime," "the show-up confrontation was not conducted near the time of the alleged crime, but, rather, some seven months after its com-

mission," and the complaining witness was unable to give "a good physical description of her assailant" to the police. App. 41–42. The Court of Appeals, which conducted its own review of the record, upheld the District Court's findings in their entirety. 448 F. 2d 91, 95 (CA6 1971).

Although this case would seem to fall squarely within the bounds of the "two-court" rule, the Court seems to suggest that the rule is "inapplicable here" because "this is a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below) . . . ." *Ante,* at 193 n. 3. The "two-court" rule, however, rests upon more than mere deference to the trier of fact who has a firsthand opportunity to observe the testimony and to gauge the credibility of witnesses. For the rule also serves as an indispensable judicial "time-saver," making it unnecessary for this Court to waste scarce time and resources on minor factual questions which have already been accorded consideration by two federal courts and whose resolution is without significance except to the parties immediately involved. Thus, the "two-court" rule must logically apply even where, as here, the lower courts' findings of fact are based primarily upon the state court record.

The Court argues further, however, that the rule is irrelevant here because, in its view, "the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." *Ante,* at 193 n. 3. I cannot agree. Even a cursory examination of the Court's opinion reveals that its concern is not limited solely to the proper application of legal principles but, rather, extends to an essentially *de novo* inquiry into such "elemental facts" as the nature of the victim's opportunity to observe the assailant and the type of description the victim gave

the police at the time of the crime. And although we might reasonably disagree with the lower courts' findings as to such matters, the "two-court" rule wisely inhibits us from cavalierly substituting our own view of the facts simply because we might adopt a different construction of the evidence or resolve the ambiguities differently. On the contrary, these findings are "final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 214 (1948). The record before us is simply not susceptible of such a showing and, indeed, the petitioner does not argue otherwise. I would therefore dismiss the writ of certiorari as improvidently granted insofar as it relates to Question 2 of the Questions Presented.

TRAFFICANTE ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL.

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

No. 71–708. Argued November 7, 1972—Decided December 7, 1972

Two tenants of an apartment complex filed complaints with the Secretary of Housing and Urban Development alleging that their landlord racially discriminated against nonwhites, that the tenants thereby lost the social benefits of living in an integrated community, missed business and professional advantages that would have accrued from living with members of minority groups, and suffered from being "stigmatized" as residents of a "white ghetto." The District Court, not reaching the merits, held that the complaining tenants were not within the class of persons entitled to sue under § 810 (a) of the Civil Rights Act of 1968. The Court of Appeals, in affirming, construed § 810 (a) to permit complaints only by persons who are the objects of discriminatory housing practices. *Held:* The definition in § 810 (a) of "person aggrieved," as "any person who claims to have been injured by a discriminatory housing practice," shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution, and petitioners, being tenants of the apartment complex, have standing to sue under § 810 (a). Pp. 208–212.

446 F. 2d 1158, reversed and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BLACKMUN and POWELL, JJ., joined, *post,* p. 212.

Stephen V. Bomse argued the cause for petitioners. With him on the briefs were *George H. Clyde, Jr.,* and *Margaret D. Brown.*

Richard J. Kilmartin argued the cause and filed a brief for Metropolitan Life Insurance Co. *Robert M. Shea* argued the cause and filed a brief for respondent Parkmerced Corp.

Deputy Solicitor General 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 Norman,* and *Frank E. Schwelb.* Briefs of *amici curiae* urging reversal were filed by *Robert Keith Booth, Jr.,* for the City of Palo Alto, California, and by *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Michael Davidson, William Bennett Turner,* and *Alice Daniel* for the NAACP Legal Defense and Educational Fund, Inc.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Two tenants of Parkmerced, an apartment complex in San Francisco housing about 8,200 residents, filed separate complaints with the Secretary of Housing and Urban Development (HUD) pursuant to § 810 (a) [1] of the Civil Rights Act of 1968, 82 Stat. 85, 42 U. S. C. § 3610 (a). One tenant is black, one white. Each alleged that the owner [2]

[1] Section 810 (a) of the Act provides in relevant part:

"Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c), the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion."

[2] The owner at the time the suit was started was Metropolitan Life Ins. Co. After the suit was commenced, Parkmerced Corp.

of Parkmerced had discriminated against nonwhites on the basis of race in the rental of apartments within the complex in violation of § 804 of the Act.

HUD, pursuant to § 810 (c) of the Act,[3] notified the appropriate California state agency of the complaints and the state agency, for lack of adequate resources to handle the complaints, referred the charge back to HUD. Since HUD failed to secure voluntary compliance within 30 days, petitioners brought this action in the District Court under § 810 (d) of the Act.[4]

The complaint alleged that the owner had discriminated against nonwhite rental applicants in numerous

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acquired the apartment complex from Metropolitan, and it was joined as a defendant.

[3] Section 810 (c) provides:

"Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title, the Secretary shall notify the appropriate State or local agency of any complaint filed under this title which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action."

[4] Section 810 (d) provides in relevant part:

"If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint."

ways, *e. g.*, making it known to them that they would not be welcome at Parkmerced, manipulating the waiting list for apartments, delaying action on their applications, using discriminatory acceptance standards, and the like.

They—the two tenants—claimed they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto." [5]

The District Court did not reach the merits but only held that petitioners were not within the class of persons entitled to sue under the Act. 322 F. Supp. 352. The Court of Appeals affirmed, construing § 810 (a) narrowly to permit complaints only by persons who are the objects of discriminatory housing practices. 446 F. 2d 1158. The case is here on a petition for a writ of certiorari, which we granted, 405 U. S. 915. We reverse the judgment below.

The definition of "person aggrieved" contained in § 810 (a)[6] is in terms broad, as it is defined as "[a]ny person who claims to have been injured by a discriminatory housing practice."

The Act gives the Secretary of HUD power to receive and investigate complaints regarding discriminatory housing practices. The Secretary, however, must defer to state agencies that can provide relief against the named practice. If the state agency does not act, the Secretary may seek to resolve the controversy by confer-

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[5] Less than 1% of the tenants in this apartment complex are black.

[6] Note 1, *supra*.

ence, conciliation, or persuasion. If these attempts fail, the complainant may proceed to court pursuant to § 810 (d).[7] Moreover, these rights may be enforced "by civil actions in appropriate United States district courts without regard to the amount in controversy," if brought within 180 days "after the alleged discriminatory housing practice occurred." § 812 (a). In addition, § 813 gives the Attorney General authority to bring a civil action in any appropriate United States district court when he has reasonable cause to believe "that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted" by the Act.

It is apparent, as the Solicitor General says, that complaints by private persons are the primary method of obtaining compliance with the Act. *Hackett* v. *McGuire Bros., Inc.,* 445 F. 2d 442 (CA3), which dealt with the phrase that allowed a suit to be started "by a person claiming to be aggrieved" under the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5 (a), concluded that the words used showed "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.,* at 446. With respect to suits brought under the 1968 Act,[8] we reach the same conclusion, insofar as tenants of the same housing unit that is charged with discrimination are concerned.

The language of the Act is broad and inclusive. Individual injury or injury in fact to petitioners, the ingredient found missing in *Sierra Club* v. *Morton,* 405 U. S. 727, is alleged here. What the proof may be is one thing; the alleged injury to existing tenants by exclusion

[7] Note 4, *supra.*

[8] We find it unnecessary to reach the question of standing to sue under 42 U. S. C. § 1982 which is the basis of the third cause of action alleged in the petition but based on the same allegations as those made under the Civil Rights Act of 1968.

of minority persons from the apartment complex is the loss of important benefits from interracial associations.

The legislative history of the Act is not too helpful. The key section now before us, *i. e.*, § 810, was derived from an amendment offered by Senator Mondale and incorporated in the bill offered by Senator Dirksen.[9] While members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.[10]

The Assistant Regional Administrator for HUD wrote petitioners' counsel on November 5, 1970, that "it is the determination of this office that the complainants are aggrieved persons and as such are within the jurisdiction" of the Act. We are told that that is the consistent administrative construction of the Act. Such construction is entitled to great weight. *Udall* v. *Tallman,* 380 U. S. 1, 16; *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 433–434.

The design of the Act confirms this construction. HUD has no power of enforcement. So far as federal agencies are concerned only the Attorney General may sue; yet, as noted, he may sue only to correct "a pattern or practice" of housing discrimination. That phrase "a pattern or practice" creates some limiting factors in

[9] The Dirksen substitute, 114 Cong. Rec. 4570–4573 retained the present language of § 810 (a) which Senator Mondale had previously introduced, *id.,* at 2270, and it was in the bill passed by the Senate, *id.,* at 5992, which the House subsequently passed, *id.,* at 9621.

The "aggrieved person" provision that was in Senator Mondale's bill and carried into the Dirksen bill can be found *id.,* at 2271 (§ 11 (a) of the Mondale bill).

[10] See Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency on S. 1358, S. 2114, and S. 2280, 90th Cong., 1st Sess. (1967).

his authority which we need not stop to analyze. For, as the Solicitor General points out, most of the fair housing litigation conducted by the Attorney General is handled by the Housing Section of the Civil Rights Division, which has less than two dozen lawyers. Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which, the Solicitor General says, the complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." The role of "private attorneys general" is not uncommon in modern legislative programs. See *Newman* v. *Piggie Park Enterprises,* 390 U. S. 400, 402; *Allen* v. *State Board of Elections,* 393 U. S. 544, 556; *Perkins* v. *Matthews,* 400 U. S. 379, 396; *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 432. It serves an important role in this part of the Civil Rights Act of 1968 in protecting not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects "the very quality of their daily lives." *Shannon* v. *United States Dept. of Housing & Urban Dev.,* 436 F. 2d 809, 818 (CA3).

The dispute tendered by this complaint is presented in an adversary context. *Flast* v. *Cohen,* 392 U. S. 83, 101. Injury is alleged with particularity, so there is not present the abstract question raising problems under Art. III of the Constitution. The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, "the whole community," 114 Cong. Rec. 2706, and as Senator Mondale who drafted § 810 (a) said, the reach of the proposed law was to replace the ghettos "by truly integrated and balanced living patterns." *Id.,* at 3422.

We can give vitality to § 810 (a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.

We reverse and remand the case to the District Court, leaving untouched all other questions, including the suggestion that the case against Metropolitan Life Insurance Co. has become moot.

Reversed and remanded.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL join, concurring.

Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case. Cf. *Katzenbach* v. *Morgan,* 384 U. S. 641, 648–649 (1966); *Oregon* v. *Mitchell,* 400 U. S. 112, 240, 248–249 (1970). Consequently, I join the Court's opinion and judgment.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* GRANITE STATE JOINT BOARD, TEXTILE WORKERS UNION OF AMERICA, LOCAL 1029, AFL–CIO

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

No. 71–711. Argued November 13, 1972—Decided December 7, 1972

Where neither the Union-employer contract nor the Union's constitution or bylaws defined or limited the circumstances under which a member could resign from the Union, it was an unfair labor practice for the Union to fine employees who had been Union members in good standing but who had resigned during a lawful strike authorized by the members and thereafter returned to work during that strike. Pp. 215–218.

446 F. 2d 369, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post,* p. 218. BLACKMUN, J., filed a dissenting opinion, *post,* p. 218.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Allan A. Tuttle,* and *Peter G. Nash.*

Harold B. Roitman argued the cause and filed a brief for respondent.

Milton Smith, Jerry Kronenberg, and *Gerard C. Smetana* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Plato E. Papps, Louis Poulton, and *Bernard Dunau* filed a brief for the International Association of Machinists and Aerospace Workers, AFL–CIO, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent is a union that had a collective-bargaining agreement with an employer which contained a maintenance-of-membership clause providing that members were, as a condition of employment, to remain in good standing "as to payment of dues" for the duration of the contract. Neither the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign. A few days before the collective agreement expired, the Union membership voted to strike if no agreement was reached by a given date. No agreement was reached in the specified period, so the strike and attendant picketing commenced. Shortly thereafter, the Union held a meeting at which the membership resolved that any member aiding or abetting the employer during the strike would be subject to a $2,000 fine.

About six weeks later, two members sent the Union their letters of resignation. Six months or more later, 29 other members resigned. These 31 employees returned to work.

The Union gave them notice that charges had been made against them and that on given dates the Union would hold trials. None of the 31 employees appeared on the dates prescribed; but the trials nonetheless took place even in the absence of the employees and fines were imposed on all.[1] Suits were filed by the Union to collect the fines. But the outcome was not determined because the employees filed unfair labor practice charges with the National Labor Relations Board against the Union.

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[1] Fines equivalent to a day's wages for each day worked during the strike were imposed.

The unfair labor practice charged was that the Union restrained or coerced the employees "in the exercise of the rights guaranteed in section 7." [2] See § 8 (b)(1) of the Act.[3] The Board ruled that the Union had violated § 8 (b)(1). 187 N. L. R. B. 636. The Court of Appeals denied enforcement of the Board's order. 446 F. 2d 369. The case is here on certiorari, 405 U. S. 987.

We held in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, that a union did not violate § 8 (b)(1) by fining members who went to work during a lawful strike authorized by the membership and by suing to collect the fines. The Court reviewed at length in that opinion the legislative history of §§ 7 and 8 (b)(1), and concluded by a close majority vote that the disciplinary measures taken by the union against its members on those facts were within the ambit of the union's control over its internal affairs. But the sanctions allowed were against those who "enjoyed full union membership." *Id.*, at 196.

Yet when a member lawfully resigns from the union, its power over him ends. We noted in *Scofield* v. *NLRB*,

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[2] Section 7 provides in relevant part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ." 61 Stat. 140, 29 U. S. C. § 157.

[3] Section 8 (b). "It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." 61 Stat. 141, 29 U. S. C. § 158 (b).

394 U. S. 423, 429, that if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8 (b)(1)." On the facts, we held that *Scofield,* where fines were imposed on members by the union, fell within the ambit of *Allis-Chalmers.* But we drew the line between permissible and impermissible union action against members as follows:

> ". . . § 8 (b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Id.,* at 430.

Under § 7 of the Act the employees have "the right to refrain from any or all" concerted activities relating to collective bargaining or mutual aid and protection, as well as the right to join a union and participate in those concerted activities. We have here no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union.[4] We have, therefore, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit "subject of course to any financial obligations due and owing" the group with which he was associated. *Communications Workers* v. *NLRB,* 215 F. 2d 835, 838.

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[4] Union-security arrangements requiring employees to pay dues, though not requiring membership, have been held not to be an unfair labor practice and therefore not an excuse for the employer to refuse to bargain collectively for such an agreement, at least where state law allows employees that option. *NLRB* v. *General Motors Corp.,* 373 U. S. 734.

The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.

The Court of Appeals gave weight to the fact that the resigning employees had participated in the vote to strike. We give that factor little weight. The first two members resigned from the Union from one to two months after the strike had begun. The others did so from seven to 12 months after its commencement. And the strike was still in progress 18 months after its inception. Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. We do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign. But where, as here, there are no restraints on the resignation of members,[5] we conclude that the vitality of § 7 requires that the member be free to refrain in November from the

[5] The Union argues that its practice was to accept resignations of members only during an annual ten-day "escape period," during which time the employees were allowed to revoke their "dues check-off" authorizations. The Court of Appeals rejected that argument, saying there was no evidence that the employees knew of this practice or that they had consented to its limitation on their right to resign. 446 F. 2d 369, 372.

actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.

Reversed.

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion because for me the institutional needs of the Union, important though they are, do not outweigh the rights and needs of the individual. The balance is close and difficult; unions have need for solidarity and at no time is that need more pressing than under the stress of economic conflict. Yet we have given special protection to the associational rights of individuals in a variety of contexts; through § 7 of the Labor Act, Congress has manifested its concern with those rights in the specific context of our national scheme of collective bargaining. Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership.

MR. JUSTICE BLACKMUN, dissenting.

On September 14, 1968, just six days prior to the expiration of the collective-bargaining agreement then in force, the Union membership voted to strike. The strike began September 20. On September 21 the membership unanimously [1] adopted a resolution that anyone aiding or abetting the company during the strike would be subject to a fine not exceeding $2,000. Each of the employees involved here voted for both of these resolutions

[1] There is a mild discrepancy in the record as to whether the vote on the strikebreaking resolution was unanimous. In his first opinion, the trial examiner indicated that the vote was unanimous. (Pet. for Cert. 23a.) In a second opinion, the examiner indicated that there was one dissenting vote.

and participated in the strike.[2] Each was a member of the Union during the period in which the votes were taken and the strike began. Membership was voluntary, and persons who became members were free to resign at any time.[3]

In *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), this Court held that a union could enforce in a state court a fine levied against a strikebreaking member. The Court noted that, at the time § 8 (b)(1)(A) was enacted, "provisions defining punishable conduct and the procedures for trial and appeal constituted part of the contract between member and union and that '[t]he courts' role is but to enforce the contract.' " *Id.*, at 182. The scope of § 8 (b)(1)(A) was confined to restraint or coercion visited upon union members in the course of organizational campaigns, *id.*, at 186–188, or by arbitrary and undemocratic union leadership, *id.*, at 188–189, or by coercion that prevented employees not in the bargaining

[2] The parties stipulated before the trial examiner that all 31 employees participated in the strike vote, and voted in favor of the strike. App. 45. It is less clear whether each of the employees voted in favor of the fine. These are matters that would be resolved in the state court proceedings.

[3] The Union and the company had no union shop clause in the 1965 collective-bargaining agreement. The Union constitution and bylaws contained no express provision limiting members' rights to resign. In the absence of such a provision, the members could submit voluntary resignations at any time. *NLRB* v. *Mechanical & Allied Production Workers, Local 444*, 427 F. 2d 883 (CA1 1970); *Communications Workers* v. *NLRB*, 215 F. 2d 835, 838–839 (CA2 1954). And, as the collective-bargaining agreement was no longer in force at the time of the resignations, the retention-of-membership provision was no longer in effect. Finally, the trial examiner found no evidence that the members knew of the Union's "established practice" of accepting resignations only during the annual 10-day escape period, and in the absence of such knowledge that practice cannot be enforced.

unit from going to work, *id.*, at 189 and n. 25. That section was not viewed as prohibiting "the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines." *Id.*, at 195. Finding, as a consequence, no restraint or coercion by the union on the employees' § 7 rights, the Court sustained the union's power to enforce the strikebreaking fines in state court.

Today the Court reaches an opposite result on the basis of two facts: "Neither the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign"; and the strikebreaking employees resigned before returning to work, thus effecting "a lawful dissolution of [the] union-member relation." As to the first fact, I am not convinced that the presence of a provision in the union constitution, for example, should always make a difference with respect to the existence of an enforceable, voluntary obligation on the part of an employee to refrain from strikebreaking activity. In fact, it seems likely that the three factors of a member's strike vote, his ratification of strikebreaking penalties, and his actual participation in the strike, would be far more reliable indicia of his obligation to the union and its members than the presence of boilerplate provisions in a union's constitution. As to the second fact, while membership in the union may well have implications with respect to the union's power over the resigned member, I am hard put to understand why this fact, alone, results in restraint or coercion under § 8 (b)(1)(A), when the imposition of fines for similar conduct by members, and their enforcement in state courts, does not fall within that section's prohibition. *NLRB* v. *Allis-Chalmers Mfg. Co., supra.* Are an employee's § 7 rights any more at stake here than they are where, as in *Allis-Chalmers,* the

employee engages in the same activity but stops short of resigning from the union?

I cannot join the Court's opinion, which seems to me to exalt the formality of resignation over the substance of the various interests and national labor policies that are at stake here. Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by the union rest fundamentally on the mutual reliance that inheres in the "pact." Similar mutual commitments arising from perhaps less compelling circumstances have been held to be legally enforceable. See 1A A. Corbin, Contracts § 198, pp. 210–212 (1963).

A union's power to enforce these mutual commitments on behalf of its members is of particular importance during the course of a strike. "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . .'" 388 U. S., at 181. The 31 employees involved in this case, joined with their then-fellow members, voted to strike as well as to impose sanctions on those who broke ranks,[4] and participated in the strike. Their votes were voluntary and uncoerced. They had notice of the fines, and raised no objections, perhaps feeling that the hardships that would befall them during the strike would be compensated by ultimate victory at the bargaining table. They

[4] The reasonableness of the fines imposed by the Union is not in issue here.

did not attempt to bring the matter to the vote of the membership, a majority of which could have, and later did,[5] terminate the strike.

I am not convinced that in the strike context, where paramount union and employee interests are at stake, union enforcement of this mutual obligation by reasonable fines "invades or frustrates an overriding policy of the labor laws." *Scofield* v. *NLRB,* 394 U. S. 423, 429 (1969).[6] The Court of Appeals concluded that § 7 of the Act, granting employees the right "to *refrain* from any or all" collective activities, including membership and participation in strikes, was not involved in this case. Emphasizing the meaning of the word "refrain," the court concluded that "although § 7 gives an employee the right to refuse to undertake and involve himself in union activities, it does not necessarily give him the right to abandon these activities in midcourse once he has undertaken them voluntarily." 446 F. 2d 369, 373. See H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 39–40 (1947). I believe this notion expressed by the Court of Appeals is applicable in the limited context of the economic strike. In my view, the policy of § 7 would not be frustrated by a holding that an employee could, in the circumstances of this case, knowingly waive his § 7 right to resign from the union and to return to work

[5] Counsel for respondent stated in oral argument that the Union membership ultimately voted to terminate the strike and accept the company's offer. Tr. of Oral Arg. 29.

[6] The decision in *Scofield* v. *NLRB,* 394 U. S. 423, 430 (1969), indicated, in dictum, that an employee could avoid a union productivity rule by resigning from membership. That statement should not be construed to mean that employees can never bind themselves to fulfill union obligations where, as here, the enforcement of that obligation is essential to maintain union discipline during a strike. See Recent Cases, 85 Harv. L. Rev. 1669, 1674–1675, n. 23 (1972); Recent Decisions, 40 Geo. Wash. L. Rev. 330, 338–339 (1971).

without sanction.[7] The mutual reliance of his fellow members who abide by the strike for which they have all voted outweighs, in the circumstances here presented, the admitted interests of the individual who resigns to return to work. He may still resign, and he may also return to work, but not without the prospect of having to pay a reasonable union fine for which he voted.

The employees who resigned have not asserted any changed circumstances or undue hardships that would justify their resignations and return to work. Nor do they claim that the fines imposed on them were unreasonable.[8] Perhaps these matters could be asserted before the Board or in defense in the state court proceedings under prevailing state law. As these issues have not been argued in this case, they need not be resolved at this time.

I would affirm the decision below.

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[7] In other contexts it has been held that § 7 rights may be waived. *E. g., NLRB* v. *Shop Rite Foods, Inc.*, 430 F. 2d 786 (CA5 1970). Indeed, this Court's opinions in *Allis-Chalmers* and *Scofield* implicitly recognize that § 7 rights can be waived. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 200 (1967) (Black, J., dissenting).

[8] The General Counsel argued before the trial examiner that the fines imposed were unreasonable, and that the imposition of an unreasonable fine would constitute a violation of § 8 (b) (1) (A). The trial examiner did not pass on this issue, as he concluded that the imposition of any fine on employees who resigned from membership in the Union and returned to work violated § 8 (b) (1) (A). Neither the Board nor the Court of Appeals passed on this issue, and it has not been argued before this Court.

SWENSON, WARDEN *v.* STIDHAM

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

No. 71–224. Argued October 11, 1972—Decided December 7, 1972

During respondent's trial for murder he challenged the voluntariness of his confession. A full evidentiary hearing was held outside the jury's presence, following which the trial court held the confession admissible. After affirmance of respondent's conviction on appeal, respondent sought state post-conviction relief. The Missouri Supreme Court reversed the denial of respondent's motion to vacate, and an evidentiary hearing was held by the St. Louis Circuit Court on the voluntariness issue. That court concluded that the trial judge himself had found the confession voluntary and thus complied with *Jackson* v. *Denno,* 378 U. S. 368. The Missouri Supreme Court affirmed, and held additionally that respondent had been given a new evidentiary hearing by the St. Louis court and that his confession had again been found to be voluntary. Respondent then sought federal habeas corpus. The District Court determined that *Jackson* v. *Denno* had been satisfied. The Court of Appeals, concluding that the trial judge, as permitted by then-prevailing state law, had not made the voluntariness finding himself but had submitted the issue to the jury, reversed and held that respondent was entitled to a new hearing. *Held:* The trial court's *Jackson* v. *Denno* error, if any, was remedied by the constitutionally adequate evidentiary hearing given respondent on the voluntariness issue by the St. Louis court, which the Missouri Supreme Court upheld after concluding from its independent examination of the record that the confession was voluntary. The Court of Appeals therefore erred in holding that respondent was entitled to still another voluntariness hearing in the state court. Pp. 228–231.

443 F. 2d 1327, reversed and remanded.

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

Kenneth M. Romines, Assistant Attorney General of Missouri, argued the cause for petitioner. With him on the brief was *John C. Danforth,* Attorney General.

Mark M. Hennelly, by appointment of the Court, 405 U. S. 913, argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case has a long and tortured history and is not yet concluded. At this juncture the question is whether, absent further state court proceedings to determine the voluntariness of his confession, respondent's 1955 conviction for murder is vulnerable to attack under the Fourteenth Amendment as construed and applied in *Jackson* v. *Denno,* 378 U. S. 368 (1964).

In July 1955, respondent Stidham was convicted of first-degree murder of a fellow inmate during a riot. He was sentenced to life imprisonment. He was represented by experienced counsel who challenged his confession when it was offered at trial. A full evidentiary hearing outside the presence of the jury was held. Stidham's testimony as to the relevant circumstances surrounding his confession was in sharp conflict with that of the officers. His claim was that he had been subjected to gross physical abuse; the officers denied the claim. At the conclusion of the hearing, the trial judge admitted the confession with the following ruling:

> "THE COURT: [Exhibit] 16 and 16–1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and out-

side of the hearing of the Jury, . . . the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16–1.

"MR. HENNELLY: In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?

"THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?"

Stidham's conviction was affirmed on appeal in *State* v. *Stidham,* 305 S. W. 2d 7 (Mo. 1957). A motion to vacate was denied and the denial affirmed, 403 S. W. 2d 616 (Mo. 1966). On a second motion to vacate, however, the Missouri Supreme Court ordered an evidentiary hearing in accordance with its newly revised post-conviction procedures. *State* v. *Stidham,* 415 S. W. 2d 297 (1967). Among the issues to be heard and decided was whether Stidham's conviction was infirm under *Jackson* v. *Denno* and the Due Process Clause of the Fourteenth Amendment.

In compliance with this order, an evidentiary hearing was held on December 5, 1968, before Judge Godfrey in the Circuit Court of the City of St. Louis. The court heard oral testimony from both Stidham and witnesses offered by the State; it also had before it the transcript of the prior proceedings as well as certain stipulations of fact by the parties. In April 1969, the court issued its opinion, with findings of fact and conclusions of law, denying the relief requested. With respect to the confession issue, the court first concluded that the judge himself at Stidham's trial had found the confession volun-

tary and had thus complied with the rule of *Jackson* v. *Denno*. As to voluntariness *vel non,* the court said:

> "As to subparagraph b concerning the averment that 'the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant,' this contention was raised and profusely litigated in State vs. Stidham, supra, and the Court finds it no longer open to question here. State vs. Statler, supra; Crawford vs. State, supra.
>
> "It should be noted that the evidence concerning the issue of voluntariness was greatly conflicting and was to be resolved by the trial court in the first instance and the jury in the second having regard to the credibility of the witnesses. This issue should now be considered closed, and this Court finds it to be so."

This judgment was affirmed in the Missouri Supreme Court. *State* v. *Stidham,* 449 S. W. 2d 634 (1970). Agreeing first that the judge at Stidham's trial had with sufficient clarity found the confession voluntary and admissible in evidence, the court then held that in any event Stidham had been given a new evidentiary hearing and his confession again determined to be voluntary by the circuit court. In its view, the circuit court had "found, as had the previous court, that the oral and written confessions were voluntary . . . ." Based upon its own extensive analysis of the record, the Missouri Supreme Court also concluded that the finding of voluntariness was "overwhelmingly supported and procedurally and factually the cause meets all the requirements of the federal cases and there has been no invasion of due process." *Id.,* at 644.

Stidham then resorted to federal habeas corpus, presenting several issues including the confession matter.

The United States District Court for the Western District of Missouri, after having examined the full record of the state court proceedings, denied the petition without a hearing but with an opinion holding that there had been no violation of *Jackson* v. *Denno* because the state trial judge had satisfactorily found the confession voluntary prior to submitting it to the jury. 328 F. Supp. 1291 (1970).

The Court of Appeals reversed by a divided vote. 443 F. 2d 1327 (CA8 1971). Its understanding of Missouri law at the time of Stidham's trial was that the trial judge was not required to make a finding on voluntariness himself, but was permitted to submit the issue to the jury in the first instance. As the Court of Appeals saw it, this is precisely what the trial court did: the finding that the confession was not involuntary as a matter of law was not an independent assessment of voluntariness but merely a statement that the issue was one for the jury. Because in its view there had never been a reliable judicial determination of the facts and of the ultimate issue of voluntariness, either at trial or in later proceedings, the Court of Appeals reversed the judgment and remanded the case to the District Court, it being contemplated that the State would be allowed "reasonable time to make an error-free determination on the voluntariness of the confession at issue . . . ." *Sigler* v. *Parker,* 396 U. S. 482, 484 (1970). We granted certiorari, 404 U. S. 1058 (1972).

We are first asked to hold that the Court of Appeals erred in concluding that Stidham's trial judge failed to comply with the requirement of the Fourteenth Amendment as construed in *Jackson* v. *Denno* that there must be a judicial finding of voluntariness before a challenged confession is submitted to the jury. Petitioner's position is not without force, and begins with the proposition that the Court of Appeals was too much influenced by

what the trial judge might have done under the Missouri law prevailing at the time and too little by what he actually did. Even if the controlling rule permitted submission of a challenged confession to the jury without the judge's own determination of voluntariness, that rule, the argument goes, did not prevent him from resolving the disputed issues of fact prior to admitting the confession into evidence. Obviously, it is said, Stidham's trial judge took the latter course, for (1) he held a full evidentiary hearing outside the presence of the jury, a wholly unnecessary and time-wasting procedure if he was merely to determine if there was a disputed issue as to voluntariness that should be submitted to the jury and (2) having heard the evidence, he denied the motion to suppress and found the confession not involuntary as a matter of law, a conclusion necessarily indicating that the judge resolved the disputed issues against Stidham, for had he believed him rather than the police, it is inconceivable that the confession would have been submitted to the jury. Finally, it is urged that the Missouri courts and the Federal District Court construed the trial judge's ruling as equivalent to an affirmative finding that the confession was voluntary and that the Court of Appeals should have accepted this interpretation of the proceedings in the lower courts.

The issue, then, is not free from doubt, but it is evident that we need not decide it in this case, for the Court of Appeals erred in another respect that requires reversal of its judgment.

Even if the trial procedure was flawed with respect to the challenged confession, *Jackson* v. *Denno* does not entitle Stidham to a new trial if the State subsequently provided him an error-free judicial determination of the voluntariness of his confession—error-free in that the determination was procedurally adequate and substantively acceptable under the Due Process Clause. *Jackson* v.

Denno, 378 U. S., at 393–396. Here, the Missouri courts, in connection with Stidham's second motion to vacate his sentence, unquestionably furnished a procedurally adequate evidentiary hearing, and the outcome was adverse to Stidham. But it is said that the St. Louis Circuit Court considered itself bound by prior proceedings and never independently determined that Stidham's confession was voluntarily given. Reliance is placed on Judge Godfrey's statement that the evidence was conflicting, that the issue was for the trial court and jury and that "[the] issue should now be considered closed, and this Court finds it to be so."

This contention is in the teeth of the Missouri Supreme Court's prior order reopening the entire matter and directing the trial judge to hold a full evidentiary hearing and then "to decide all issues of fact and questions of law . . . ." 415 S. W. 2d, at 298. The Missouri Supreme Court later thought its mandate had been complied with and expressly read the Circuit Court as having "found, as had the previous court, that the oral and written confessions were voluntary . . . ." 449 S. W. 2d, at 644. What is more, the Supreme Court carefully reviewed the record, noting that "the testimony in contradiction of Stidham's uncorroborated claims was all but overwhelming," *id.,* at 641, and that the patrol, police and prison officers—"all these witnesses, all produced by the state, categorically or implicitly refuted all of Stidham's claims of mistreatment, either physical or mental." *Id.,* at 643–644. The court's conclusion was that the finding of voluntariness was "overwhelmingly supported" and that there had been no invasion of due process. *Id.,* at 644.

We are not inclined to disagree with the Missouri Supreme Court's interpretation of the Circuit Court's opinion and judgment. We also hold that as between the two courts the *Jackson* v. *Denno* error, if any, was sufficiently remedied.

This, of course, does not end the matter. A state prisoner is free to resort to federal habeas corpus with the claim that, contrary to a state court's judgment, his confession was involuntary and inadmissible as a matter of law. The Court of Appeals did not reach this issue. We are asked to decide the question here but it is not our function to deal with this issue in the first instance.

The judgment of the Court of Appeals for the Eighth Circuit is reversed and the cause is remanded for further proceedings consistent with this opinion.

So ordered.

ONE LOT EMERALD CUT STONES AND ONE RING *v.* UNITED STATES

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

No. 72–376. Decided December 11, 1972

A forfeiture of imported merchandise not included in a declaration and entry pursuant to the tariff provision in 19 U. S. C. § 1497 is not barred by a prior acquittal under 18 U. S. C. § 545, which (unlike the civil forfeiture proceeding) requires proof of an intent to defraud; nor is the forfeiture action barred by the Double Jeopardy Clause, since Congress may impose both a criminal and civil sanction respecting the same act or omission.

Certiorari granted; 461 F. 2d 1189, affirmed.

PER CURIAM.

On June 5, 1969, Francisco Farkac Klementova entered the United States without declaring to United States Customs one lot of emerald cut stones and one ring. Klementova was indicted, tried, and acquitted of charges of violating 18 U. S. C. § 545[1] by willfully and know-

[1] "Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

"Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

"Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person de-

ingly, with intent to defraud the United States, smuggling the articles into the United States without submitting to the required customs procedures. Following the acquittal, the Government instituted a forfeiture action in the United States District Court, Southern District of Florida, under 18 U. S. C. § 545 and § 497 of the Tariff Act of 1930, 46 Stat. 728, 19 U. S. C. § 1497.[2] Klementova intervened in the proceeding and argued that his acquittal of charges of violating 18 U. S. C. § 545 barred the forfeiture. The District Court held that the forfeiture was barred by collateral estoppel and the Fifth Amendment. The United States Court of Appeals for the Fifth Circuit reversed, holding that a forfeiture action pursuant to 19 U. S. C. § 1497 was not barred by an acquittal of charges of violating 18 U. S. C. § 545. We grant certiorari, affirm, and thereby resolve a conflict among the circuits as to whether a forfeiture is barred in these circumstances.[3]

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scribed in the first or second paragraph of this section, shall be forfeited to the United States.

"The term 'United States,' as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam."

[2] Title 19 U. S. C. § 1497 provides:

"Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."

[3] In *United States* v. *Two Hundred and One Fifty-Pound Bags of Furazolidone,* No. 71–1329 (1971), cert. denied, 405 U. S. 964 (1972), the Court of Appeals for the Eighth Circuit affirmed a summary judgment on the basis of a previous acquittal of charges of violating § 545 in favor of the owner of property in a forfeiture action commenced by the Government under 18 U. S. C. § 545 and 19 U. S. C. § 1460. The Court of Appeals for the First Circuit agrees with the view of the Fifth Circuit in the present case. See

Collateral estoppel would bar a forfeiture under § 1497 if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had been resolved against the Government. *Ashe* v. *Swenson,* 397 U. S. 436, 443 (1970). But in this case acquittal on the criminal charge did not necessarily resolve the issues in the forfeiture action. For the Government to secure a conviction under § 545, it must prove the physical act of unlawful importation as well as a knowing and willful intent to defraud the United States. An acquittal on the criminal charge may have involved a finding that the physical act was not done with the requisite intent. Indeed, the court that tried the criminal charge specifically found that the Government had failed to establish intent.[4] To succeed in a forfeiture action under § 1497, on the other hand, the Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent. Thus, the criminal acquittal may not be regarded as a determination that the property was not unlawfully brought into the United States, and the for-

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Leiser v. *United States,* 234 F. 2d 648, cert. denied, 352 U. S. 893 (1956).

We need not, and do not, decide whether an acquittal under § 545 bars a forfeiture under § 545.

[4] The judge at the criminal trial specifically stated:

"He is, obviously, a sophisticated dealer in emeralds and other jewelry.

"I don't condone nor do I approve, for one minute, what he did in this instance. I think he knew that that jewelry—that that ring and those emeralds should have been declared.

"He made a declaration of some cigarettes and some whiskey, several other little odd, meager items there, but I'm not persuaded beyond a reasonable doubt that he did what he did with the intent to defraud the United States."

feiture proceeding will not involve an issue previously litigated and finally determined between these parties.[5]

Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may have only represented " 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' " *Helvering* v. *Mitchell,* 303 U. S. 391, 397 (1938). As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings. See *Murphy* v. *United States,* 272 U. S. 630 (1926); *Stone* v. *United States,* 167 U. S. 178 (1897).

If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely

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[5] The difference in the issues involved in the criminal proceeding, on the one hand, and the forfeiture action, on the other, serves to distinguish *Coffey* v. *United States,* 116 U. S. 436 (1886), relied upon by the District Court in the present case. *Coffey* involved a forfeiture action commenced after an acquittal. This Court noted, in holding the forfeiture barred, that "[t]he information [for forfeiture] is founded on §§ 3257, 3450 and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit." *Id.,* at 442. The Court specifically distinguished the situation where "a certain intent must be proved to support the indictment, which need not be proved to support the civil action." *Id.,* at 443. See also *Stone* v. *United States,* 167 U. S. 178 (1897).

punishing twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell, supra,* at 399. See also *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943).[6] Forfeiture under § 1497 is a civil sanction. The provision was originally enacted as § 497 of the Tariff Act of 1922, 42 Stat. 964. The Tariff Act of 1930 re-enacted the forfeiture remedy, 46 Stat. 728, and added § 593, 46 Stat. 751, which became 18 U. S. C. § 545. The forfeiture provision fell within Title IV of the Act, which contained the "Administrative Provisions." Part III of that title, of which § 1497 was a part, dealt with "Ascertainment, Collection, and Recovery of Duties." Section 545, on the other hand, was part of the "Enforcement Provisions" and became part of the Criminal Code of the United States. The fact that the sanctions were separate and distinct and were contained in different parts of the statutory scheme is relevant in determining the character of the forfeiture. Congress could and did order both civil and criminal sanctions, clearly distinguishing them. There is no

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[6] The District Court relied upon the following language in *United States* v. *U. S. Coin & Currency,* 401 U. S. 715, 718 (1971):

"But as *Boyd* v. *United States,* 116 U. S. 616, 634 (1886), makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offences committed by him,* though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes." (Emphasis in *United States* v. *U. S. Coin & Currency.*)

Section 1497 does not result in a forfeiture by reason of the commission of a criminal offense. A forfeiture results from the act of importation without following customs procedures; no criminal offense, much less a criminal conviction, is required. Cf. *id.,* at 718–722.

One 1958 Plymouth Sedan v. *Pennsylvania,* 380 U. S. 693 (1965), is likewise inapposite for it dealt with a forfeiture that could not be had without a "determination that the criminal law has been violated." *Id.,* at 701.

reason for frustrating that design. See *Helvering* v. *Mitchell, supra,* at 404.

The § 1497 forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions. See *id.,* at 401; *United States ex rel. Marcus* v. *Hess, supra,* at 549–550; *Rex Trailer Co.* v. *United States,* 350 U. S. 148, 151–154 (1956). Moreover, it cannot be said that the measure of recovery fixed by Congress in § 1497 is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty. *Rex Trailer Co.* v. *United States, supra,* at 154. See *Murphy* v. *United States, supra; United States ex rel. Marcus* v. *Hess, supra.*

> "Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings . . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering* v. *Mitchell, supra,* at 400.

The question of whether a given sanction is civil or criminal is one of statutory construction. *Id.,* at 399. It appears that the § 1497 forfeiture is civil and remedial, and, as a result, its imposition is not barred by an acquittal of charges of violating § 545.

Affirmed.

DILLARD *v.* INDUSTRIAL COMMISSION OF VIRGINIA ET AL.

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

No. 72–5411. Decided December 11, 1972

347 F. Supp. 71, vacated and remanded.

PER CURIAM.

Appellant brought a class action to challenge the constitutionality of a state regulation that permitted temporary suspension of his workmen's compensation payments without a prior hearing. He appealed an adverse judgment, but his jurisdictional statement states that after the decision below "an Order was entered by the Commission approving a lump-sum settlement of $4,243.20 in full settlement of [his] individual claim for compensation for his injury which occurred on March 15, 1971."

In this state of the record, the motion to proceed *in forma pauperis* is granted, the judgment is vacated, and the case is remanded to the United States District Court for the Eastern District of Virginia to consider whether this case is moot.

ERLENBAUGH ET AL. *v.* UNITED STATES

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

No. 71–839. Argued November 13, 1972—
Decided December 12, 1972

Causing a publication to be carried by a facility of interstate commerce with an intent to facilitate the operation of an illegal gambling business is a violation of 18 U. S. C. § 1952. The exception for "any newspaper or similar publication" contained in 18 U. S. C. § 1953, which prohibits the interstate shipment of certain gambling paraphernalia, was not intended to be read into § 1952. Pp. 242–248.

452 F. 2d 967, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except WHITE, J., who took no part in the decision of the case.

Charles W. Grubb argued the cause and filed a brief for petitioners.

Allan A. Tuttle argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen,* and *Roger A. Pauley.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The petitioners in this case attack their convictions under the Travel Act, 18 U. S. C. § 1952, which makes it unlawful to use a facility of interstate commerce in furtherance of certain criminal activity. Petitioners were tried in five separate trials.[1] The cases were

[1] Petitioners Erlenbaugh, Mitchell, and Hintz were tried together. Petitioner Erlenbaugh was convicted of conspiracy to violate

consolidated for purposes of appeal since each raised the question whether causing a publication to be carried by a facility of interstate commerce with an intent to facilitate the operation of a gambling business illegal under state law violated § 1952. The Court of Appeals for the Seventh Circuit affirmed the convictions, finding no exception in § 1952 for the transmittal of publications. 452 F. 2d 967 (1971). We granted certiorari for the limited purpose of resolving the conflict between this decision and a previous ruling of the Court of Appeals for the Fourth Circuit.[2] 405 U. S. 973 (1972). For reasons stated below, we affirm.

In all respects here relevant, the facts of the five cases are identical. Each involves the operation in Ham-

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§ 1952. Petitioners Mitchell and Hintz were each convicted of two counts of violating § 1952 and of conspiracy to violate the section.

Petitioners White and Lloyd were tried together with petitioner Hintz in a second trial. Each was convicted of conspiracy to violate § 1952, and petitioner White was convicted of three counts, petitioner Hintz of two counts, and petitioner Lloyd of one count of violating § 1952.

Petitioner Kelly was tried alone and convicted of one count of violating § 1952 and of conspiracy to violate the section.

Petitioners Kulik and Dobrowski were tried together and convicted of conspiracy to violate § 1952 and of three counts and two counts, respectively, of violating the section.

Petitioners Misiolek, Tumlin, and Strosky were tried together, and convicted of conspiracy to violate § 1952. Petitioner Misiolek was also convicted of three counts of violating § 1952, while petitioners Tumlin and Strosky were convicted of four counts of violating the section.

[2] In *United States* v. *Arnold,* 380 F. 2d 366, 368 (1967), the Fourth Circuit reversed a conviction under § 1952 because, in its view, "the use of the telephone to order . . . transmittal through the mail [of a sports publication intended to be used to facilitate the operation of a football betting pool] is not the use of a 'facility . . . to . . . promote . . . any unlawful activity', as contemplated by . . . § 1952." The Seventh Circuit in this case specifically declined to follow the decision in *Arnold.* See 452 F. 2d, at 973.

mond, Indiana, of a bookmaking business. A publication known as the Illinois Sports News was important to the functioning of each bookmaking operation. The News, a publication of the type generally referred to as a "scratch sheet," [3] contains more complete and detailed horse racing information than is found in regular newspapers, and was used extensively by the customers of the five bookmaking operations in placing their bets. Because the News, which appears daily except Sunday, is published in Chicago, Illinois, it was necessary to make arrangements for prompt daily delivery from Chicago to Hammond and the bookmaking establishments. This was accomplished by causing copies of the News to be placed on board an early morning train of the Chicago, South Shore, & South Bend Railroad in Chicago for delivery to the railroad station in Hammond, where copies were picked up for each of the bookmaking operations. In each case the petitioners assumed various roles in this scheme,[4] but the pattern of the scheme for securing the prompt daily delivery of the News was the same in all cases.

Section 1952 (a) subjects to criminal liability anyone who "uses any facility in interstate . . . commerce . . . with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of [these] acts . . . ." Unlawful activity includes "any business enterprise involving gambling . . . offenses in violation of the laws of the State in which they are com-

[3] A "scratch" is a horse that has been withdrawn from a race in which it was entered. The withdrawal of a good horse obviously affects the odds in a race, and is therefore of great interest to bettors.

[4] The Court of Appeals described each operation and the respective roles of the petitioners in detail, see 452 F. 2d, at 969–970.

mitted . . . ." See 18 U. S. C. § 1952 (b).[5] For our limited purposes it is not open to dispute that in each case petitioners were involved in bookmaking businesses which violated Indiana law;[6] that the Illinois Sports News was important to the operation of those bookmaking businesses; that the scheme for delivery of the News—a scheme which involved the use of a facility of interstate commerce, the railroad—was intended to facilitate the operation of the bookmaking businesses; or that the requisite overt acts occurred following the use of the interstate facility. The only question here is whether these cases fall outside the ambit of § 1952 because the use of the interstate facility was to secure delivery of a news publication.[7]

The basis of petitioners' challenge to the legality of their convictions under § 1952—and of the conflict between the courts of appeals—is to be found in 18 U. S. C. § 1953. Section 1953 (a) makes it unlawful for anyone, "except a common carrier in the usual course of its business, knowingly [to] carr[y] or [to send] in interstate . . . commerce any . . . paraphernalia, . . . paper, writing, or other device used, or to be used . . . in (a) bookmaking; or (b) wagering pools . . . ; or (c) in a numbers, policy, bolita, or similar game . . . ." The broad sweep of subsection (a) in terms of paraphernalia covered is limited to some extent by § 1953 (b)(3) which makes the section inapplicable to "the carriage or transportation in interstate . . . commerce of any newspaper or similar publication."[8]

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[5] See n. 19, *infra*.

[6] See Ind. Ann. Stat. §§ 10–2304, 10–2307, 10–2331 (1956).

[7] The question presented in this case is solely one of statutory construction. There is no issue here as to the constitutionality of § 1952.

[8] Subsection (b) also makes the section inapplicable to:

"(1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at race-

Petitioners' argument starts from the premise that they could not have been prosecuted under § 1953 (a) because the Illinois Sports News falls within the newspaper exception contained in § 1953 (b)(3).[9] Petitioners recognize that § 1952 contains no express exception for newspapers comparable to § 1953 (b)(3), but contend that § 1952 and § 1953 are *in pari materia*—that is, pertain to the same subject—and, under settled principles of statutory construction, should therefore be construed "as if they were one law," *United States* v. *Freeman,* 3 How. 556, 564 (1845); see, *e. g., United States* v. *Stewart,* 311 U. S. 60, 64 (1940); *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 44 (1939). Thus, petitioners would have us read the exception contained in § 1953 (b)(3) as applicable to not only § 1953 (a) but also § 1952 (a), thereby barring their prosecution under the latter as well as the former. This we cannot do.

The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a "later act

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tracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State . . . ."

[9] Whether publications such as the "scratch sheet" here at issue are in fact within the "newspaper or similar publication" exception contained in § 1953 (b)(3) is a question that has arisen on a number of occasions in the lower courts. See *United States* v. *Kelly,* 328 F. 2d 227, 229–236 (CA6 1964); *United States* v. *Arnold,* 380 F. 2d 366, 368 (CA4 1967); *United States* v. *Kish,* 303 F. Supp. 1212 (ND Ind. 1969); *United States* v. *Azar,* 243 F. Supp. 345, 346–347 (ED Mich. 1964). The Government here concedes that the Illinois Sports News is within § 1953 (b)(3). See Brief for United States 9 n. 3.

can . . . be regarded as a legislative interpretation of [an] earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting," and "is therefore entitled to great weight in resolving any ambiguities and doubts." *United States* v. *Stewart, supra,* at 64–65. See also, *e. g., Hunter* v. *Erickson,* 393 U. S. 385, 388 (1969); *United States* v. *Freeman, supra,* at 565. The rule is but a logical extension of the principle that individual sections of a single statute should be construed together,[10] for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject, cf. *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535, 541–552 (1954). Given this underlying assumption, the rule's application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time. Such was indeed the case here.[11] Yet petitioners would have us resort to the exception

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[10] See, *e. g., Clark* v. *Uebersee Finanz-Korporation, A. G.,* 332 U. S. 480, 488 (1947); *Markham* v. *Cabell,* 326 U. S. 404, 410–411 (1945); *Ex parte Public National Bank,* 278 U. S. 101, 104 (1928).

[11] Section 1952 was added to Title 18 of the United States Code by the Act of Sept. 13, 1961, Pub. L. 87–228, § 1 (a), 75 Stat. 498, amended, Act of July 7, 1965, Pub. L. 89–68, 79 Stat. 212; Act of Oct. 27, 1970, Tit. II, § 701 (i) (2), 84 Stat. 1282. Section 1953 was added to Title 18 of the United States Code by the Act of Sept. 13, 1961, Pub. L. 87–218, 75 Stat. 492. Indeed, both statutes were a part of Attorney General Kennedy's legislative program to combat organized crime and racketeering, and were considered simultaneously by committees of the House and Senate. See Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter Senate Hearings); Hearings on H. R. 468, H. R. 1246, H. R. 3021, H. R. 3022, H. R. 3023, H. R. 3246, H. R. 5230, H. R. 6571, H. R. 6572, H. R. 6909, H. R. 7039 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter House Hearings).

contained in § 1953 (b)(3) not simply to resolve any "ambiguities [or] doubts" in the language in § 1952 but to introduce an exception to the coverage of the latter where none is now apparent. This might be a sensible construction of the two statutes if they were intended to serve the same function, but plainly they were not.[12]

True, § 1952 and § 1953 were both parts of a comprehensive federal legislative effort[13] to assist local authorities in dealing with organized criminal activity which, in many instances, had assumed interstate proportions[14] and which in all cases was materially assisted in its operations by the availability of facilities of interstate commerce.[15] The two statutes, however, play different roles in achieving these broad, common goals.

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[12] Cf. *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U. S. 755, 764 (1949); *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 87–88 (1934); *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433 (1932).

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

[14] Attorney General Kennedy, who recommended the legislation to Congress, testified before the Senate and House Committees that "the extent to which organized crime and racketeering have developed on an interstate basis convincingly [demonstrates] the need for new Federal laws." Senate Hearings 10–11; see House Hearings 19–20. See also H. R. Rep. No. 966, 87th Cong., 1st Sess., 2–3 (1961) (§ 1952).

[15] Attorney General Kennedy observed before the Senate Committee that racketeers "use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. If we could curtail their use of interstate communications and facilities, we could inflict a telling blow to their operations. We could cut them down to size." Senate Hearings 11. Previously, before the House Subcommittee, the Attorney General had described the legislative package as "designed to prohibit the use of interstate facilities for the conduct of the many unlawful enterprises which make up organized crime today." House Hearings 20. See also H. R. Rep. No. 966, 87th Cong., 1st Sess., 3 (1961) (§ 1952); H. R. Rep. No. 968, 87th Cong., 1st Sess., 2 (1961) (§ 1953).

Section 1953 has a narrow, specific function. It erects a substantial barrier [16] to the distribution of certain materials used in the conduct of various forms of illegal gambling.[17] By interdicting the flow of these materials to and between illegal gambling businesses, the statute purposefully seeks to impede the operation of such businesses.[18]

Section 1952, by contrast, does not apply just to illegal gambling; rather, it is concerned with a broad spectrum of "unlawful activity," [19] illegal gambling businesses being only one element. Moreover, the statute does not focus upon any particular materials, but upon the use of the facilities of interstate commerce with the intent of furthering an unlawful "business enterprise." It is, in short, an effort to deny individuals who act for such a criminal purpose access to the channels of commerce.[20] Thus, while § 1952 ultimately seeks, like § 1953,

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[16] Only common carriers acting in the usual course of their business, plus those materials specified in § 1953 (b), see n. 8, *supra,* are excluded from the statute's prohibition.

[17] See also 18 U. S. C. § 1084.

[18] Representative Celler, who introduced the statute in the House, described its purposes as follows:

"The primary purpose is to prevent the transportation in interstate commerce of wagering material. The purpose actually is to cutoff and shutoff gambling supplies, in reality to prevent these lotteries and kindred illegal diversions." 107 Cong. Rec. 16537. See also S. Rep. No. 589, 87th Cong., 1st Sess., 2 (1961); H. R. Rep. No. 968, 87th Cong., 1st Sess., 2 (1961).

[19] "As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances . . . or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

[20] "This bill will assist local law enforcement by denying interstate facilities to individuals engaged in illegal gambling, liquor,

to inhibit organized criminal activity,[21] it takes a very different approach to doing so. To introduce into § 1952 an exception based upon the nature of the material transported in interstate commerce would carve a substantial slice from the intended coverage of the statute. This we will not do without an affirmative indication—which is lacking here—that Congress so intended.

Our conclusion here is bolstered by the fact that the reason for the newspaper exception to § 1953 is absent in the context of § 1952. The original version of § 1953 introduced in the Senate contained none of the exceptions set forth in subsection (b). It was quickly realized that the bill, as introduced, bore the potential for unreasonably broad application, since it would have imposed absolute criminal liability on anyone, except a common carrier, who "knowingly carries or sends in interstate . . . commerce" any gambling paraphernalia

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narcotics or prostitution business enterprises." H. R. Rep. No. 966, 87th Cong., 1st Sess., 3 (1961). See also 107 Cong. Rec. 13943 (remarks of Sen. Eastland).

[21] In *Rewis* v. *United States,* 401 U. S. 808, 811 (1971), we observed that "§ 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." We, of course, adhere to this view of the statute for "Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which . . . relatively minor state offenses [would be transformed] into federal felonies." *Id.,* at 812. See also *United States* v. *Bass,* 404 U. S. 336, 349–350 (1971). Petitioners contend that there was no proof in these cases that they were involved in organized criminal activity and that such activity was being directed from another State. Given the limited nature of our grant of certiorari, it is not open to question here that the five illegal bookmaking businesses were elements of organized criminal activity of the type contemplated by § 1952—though we do note that the reach of the statute clearly was not *limited* to instances in which organized criminal activity in one State is managed from another State, see n. 15, *supra.*

used in an illegal gambling business. Were "knowingly" construed as modifying only the phrase "carries or sends," [22] the statute might have been applied to a wholly innocent person who knowingly carried a newspaper in interstate commerce unaware that it contained racing information.[23] It was to avoid this problem that the newspaper exception was added to § 1953.[24] But § 1952 obviously poses no threat to innocent citizens. Its application is limited to those who act with an intent to further unlawful activity—as was clearly true of these petitioners. There is, then, no reason for carrying the newspaper exception of § 1953 (b)(3) over to § 1952.

The judgment is

Affirmed.

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

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[22] But cf. *United States* v. *Chase,* 372 F. 2d 453, 460 (CA4), cert. denied, 387 U. S. 907 (1967) ("[K]nowledge and intent to transmit gambling paraphernalia in interstate commerce are elements of the crime created by" § 1953).

[23] "The committee . . . felt that the bill, as introduced, might be so interpreted as to bring within its criminal penalties a person who carried a newspaper or other publication containing racing results or predictions." S. Rep. No. 589, 87th Cong., 1st Sess., 2 (1961).

[24] See *ibid.;* H. R. Rep. No. 968, 87th Cong., 1st Sess., 3 (1961).

EXECUTIVE JET AVIATION, INC., ET AL. *v.* CITY OF CLEVELAND ET AL.

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

No. 71–678. Argued November 15, 1972—
Decided December 18, 1972

Petitioners, invoking federal admiralty jurisdiction under 28 U. S. C. § 1333 (1), brought suit for damages resulting from the crash-landing and sinking in the navigable waters of Lake Erie of their jet aircraft shortly after takeoff from a Cleveland airport. The District Court dismissed the complaint for lack of admiralty jurisdiction on the grounds that the alleged tort had neither a maritime locality nor a maritime nexus. The Court of Appeals affirmed on the first ground. *Held:* Neither the fact that an aircraft goes down on navigable waters nor that the negligence "occurs" while the aircraft is flying over such waters is sufficient to confer federal admiralty jurisdiction over aviation tort claims, and in the absence of legislation to the contrary such jurisdiction exists with respect to those claims only when there is a significant relationship to traditional maritime activity. Therefore, federal admiralty jurisdiction does not extend to aviation tort claims arising from flights like the one involved here between points within the continental United States. Pp. 253–274.

448 F. 2d 151, affirmed.

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

Phillip D. Bostwick argued the cause and filed briefs for petitioners.

Solicitor General Griswold argued the cause for respondent Dicken. With him on the brief were *Assistant Attorney General Wood, Allan A. Tuttle,* and *Walter H. Fleischer. Edward D. Crocker* filed a brief for respondents City of Cleveland et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

On July 28, 1968, a jet aircraft, owned and operated by the petitioners, struck a flock of seagulls as it was taking off from Burke Lakefront Airport in Cleveland, Ohio, adjacent to Lake Erie. As a result, the plane lost its power, crashed, and ultimately sank in the navigable waters of Lake Erie, a short distance from the airport. The question before us is whether the petitioners' suit for property damage to the aircraft, allegedly caused by the respondents' negligence, lies within federal admiralty jurisdiction.

When the crash occurred, the plane was manned by a pilot, a co-pilot, and a stewardess, and was departing Cleveland on a charter flight to Portland, Maine, where it was to pick up passengers and then continue to White Plains, New York. After being cleared for takeoff by the respondent Dicken, who was the federal air traffic controller at the airport, the plane took off, becoming airborne at about half the distance down the runway. The takeoff flushed the seagulls on the runway, and they rose into the airspace directly ahead of the ascending plane. Ingestion of the birds into the plane's jet engines caused an almost total loss of power. Descending back toward the runway in a semi-stalled condition, the plane veered slightly to the left, struck a portion of the airport perimeter fence and the top of a nearby pickup truck, and then settled in Lake Erie just off the end of the runway and less than one-fifth of a statute mile offshore. There were no injuries to the crew, but the aircraft soon sank and became a total loss.

Invoking federal admiralty jurisdiction under 28

U. S. C. § 1333 (1),[1] the petitioners brought this suit for damages in the District Court for the Northern District of Ohio against Dicken and the other respondents,[2] alleging that the crash had been caused by the respondents' negligent failure to keep the runway free of the birds or to give adequate warning of their presence.[3] The District Court, in an unreported opinion, held that the suit was not cognizable in admiralty and dismissed the complaint for lack of subject matter jurisdiction.

Relying primarily on the Sixth Circuit precedent of *Chapman* v. *City of Grosse Pointe Farms,* 385 F. 2d 962 (1967), the District Court held that admiralty jurisdiction over torts may properly be invoked only when two criteria are met: (1) the locality where the alleged tortious wrong occurred must have been on navigable waters; and (2) there must have been a relationship between the wrong and some maritime service, navigation, or commerce on navigable waters. The District Court found that the allegations of the petitioners' complaint satisfied neither of these criteria. With respect to the locality of the alleged wrong, the court stated that "the alleged negligence became operative upon the aircraft while it was over the land; and in this sense

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[1] That section provides:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

[2] Besides Dicken, the respondents are the City of Cleveland, as owner and operator of the airport, and Phillip A. Schwenz, the airport manager.

[3] The petitioners also filed an action against Dicken's employer, the United States, under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b) and 2674, asserting the same claim. That action is pending in the District Court for the Northern District of Ohio.

the 'impact' of the alleged negligence occurred when the gulls disabled the plane's engines [over the land] . . . . From this point on the plane was disabled and was caused to fall. Whether it came down upon land or upon water was largely fortuitous." Alternatively, the court concluded that the wrong bore no relationship to maritime service, navigation, or commerce:

> "Assuming . . . that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed 'wrong' in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.
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> ". . . Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off."

The Court of Appeals for the Sixth Circuit affirmed on the ground that "the alleged tort in this case occurred on land before the aircraft reached Lake Erie . . . ." 448 F. 2d 151, 154 (1971). Hence, that court found it "not necessary to consider the question of maritime relationship or nexus discussed by this court in [*Chapman*]." *Ibid.* We granted certiorari to consider a seemingly important question affecting the jurisdiction of the federal courts. 405 U. S. 915 (1972).

I

Determination of the question whether a tort is "maritime" and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not. As early as 1813, Mr. Justice Story, on Circuit, stated this general principle:

> "In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." *Thomas* v. *Lane,* 23 F. Cas. 957, 960 (No. 13,902) (CC Me.).

See also *De Lovio* v. *Boit,* 7 F. Cas. 418, 444 (No. 3,776) (CC Mass. 1815); *Philadelphia, W. & B. R. Co.* v. *Philadelphia & Havre de Grace Steam Towboat Co.,* 23 How. 209, 215 (1860). Later, this locality test was expanded to include not only tidewaters, but all navigable waters, including lakes and rivers. *The Genesee Chief* v. *Fitzhugh,* 12 How. 443 (1852).

In *The Plymouth,* 3 Wall. 20, 35, 36 (1866), the Court essayed a definition of when a tort is "located" on navigable waters:

> "[T]he wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. . . .
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> . . . . . .

> ". . . The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.
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> ". . . Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

The Court has often reiterated this rule of locality.[4] As recently as last Term, in *Victory Carriers, Inc.* v. *Law,* 404 U. S. 202, 205, we repeated that "[t]he historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States."

This locality test, of course, was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel. Indeed, for the traditional types of maritime torts, the traditional test has worked quite satisfactorily. As a leading admiralty text has put the matter:

> "It should be stressed that the important cases in admiralty are *not* the borderline cases on jurisdiction; these may exercise a perverse fascination in the occasion they afford for elaborate casuistry, but the main business of the [admiralty] court involves claims for cargo damage, collision, seamen's injuries and the like—all well and comfortably within the circle, and far from the penumbra." G. Gilmore & C. Black, The Law of Admiralty 24 n. 88 (1957).

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[4] In *Victory Carriers, Inc.* v. *Law,* 404 U. S. 202, 205 n. 2 (1971), we cited over 40 cases to this effect.

But it is the perverse and casuistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort jurisdiction. In *Smith & Son* v. *Taylor,* 276 U. S. 179 (1928), for instance, a longshoreman unloading a vessel was standing on the pier when he was struck by a cargo-laden sling from the ship and knocked into the water where he was later found dead. This Court held that there was no admiralty jurisdiction in that case, despite the fact that the longshoreman was knocked into the water, because the blow by the sling was what gave rise to the cause of action, and it took effect on the land. Hence, the Court concluded, "[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land." 276 U. S., at 182. In the converse factual setting, however, where a longshoreman working on the deck of a vessel was struck by a hoist and knocked onto the pier, the Court upheld admiralty jurisdiction because the cause of action arose on the vessel. *Minnie* v. *Port Huron Terminal Co.,* 295 U. S. 647 (1935). See also *The Admiral Peoples,* 295 U. S. 649 (1935).

Other serious difficulties with the locality test are illustrated by cases where the maritime locality of the tort is clear, but where the invocation of admiralty jurisdiction seems almost absurd. If a swimmer at a public beach is injured by another swimmer or by a submerged object on the bottom, or if a piece of machinery sustains water damage from being dropped into a harbor by a land-based crane, a literal application of the locality test invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well. In cases such as these, some courts have adhered to a mechanical application of the strict locality rule and have sustained admiralty jurisdiction despite the lack of any connection between the wrong and tradi-

tional forms of maritime commerce and navigation.[5] Other courts, however, have held in such situations that a maritime locality is not sufficient to bring the tort within federal admiralty jurisdiction, but that there must also be a maritime nexus—some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters. The Court of Appeals for the Sixth Circuit, for instance, in the *Chapman* case, where a swimmer at a public beach was injured, held that

> "[a]bsent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts." 385 F. 2d, at 966.[6]

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[5] *Davis* v. *City of Jacksonville Beach,* 251 F. Supp. 327 (MD Fla. 1965) (injury to a swimmer by a surfboard); *King* v. *Testerman,* 214 F. Supp. 335, 336 (ED Tenn. 1963) (injuries to a water skier). See also *Horton* v. *J. & J. Aircraft, Inc.,* 257 F. Supp. 120, 121 (SD Fla. 1966). Cf. *Weinstein* v. *Eastern Airlines, Inc.,* 316 F. 2d 758 (CA3 1963).

[6] In another injured-swimmer case, *McGuire* v. *City of New York,* 192 F. Supp. 866, 871–872 (SDNY 1961), the court stated:

"The proper scope of jurisdiction should include all matters relating to the business of the sea and the business conducted on navigable waters.

"The libel in this case does not relate to any tort which grows out of navigation. It alleges an ordinary tort, no different in substance because the injury occurred in shallow waters along the shore than if the injury had occurred on the sandy beach above the water line. Whether the City of New York should be held liable for the injury suffered by libellant is a question which can easily be determined in the courts of the locality. To endeavor to project such an action into the federal courts on the ground of admiralty jurisdiction is to misinterpret the nature of admiralty jurisdiction."

Other cases holding that admiralty jurisdiction was not properly invoked because the tort, while having a maritime locality, lacked a

As early as 1850, admiralty scholars began to suggest that a traditional maritime activity, as well as a maritime locality, is necessary to invoke admiralty jurisdiction over torts. In that year, Judge Benedict expressed his "celebrated doubt" [7] as to whether such jurisdiction did not depend, in addition to a maritime locality, upon some "relation of the parties to a ship or vessel, embracing only those tortious violation[s] of maritime right and duty which occur in vessels to which the Admiralty jurisdiction, in cases of contracts, applies." E. Benedict, The American Admiralty 173 (1850). More recently, commentators have actively criticized the rule of locality as the sole criterion for admiralty jurisdiction, and have recommended adoption of a maritime relationship requirement as well. See 7A J. Moore, Federal Practice, Admiralty ¶¶ .325 [3] and .325 [5] (2d ed. 1972); Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Col. L. Rev. 259, 264 (1950). In 1969, the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts (ALI Study) also made that recommendation, stating (at 233):

> "It is hard to think of any reason why access to federal court should be allowed without regard to amount in controversy or citizenship of the parties merely because of the fortuity that a tort

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significant relationship to maritime navigation and commerce, include: *Peytavin* v. *Government Employees Insurance Co.*, 453 F. 2d 1121 (CA5 1972); *Gowdy* v. *United States*, 412 F. 2d 525, 527–529 (CA6 1969); *Smith* v. *Guerrant*, 290 F. Supp. 111, 113–114 (SD Tex. 1968). See also *J. W. Petersen Coal & Oil Co.* v. *United States*, 323 F. Supp. 1198, 1201 (ND Ill. 1970); *O'Connor & Co.* v. *City of Pascagoula*, 304 F. Supp. 681, 683 (SD Miss. 1969); *Hastings* v. *Mann*, 226 F. Supp. 962, 964–965 (EDNC 1964), aff'd, 340 F. 2d 910 (CA4 1965). A similar view is taken by the English courts. *Queen* v. *Judge of the City of London Court*, [1892] 1 Q. B. 273.

[7] Hough, Admiralty Jurisdiction—Of Late Years, 37 Harv. L. Rev. 529, 531 (1924).

> occurred on navigable waters, rather than on other waters or on land. The federal courts should not be burdened with every case of an injured swimmer."

Despite the broad language of cases like *The Plymouth,* 3 Wall. 20 (1866), the fact is that this Court has never explicitly held that a maritime locality is the sole test of admiralty tort jurisdiction. The last time the Court considered the matter, the question was left open. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52 (1914). In that case, a stevedore brought suit for injuries sustained on board a vessel while loading and stowing copper. The petitioner admitted the maritime locality of the tort, but contended that no maritime relationship was present. The Court sustained federal admiralty jurisdiction, but found that it was not necessary to decide whether locality alone is sufficient:

> "Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. . . .
>
> ". . . If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient." *Id.,* at 61, 62.

Since the time of that decision the Court has not squarely dealt with the question left open there, although opinions in several cases have discussed the maritime or non-maritime nature of the tort and its relationship to maritime navigation. In *Rodrigue* v. *Aetna Casualty & Surety Co.,* 395 U. S. 352 (1969), for instance, we held that admiralty had no jurisdiction of wrongful-death actions under the Death on the High Seas Act, 41 Stat.

537, 46 U. S. C. § 761 *et seq.*, arising out of accidents on artificial island drilling rigs in the Gulf of Mexico more than a marine league offshore. We relied in that case on the fact that the accidents bore no relation to any navigational function:

> "The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers." *Id.*, at 360.

See also *The Raithmoor,* 241 U. S. 166, 176–177 (1916); *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 382 (1918); *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479, 481 (1923); *Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449, 457 (1925); *London Guarantee & Accident Co.* v. *Industrial Accident Comm'n,* 279 U. S. 109, 123 (1929).

Apart from the difficulties involved in trying to apply the locality rule as the sole test of admiralty tort jurisdiction, another indictment of that test is to be found in the number of times the federal courts and the Congress, in the interests of justice, have had to create exceptions to it in the converse situation—*i. e.*, when the tort has no maritime locality, but does bear a relationship to maritime service, commerce, or navigation. See 7A J. Moore, Federal Practice, Admiralty ¶ .325 [4] (2d ed. 1972). For example, in *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U. S. 36 (1943), the Court sustained the application of the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, to injuries to a seaman on land, because of the seaman's connection with maritime commerce. We relied in that case on an analogy to maintenance and cure:

> "[T]he maritime law, as recognized in the federal courts, has not in general allowed recovery for per-

> sonal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land." *Id.*, at 41–42.

Similarly, the doctrine of unseaworthiness has been extended to permit a seaman or a longshoreman to recover from a shipowner for injuries sustained wholly on land, so long as those injuries were caused by defects in the ship or its gear. *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206, 214–215 (1963). See also *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555 (CA2 1950).

Congress, too, has extended admiralty jurisdiction predicated on the relation of the wrong to maritime activities, regardless of the locality of the tort. In the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U. S. C. § 740, enacted in 1948, Congress provided:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

This Act was passed specifically to overrule cases, such as *The Plymouth, supra,* holding that admiralty does not provide a remedy for damage done to land structures by ships on navigable waters. *Victory Carriers, Inc.* v. *Law*, 404 U. S., at 209 n. 8; *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S., at 209–210.[8]

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[8] The Court has held, however, that there is no admiralty jurisdiction under the Extension of Admiralty Jurisdiction Act over suits brought by longshoremen injured while working on a pier, when such

In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

II

One area in which locality as the exclusive test of admiralty tort jurisdiction has given rise to serious problems in application is that of aviation. For the reasons discussed above and those to be discussed, we have concluded that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases.

In one of the earliest aircraft cases brought in admiralty, *The Crawford Bros. No. 2,* 215 F. 269, 271 (WD Wash. 1914), in which a libel *in rem* for repairs was brought against an airplane that had crashed into Puget Sound, the federal court declined to assume jurisdiction, reasoning that an airplane could not be characterized as a maritime vessel. *The Crawford Bros.* was followed by a number of cases dealing with seaplanes, in which the courts restricted admiralty jurisdiction to occurrences involving planes that were afloat on navigable waters.[9] Continuing doubt as to the applicability

injuries were caused, not by ships, but by pier-based equipment. *Victory Carriers, Inc.* v. *Law, supra; Nacirema Co.* v. *Johnson,* 396 U. S. 212, 223 (1969). The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, was amended in 1972 to cover employees working on those areas of the shore customarily used in loading, unloading, repairing, or building a vessel. Pub. L. No. 92–576, § 2, 86 Stat. 1251.

[9] *Matter of Reinhardt* v. *Newport Flying Service Corp.,* 232 N. Y. 115, 117–118, 133 N. E. 371, 372 (1921); *United States* v. *Northwest Air Service, Inc.,* 80 F. 2d 804, 805 (CA9 1935). See also *Lambros Seaplane Base* v. *The Batory,* 215 F. 2d 228, 231 (CA2 1954).

of admiralty law to aircraft was illustrated by cases in the 1930's and 1940's holding that aircraft owners could not invoke the benefits of the maritime doctrine of limitation of liability,[10] and that crimes committed on board aircraft flying over international waters were not punishable under criminal statutes proscribing acts committed on the high seas.[11] Moreover, Congress exempted all aircraft from conformity with United States navigation and shipping laws.[12]

The first major extension of admiralty jurisdiction to land-based aircraft came in wrongful-death actions arising out of aircraft crashes at sea and brought under the Death on the High Seas Act, 46 U. S. C. § 761 *et seq.* The federal courts took jurisdiction of such cases because the literal provisions of that statute appeared to be clearly applicable. The Death on the High Seas Act, enacted in 1920, provides:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may

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[10] *Dollins* v. *Pan-American Grace Airways, Inc.*, 27 F. Supp. 487, 488–489 (SDNY 1939); *Noakes* v. *Imperial Airways, Ltd.*, 29 F. Supp. 412, 413 (SDNY 1939).

[11] *United States* v. *Peoples*, 50 F. Supp. 462 (ND Cal. 1943); *United States* v. *Cordova*, 89 F. Supp. 298 (EDNY 1950).

In 1952, however, Congress amended the criminal jurisdiction of admiralty to include crimes committed aboard aircraft while in flight over the high seas or any other waters within the admiralty jurisdiction of the United States except waters within the territorial jurisdiction of any State. 18 U. S. C. § 7 (5).

[12] The Federal Aviation Act of 1958, 72 Stat. 799, as amended, 49 U. S. C. § 1509 (a), the successor to the Air Commerce Act of 1926, 44 Stat. 572, formerly 49 U. S. C. § 177 (1952 ed.).

> maintain a suit for damages in the district courts of the United States, in admiralty . . . ."

The first aviation case brought pursuant to the Death on the High Seas Act was apparently *Choy* v. *Pan-American Airways Co.,* 1941 A. M. C. 483 (SDNY), where death was caused by the crash of a seaplane into the Pacific Ocean during a transoceanic flight. The District Court upheld admiralty jurisdiction on the ground that the language of the Act was broad and made no reference to surface vessels. According to the court:

> "The statute certainly includes the phrase 'on the high seas' but there is no reason why this should make the law operable only on a horizontal plane. The very next phrase 'beyond a marine league from the shore of any State' may be said to include a vertical sense and another dimension." *Id.,* at 484.

Since *Choy,* many actions for wrongful death arising out of aircraft crashes into the high seas beyond one marine league from shore have been brought under the Death on the High Seas Act, and federal jurisdiction has consistently been sustained in those cases.[13] Indeed, it may be

[13] See, *e. g., Wyman* v. *Pan-American Airways, Inc.,* 181 Misc. 963, 966, 43 N. Y. S. 2d 420, 423, aff'd, 267 App. Div. 947, 48 N. Y. S. 2d 459, aff'd, 293 N. Y. 878, 59 N. E. 2d 785 (1944); *Higa* v. *Transocean Airlines,* 230 F. 2d 780 (CA9 1955); *Noel* v. *Linea Aeropostal Venezolana,* 247 F. 2d 677, 680 (CA2 1957); *Trihey* v. *Transocean Air Lines,* 255 F. 2d 824, 827 (CA9 1958); *Lacey* v. *L. W. Wiggins Airways, Inc.,* 95 F. Supp. 916 (Mass. 1951); *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85 (ND Cal. 1954); *Stiles* v. *National Airlines, Inc.,* 161 F. Supp. 125 (ED La. 1958), aff'd, 268 F. 2d 400 (CA5 1959); *Noel* v. *Airponents, Inc.,* 169 F. Supp. 348 (NJ 1958); *Lavello* v. *Danko,* 175 F. Supp. 92 (SDNY 1959); *Blumenthal* v. *United States,* 189 F. Supp. 439, 445 (ED Pa. 1960), aff'd, 306 F. 2d 16 (CA3 1962); *Pardonnet* v. *Flying Tiger Line, Inc.,* 233 F. Supp. 683 (ND Ill. 1964); *Kropp* v. *Douglas Aircraft Co.,* 329 F. Supp. 447, 453–455 (EDNY 1971). Cf. *D'Aleman* v. *Pan American World Airways,* 259 F. 2d 493 (CA2 1958).

considered as settled today that this specific federal statute gives the federal admiralty courts jurisdiction of such wrongful-death actions.

In recent years, however, some federal courts have been persuaded in aviation cases to extend their admiralty jurisdiction beyond the statutory coverage of the Death on the High Seas Act. Several cases have held that actions for *personal injuries* arising out of aircraft crashes into the high seas more than one league off shore or arising out of aircraft accidents in the airspace over the high seas were cognizable in admiralty because of their maritime locality, although they were not within the scope of the Death on the High Seas Act or any other federal legislation.[14] These cases, as well as most of those brought under the Death on the High Seas Act, involved torts both with a maritime locality, in that the alleged negligence became operative while the aircraft was on or over navigable waters, and also with some relationship to maritime commerce, at least insofar as the aircraft was beyond state territorial waters and performing a function—transoceanic crossing—that previously would have been performed by waterborne vessels.[15]

But a further extension of admiralty jurisdiction was created when courts began to sustain that jurisdiction in situations such as the one now before us—when the claim arose out of an aircraft accident that occurred on or over navigable waters *within* state territorial limits,

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[14] *Bergeron* v. *Aero Associates, Inc.*, 213 F. Supp. 936 (ED La. 1963); *Notarian* v. *Trans World Airlines, Inc.*, 244 F. Supp. 874 (WD Pa. 1965); *Horton* v. *J. & J. Aircraft, Inc.*, 257 F. Supp. 120 (SD Fla. 1966).

[15] Whether this type of relationship to maritime commerce is a sufficient maritime nexus to justify admiralty jurisdiction over airplane accidents is discussed *infra*, at 271–272. We do not decide that question in this case.

and when the aircraft was not on a transoceanic flight. Apparently, the first such case grew out of a 1960 crash of a commercial jet, bound from Boston to Philadelphia, that collided with a flock of birds over the airport runway and crashed into Boston Harbor within one minute after takeoff. *Weinstein* v. *Eastern Airlines, Inc.*, 316 F. 2d 758 (CA3 1963). In deciding that a wrongful-death action arising from this crash was within admiralty jurisdiction, the Court of Appeals for the Third Circuit applied the strict locality rule and found that the tort had a maritime locality. The court further justified the invocation of admiralty jurisdiction in that case by an analogy to the Death on the High Seas Act:

> "If, as it has been held, a tort claim arising out of the crash of an airplane beyond the one marine league line is within the jurisdiction of admiralty, then *a fortiori* a crash of an aircraft just short of that line but still within the navigable waters is within that jurisdiction as well." *Id.*, at 765.

There have been a few subsequent cases to like effect.[16] To the contrary, of course, is the decision of the Court of Appeals for the Sixth Circuit in the present case.

III

These latter cases graphically demonstrate the problems involved in applying a locality-alone test of admiralty tort jurisdiction to the crashes of aircraft. Airplanes, unlike waterborne vessels, are not limited by physical boundaries and can and do operate over both land and navigable bodies of water. As Professor Moore and

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[16] *Hornsby* v. *Fish Meal Co.*, 431 F. 2d 865 (CA5 1970); *Harris* v. *United Air Lines, Inc.*, 275 F. Supp. 431, 432 (SD Iowa 1967). Cf. *Scott* v. *Eastern Air Lines, Inc.*, 399 F. 2d 14, 21–22 (CA3 1968) (*en banc*).

his colleague Professor Pelaez have stated, "In both death and injury cases . . . it is evident that while distinctions based on locality often are in fact quite relevant where water vessels are concerned, they entirely lose their significance where aircraft, which are not geographically restrained, are concerned." 7A J. Moore, Federal Practice, Admiralty ¶ .330 [5], pp. 3772–3773 (2d ed. 1972). In flights within the continental United States, which are principally over land, the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous. The ALI Study, in criticizing the *Weinstein* decision, observed:

> "If a plane takes off from Boston's Logan Airport bound for Philadelphia, and crashes on takeoff, it makes little sense that the next of kin of the passengers killed should be left to their usual remedies, ordinarily in state court, if the plane crashes on land, but that they have access to a federal court, and the distinctive substantive law of admiralty applies, if the wrecked plane ends up in the waters of Boston Harbor." ALI Study 231.[17]

Moreover, not only is the locality test in such cases wholly adventitious, but it is sometimes almost impossible to apply with any degree of certainty. Under the locality test, the tort "occurs" where the alleged negligence took effect, *The Plymouth, supra; Smith & Son* v. *Taylor,* 276 U. S. 179 (1928); and in the case of aircraft that locus is often most difficult to determine.

The case before us provides a good example of these difficulties. The petitioners contend that since their aircraft crashed into the navigable waters of Lake Erie and was totally destroyed when it sank in those waters, the locality of the tort, or the place where the alleged

[17] See also Comment, Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters, 64 Col. L. Rev. 1084, 1091–1092 (1964).

negligence took effect, was there. The fact that the major damage to their plane would not have occurred if it had not landed in the lake indicates, they say, that the substance and consummation of the wrong took place in navigable waters. The respondents, on the other hand, argue that the alleged negligence took effect when the plane collided with the birds—over land. Relying on cases such as *Smith & Son* v. *Taylor, supra,* where admiralty jurisdiction was denied in the case of a longshoreman struck by a ship's sling while standing on a pier, and knocked into the water, the respondents contend that a tort "occurs" at the point of first impact of the alleged negligence. Here, they say, the cause of action arose as soon as the plane struck the birds; from then on, the plane was destined to fall, and whether it came down on land or water should not affect "the locality of the act." See *Thomas* v. *Lane,* 23 F. Cas., at 960.

In the view we take of the question before us, we need not decide who has the better of this dispute. It is enough to note that either position gives rise to the problems inherent in applying the strict locality test of admiralty tort jurisdiction in aviation accident cases. The petitioners' argument, if accepted, would make jurisdiction depend on where the plane ended up—a circumstance that could be wholly fortuitous and completely unrelated to the tort itself. The anomaly is well illustrated by the hypothetical case of two aircraft colliding at a high altitude, with one crashing on land and the other in a navigable river. If, on the other hand, the respondents' position were adopted, jurisdiction would depend on whether the plane happened to be flying over land or water when the original impact of the alleged negligence occurred. This circumstance, too, could be totally fortuitous. If the plane in the present case struck the birds over Cleveland's Lakefront Air-

port, admiralty jurisdiction would not lie; but if the plane had just crossed the shoreline when it struck the birds, admiralty jurisdiction would attach, even if the plane were then able to make it back to the airport and crashland there. These are hardly the types of distinctions with which admiralty law was designed to deal.

All these and other difficulties that can arise in attempting to apply the locality test of admiralty jurisdiction to aeronautical torts are, of course, attributable to the inherent nature of aircraft. Unlike waterborne vessels, they are not restrained by one-dimensional geographic and physical boundaries. For this elementary reason, we conclude that the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

IV

This conclusion, however, does not end our inquiry, for there remains the question of what constitutes, in the context of aviation, a significant relationship to traditional maritime activity. The petitioners argue that any aircraft falling into navigable waters has a sufficient relationship to maritime activity to satisfy the test. The relevant analogy, they say, is not between flying aircraft and sailing ships, but between a downed plane and a sinking ship. Quoting from the *Weinstein* opinion, they contend: "When an aircraft crashes into navigable waters, the dangers to persons and property

are much the same as those arising out of the sinking of a ship or a collision between two vessels." 316 F. 2d, at 763. The dissenting opinion in the Court of Appeals in the present case made the same argument:

> "I believe that there are many comparisons between the problems of aircraft over navigable waters and those of the ships which the aircraft are rapidly replacing. . . .
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> ". . . Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings upon land. . . . In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers. . . . What I would hold is that tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land." 448 F. 2d, at 163.

We cannot accept that definition of traditional maritime activity. It is true that in a literal sense there may be some similarities between the problems posed for a plane downed on water and those faced by a sinking ship. But the differences between the two modes of transportation are far greater, in terms of their basic qualities and traditions, and consequently in terms of the conceptual expertise of the law to be applied.[18] The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose

[18] Moreover, if the mere happenstance that an aircraft falls into navigable waters creates a maritime relationship because of the maritime dangers to a sinking plane, then the maritime relationship test would be the same as the petitioners' view of the maritime-locality test, with the same inherent fortuity.

shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Rules and concepts such as these are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime road. The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water. Indeed, in contexts other than tort, Congress and the courts have recognized that, because of these differences, aircraft are not subject to maritime law.[19] Although dangers of wind and wave faced by a plane that has crashed on navigable waters may be superficially similar to those encountered by a sinking ship, the plane's unexpected descent will almost invariably have been attributable to a cause unrelated to the sea—be it pilot error, defective design or manufacture of airframe or engine, error of a traffic controller at an airport, or some other cause; and the determination of liability will thus be based on factual and conceptual inquiries unfamiliar to the law of admiralty. It is clear, therefore, that neither the fact that a plane goes down on navigable waters nor the fact that the negligence "occurs" while a plane is flying

[19] See *supra*, at 261–262.

over such waters is enough to create such a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction.

We need not decide today whether an aviation tort can ever, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction in the absence of legislation.[20] It could be argued, for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute.[21] An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels.[22] Moreover,

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[20] Of course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court.

[21] But see 7A J. Moore, Federal Practice, Admiralty ¶ .330 [5], p. 3772 (2d ed. 1972):

"What possible rational basis is there, for instance, in holding that the personal representative of a passenger killed in the crash of an airplane traveling from Shannon, Ireland to Logan Field in Boston has a cause of action within the admiralty jurisdiction if the plane goes down three miles from shore; may have a cause of action within the admiralty jurisdiction if the plane goes down within an area circumscribed by the shore and the three-mile limit; and will not have a cause of action within the admiralty jurisdiction if the plane managed to remain airborne until reaching the Massachusetts coast? And this notwithstanding that in all instances the plane may have developed engine trouble or been the victim of pilot error at an identical site far out over the Atlantic."

[22] Apart from transoceanic flights, the Government's brief suggests that another example where admiralty jurisdiction might properly be invoked in an airplane accident case on the ground that the plane was performing a function traditonally performed by waterborne vessels, is shown in *Hornsby* v. *Fish Meal Co.*, 431 F. 2d 865 (CA5 1970), which involved the mid-air collision of two light aircraft

other factors might come into play in the area of international air commerce—choice-of-forum problems, choice-of-law problems,[23] international law problems, problems involving multi-nation conventions and treaties, and so on.

But none of these considerations is of concern in the case before us. The flight of the petitioners' land-based aircraft was to be from Cleveland to Portland, Maine, and thence to White Plains, New York—a flight that would have been almost entirely over land and within the continental United States. After it struck the flock of seagulls over the runway, the plane descended and settled in Lake Erie within the territorial waters of Ohio. We can find no significant relationship between such an event befalling a land-based plane flying from one point in the continental United States to another, and traditional maritime activity involving navigation and commerce on navigable waters.

Just last Term, in *Victory Carriers, Inc.* v. *Law,* 404 U. S., at 212, we observed that in determining whether to expand admiralty jurisdiction, "we should proceed with caution . . . ." Quoting from *Healy* v. *Ratta,* 292 U. S. 263, 270 (1934), we stated:

> " 'The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only

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used in spotting schools of fish and the crash of those aircraft into the Gulf of Mexico within one marine league of the Louisiana shore.

[23] In such a situation, it has been stated:

"Were the maritime law not applicable, it is argued that the recovery would depend upon a confusing consideration of what substantive law to apply, *i. e.,* the law of the forum, the law of the place where each decedent [or injured party] purchased his ticket, the law of the place where the plane took off, or, perhaps, the law of the point of destination." 7A J. Moore, Federal Practice, Admiralty ¶ .330 [5], p. 3774 (2d ed. 1972).

> by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.' "

In the situation before us, which is only fortuitously and incidentally connected to navigable waters and which bears no relationship to traditional maritime activity, the Ohio courts could plainly exercise jurisdiction over the suit,[24] and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors.[25]

It may be, as the petitioners argue, that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multi-party cases. But for this Court to uphold federal admiralty jurisdic-

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[24] There is no diversity of citizenship between petitioners and the City of Cleveland.

[25] The United States, respondent Dicken's employer, can be sued, of course, only in federal district court under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b) and 2674. Such an action has been filed by the petitioners here, but even in that suit the federal court will apply the substantive tort law of Ohio. Thus, Ohio law will not be ousted in this case, and the pendency of the action under the Tort Claims Act has no relevance in determining whether the instant case should be heard in admiralty, with its federal substantive law.

The possibility that the petitioners would have to litigate the same claim in two forums is the same possibility that would exist if their plane had stopped on the shore of the lake, instead of going into the water, and is the same possibility that exists every time a plane goes down on land, negligence of the federal air traffic controller is alleged, and there is no diversity of citizenship. This problem cannot be solved merely by upholding admiralty jurisdiction in cases where the plane happens to fall on navigable waters.

tion in a few wholly fortuitous aircraft cases would be a most quixotic way of approaching that goal. If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.

For the reasons stated in this opinion we hold that, in the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.[26]

The judgment is affirmed.

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[26] Some such flights, *e. g.*, New York City to Miami, Florida, no doubt involve passage over "the high seas beyond a marine league from the shore of any State." To the extent that the terms of the Death on the High Seas Act become applicable to such flights, that Act, of course, is "legislation to the contrary."

HEUBLEIN, INC. *v.* SOUTH CAROLINA TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 71–879. Argued November 13, 1972—
Decided December 18, 1972

Incident to South Carolina's valid scheme of regulating the sale of liquor within the State, a requirement that a manufacturer do more, as a condition of doing business, than merely solicit sales is not impermissible even though it has the effect of requiring the out-of-state manufacturer to undertake activities that eliminate its protection under 15 U. S. C. § 381 (a) from the state income tax. Pp. 278–284.

257 S. C. 17, 183 S. E. 2d 710, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a statement concurring in the result, *post*, p. 284. STEWART, J., took no part in the consideration or decision of the case.

Stephen M. Piga argued the cause for appellant. With him on the briefs was *W. Croft Jennings, Jr.*

G. Lewis Argoe, Jr., Assistant Attorney General of South Carolina, argued the cause for appellee. With him on the brief were *Daniel R. McLeod*, Attorney General, and *Joe L. Allen, Jr.*, and *John C. Von Lehe*, Assistant Attorneys General.

Mr. Piga filed a brief for the Distilled Spirits Institute as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Griswold, Assistant Attorney General Crampton*, and *Ernest J. Brown* for the United States, and by *William D. Dexter*, Assistant Attorney General of Washington, and *Eugene F. Corrigan* for the Multistate Tax Commission.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must determine whether South Carolina may tax the income from local sales of Heublein's products, consistent with the limitations on the State's power to tax imposed by 15 U. S. C. § 381 (a).[1] The South Carolina Tax Commission assessed Heublein, Inc., a Connecticut corporation that produces alcoholic beverages, a total of $21,549.50 in taxes on income derived from the sale of its goods in South Carolina.[2] After a hearing before the Tax Commission, Heublein paid the taxes and brought suit to recover them. The Court of Common Pleas held that § 381 (a) protected Heublein from tax liability in South Carolina. The Supreme Court of South Carolina reversed. 257 S. C. 17, 183 S. E. 2d 710. We noted probable jurisdiction, 405 U. S. 952 (1972), and now affirm. We hold that Heublein's activities within South Carolina exceed the minimum standards established in 15 U. S. C. § 381 (a),

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[1] Title 15 U. S. C. § 381 (a) provides in pertinent part:

"No State . . . shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person . . . are either, or both, of the following:

"(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

"(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

[2] A license tax, which is predicated upon liability for income taxes, was also assessed and paid. S. C. Code Ann. § 65–606 (1962). There is no dispute over the amount for which Heublein is liable under this statute.

and that South Carolina may, pursuant to an otherwise valid regulatory scheme, compel Heublein to undertake activities that take it beyond the protection of 15 U. S. C. § 381 (a).

I

During the years in question, Heublein had one employee in South Carolina. He maintained an office in his home and a desk at the warehouse of Ben Arnold Co., the local distributor of Heublein's products. Heublein's representative briefed Ben Arnold's salesmen on Heublein's products, and traveled throughout the State to liquor retailers, telling them of the products and leaving promotional literature with them. Ordinarily, the retailers sent orders directly to Ben Arnold, but occasionally Heublein's representative transmitted them. Ben Arnold, in turn, placed its orders with Heublein's home office in Connecticut. Heublein then acknowledged its acceptance of the orders and indicated to Ben Arnold when the goods would be shipped. They were sent by common carrier consigned to Heublein in care of its representative at the premises of Ben Arnold.

This arrangement, which served none of Heublein's business interests, was adopted to conform to the requirements of the South Carolina Alcoholic Beverage Control Act. S. C. Code Ann. § 4–1 *et seq.* (1962 and Supp. 1971). Under that Act, only registered producers of registered brands of alcoholic beverages may ship those brands of alcoholic beverages into the State. §§ 4–134, 4–135. Such producers must have a resident representative who has no direct or indirect interest in a local liquor business. §§ 4–131 (3), 4–139. Shipments of liquor into the State may be made only to the producer in care of its representative. § 4–141. Prior to the shipment, the producer must mail a copy of the invoice showing the quantity and price of the items shipped, and a copy of the bill of lading, to the Alcoholic Beverage Control

Commission. Immediately after accepting delivery, the representative must furnish the Commission a copy of the invoice showing the time and place of delivery. *Ibid.* When received, the shipment must be stored in a licensed warehouse of the producer, or, after delivery is complete, the shipment may be transferred to a licensed wholesaler. §§ 4–140, 4–141. Before the goods are shipped to a wholesaler, however, the representative must obtain the Commission's permission to make the transfer. § 4–141. Heublein complied with this regulatory scheme.

II

Title 15 U. S. C. § 381 (a)(1), on which Heublein relies, provides that no State shall have power to impose a net income tax on income derived within the State from interstate commerce if the recipient of the income confined its business within the State to "the solicitation of orders . . . in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State."

We need not decide whether, as the State urges, the actions of Heublein's representative in maintaining a local office, meeting with retailers, distributing promotional literature, and personally delivering some orders to the wholesaler, do not fall within the term "solicitation." Compare *Smith Kline & French* v. *Tax Comm'n*, 241 Ore. 50, 403 P. 2d 375 (1965), with *Clairol, Inc.* v. *Kingsley*, 109 N. J. Super. 22, 262 A. 2d 213, aff'd, 57 N. J. 199, 270 A. 2d 702 (1970), appeal dismissed, 402 U. S. 902 (1971). For here Heublein has done more than just those acts. It sent its products to its local representative who transferred them to a local wholesaler. This transfer occurred within the State and clearly was neither "solicitation" nor the filling of

orders "by shipment or delivery from a point outside the State" within the meaning of § 381 (a)(1).

Heublein contends, however, that the transfer never would have occurred had not South Carolina required it as a condition of conducting business within the State. Heublein argues that a State may not evade the purpose of § 381 (a) by requiring a firm to do more than solicit business within the State and then taxing the firm for engaging in this compelled additional activity.

If we were persuaded that South Carolina has evaded the intent of the statute we would, of course, be reluctant to uphold its actions. But that is not what South Carolina has done here. The legislative history of § 381 shows that Congress had rather limited purposes which are not evaded by South Carolina's regulation of liquor sales in the manner it has chosen. Congress did not focus on the consequences of its actions for such local regulatory schemes. We therefore will not read the statute as prohibiting the States from adopting such schemes, even when the regulation requires the producer to have more than the minimum contacts with the State for which § 381 provides tax immunity. Such a reading would require us to assume that Congress carefully considered the difficult problems of accommodating the federal interest in an open national economy with local interest in regulating the sale of liquor. The evidence is clear that Congress did not do so.

The impetus behind the enactment of § 381 was this Court's opinion in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 U. S., at 452. Congress promptly responded to the "consid-

erable concern and uncertainty" [3] and the "serious apprehension in the commercial community" [4] generated by this decision by enacting Pub. L. 86–272, 73 Stat. 555, 15 U. S. C. § 381, within seven months.

In this statute, Congress attempted to allay the apprehension of businessmen that "mere solicitation" would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, *Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax.[5] Section 381 was designed to define clearly a lower limit for the exercise of that power. Clarity that would remove uncertainty was Congress' primary goal. By establishing such a limit, Congress did, of course, implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy. But it did not address the questions raised by a requirement, incident to a valid regulatory scheme, that a business undertake activities above the limit as a condition of doing business within the State.[6]

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[3] S. Rep. No. 658, 86th Cong., 1st Sess., 2.

[4] H. R. Rep. No. 936, 86th Cong., 1st Sess., 1.

[5] See, *e. g.*, S. Rep. No. 658, *supra*, n. 3, pp. 2–3: "Persons engaged in interstate commerce are in doubt as to the amount of local activities within a State that will be regarded as forming a sufficient 'nexus,' that is, connection, with the State to support the imposition of a tax on net income from interstate operations and 'properly apportioned' to the State."

[6] That Congress was untroubled by those questions is suggested by its emphasis on the increased overhead and recordkeeping that local taxation of minimal activities would cause. See, *e. g.*, *id.*, at 4; H. R. Rep. No. 936, *supra*, n. 4, p. 2: "These businesses are concerned not only with the costs of taxation, but also with the inescapable fact that compliance with the diverse tax laws of every jurisdiction in which income is produced will require the maintenance of records for each jurisdiction and the retention

Congress recognized, instead, that the accommodation of local and national interests in this area was a delicate matter. The committees reporting the bill to the House and Senate emphasized the difficulty of devising appropriate limitations on state taxing powers. Both Committees called their bills temporary solutions to meet only the most pressing problems created by *Northwestern States Portland Cement.*[7] More comprehensive legislation could only follow careful study, in the Committees' view. Congress agreed, and in Title II of Pub. L. 86–272, provided that the Committee on the Judiciary of the House of Representatives and the Committee on Finance of the Senate study the entire problem of state taxation of interstate commerce.[8]

Congress, then, did not address in § 381 the problem of taxing a business when it undertook local activities simply in order to comply with the requirements of a valid regulatory scheme. Such regulation is an important function of local governments in our federal scheme. As we said last Term, "unless Congress conveys its purpose

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of legal counsel and accountants who are familiar with the tax practice of each jurisdiction." Where a valid regulatory scheme requires that records be kept, the overhead costs about which Congress was concerned might not rise substantially when a state income tax was imposed. South Carolina's scheme for regulating liquor does little more than require that Heublein keep certain records.

[7] H. R. Rep. No. 936, *supra,* n. 4, p. 2; S. Rep. No. 658, *supra,* n. 3, pp. 4–5: "Your committee recognizes that the bill it has reported is not a permanent solution to the problem that exists. It was not intended to be. Your committee . . . recognizes that the problem is a complex one which requires extensive and exhaustive study in arriving at a permanent solution fair alike to the States and to the Nation. Your committee believes, however, that the bill it has reported will serve as an effective stopgap or temporary solution while further studies are made of the problem."

[8] This report is published as H. R. Rep. No. 1480, 88th Cong., 2d Sess., H. R. Rep. No. 565, 89th Cong., 1st Sess., and H. R. Rep. No. 952, 89th Cong., 1st Sess.

clearly, it will not be deemed to have significantly changed the Federal-State balance." *United States* v. *Bass*, 404 U. S. 336, 349 (1971).

Congress of course did not enact in § 381 a statute which a State can deliberately evade by requiring a firm to undertake more than mere solicitation. When a State enacts a regulatory scheme that serves legitimate State purposes other than assuring that the State may tax the firm's income, it is not evading § 381; it is pursuing permissible ends in a manner that Congress did not address. Thus, if South Carolina's system of regulating the sale of liquor is valid, § 381 does not prohibit taxation of Heublein's local sales.[9]

III

South Carolina's Alcoholic Beverage Control Act is a long and detailed statute. Requirements that certain records be kept by the manufacturer, the wholesaler, and the retailer pervade the scheme. There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, South Carolina establishes a check on the accuracy of these records. For

[9] Mr. Justice Blackmun, in his separate statement, suggests that § 381 does proscribe what South Carolina has done here, but that the Twenty-first Amendment prohibits such an action by Congress. In his view, to the extent that § 381 prohibits taxing activities undertaken in order to comply with a regulation valid under the Twenty-first Amendment, it is unconstitutional. We prefer to read the statute and its legislative history, ambiguous though they may be, to avoid such a holding. Cf. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). And, though the relation between the Twenty-first Amendment and the force of the Commerce Clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951).

example, when a manufacturer can transfer its goods to a wholesaler in the State only after it submits an invoice showing the price and after it receives permission for the transfer, it is easier for the State to enforce its requirement that the wholesale price in South Carolina be no higher than that elsewhere in the country. S. C. Code Ann. § 4–137.1 (Supp. 1971). The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes and is not simply an attempt by the State to provide a basis for the taxation of an out-of-state seller's local sales.

Nor does this requirement violate the Commerce Clause. The Twenty-first Amendment, § 2, provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As this Court said in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 330 (1964):

> "This Court made clear in the early years following the adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."

The requirement that, before engaging in the liquor business in South Carolina, a manufacturer do more than merely solicit sales there, is an appropriate element in the State's system of regulating the sale of liquor.[10]

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[10] In upholding a comprehensive scheme of liquor regulation rather similar to South Carolina's, this Court said:

"[The State] has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are

The regulation in question here is therefore valid, and § 381 (a) does not apply. The judgment of the Supreme Court of South Carolina is

Affirmed.

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

MR. JUSTICE BLACKMUN, being of the opinion that the Twenty-first Amendment provides the sole authority for what South Carolina has required of Heublein by its Alcoholic Beverage Control Act and, to that extent, overrides what otherwise would be proscribed by 15 U. S. C. § 381, concurs in the result.

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not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well-known evils . . . ." *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 139 (1939). Cf. *Duckworth* v. *Arkansas,* 314 U. S. 390 (1941); *Carter* v. *Virginia,* 321 U. S. 131 (1944).

NEBRASKA *v.* IOWA

No. 17, Orig. Decided April 24, 1972—Decided and Decree entered January 8, 1973

Opinion reported: 406 U. S. 117.

PER CURIAM and DECREE.

The Special Master, as directed in *Nebraska* v. *Iowa,* 406 U. S. 117, 127 (1972), has submitted a proposed Decree. Nebraska accepts it but Iowa filed five Exceptions, to which Nebraska replied. Upon consideration of the Exceptions in light of our opinion and the Report of the Special Master, Iowa's Exceptions II and III are overruled and Exceptions I, IV, and V are sustained insofar as paragraphs 11 and 12 of the Proposed Decree are revised in the following Decree, the entry of which is directed:

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. The Missouri River was the boundary between the States of Iowa and Nebraska which was subject to the general rules of accretion and avulsion until 1943 when the states determined to agree by compact upon a permanent location of the boundary line.

2. By 1943 the shifts of the Missouri River channel had been so numerous and intricate, both in its natural state and as a result of the work of the Corps of Engineers, that it was practically impossible to locate the original boundary line between the states.

3. The Compact between the states effective July 12, 1943, provides in Section 3 as adopted by Iowa:

> "Titles, mortgages and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judg-

ment in Nebraska and such judgment shall be accorded full force and effect in Iowa."

4. Under Section 2 of the Compact, each state "cedes" to the other state "and relinquishes jurisdiction over" all such lands then located within the compact boundary of the other.

The word "cedes" in Section 2 was meant by the states to describe all areas formed before July 12, 1943, regardless of their location with reference to the original boundary, whose "titles, mortgages and other liens" were, at the date of the Compact, "good in" the ceding state. Under Section 3, the state is bound to recognize such "titles, mortgages and other liens" to be "good in" its state, and not to claim ownership in itself.

5. Sections 2 and and 3 are not to be construed as relating only to areas formed before July 12, 1943, that can be proved by clear, satisfactory, and convincing evidence to have been on the Nebraska side of the *original* boundary before the Compact fixed the permanent boundary. Such a construction would require the claimant who proves title "good in Nebraska" also to shoulder the burden of proving the location of the *original* boundary before 1943, as well as proving that the lands were on the Nebraska side of that boundary which would be placing a burden upon the land owner which the states themselves refused to undertake in 1943 and agreed would not be necessary.

6. The State of Iowa does not own Nottleman Island and Schemmel Island. The proofs sufficed to establish title "good in Nebraska" to Nottleman Island which was the land involved in the case of *State of Iowa, Plaintiff, v. Darwin Merritt Babbitt, et al.,* Equity No. 17433 in the District Court for Mills County, Iowa, and to Schemmel Island which was the land involved in the case of *State of Iowa, Plaintiff, v. Henry E. Schemmel, et al., Defendants,* Equity No. 19765 filed in the District

Court of Fremont County, Iowa, on March 26, 1963, and that Nottleman Island and Schemmel Island formed before July 12, 1943.

7. Under Section 3 of the Compact, titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from Iowa law, run to the thread of the contiguous stream.

8. Titles "good in Nebraska" are found to include and embrace titles obtained by ten years' open, notorious and adverse possession under claim of right without any requirement of a record title or of "color of title."

9. As to areas formed before July 12, 1943, Sections 2 and 3 of the Compact limit the State of Iowa to contesting with private litigants in State or Federal Courts the question whether the private claimants can prove title "good in Nebraska" and when private litigants prove such title, Iowa cannot interpose Iowa's doctrine of state ownership as defeating such title.

10. In the presently pending cases of *State of Iowa, Plaintiff v. Darwin Merritt Babbitt, et al.,* Equity No. 17433, (District Court of Mills County, Iowa), and *State of Iowa, Plaintiff v. Henry E. Schemmel, et al.,* Equity No. 19765, (District Court of Fremont County, Iowa), it having been proved that there are titles "good in Nebraska" as to those islands, there is no reason for an injunction against Iowa, its officers, agents and servants, at this stage, unless it be shown that the State of Iowa will not abide by this determination of the issues as embodied in our opinion of April 24, 1972.

11. Generally, ownership of the twenty-one areas and part of the twenty-second area north of Omaha—claimed by Iowa to be state owned by Iowa because allegedly formed wholly on the Iowa side of the Compact boundary after the Compact date—shall be determined by the law of the state in which they are found to have formed, the Compact boundary being the line which shall determine

in which state they formed. Claimants of title to these areas as against Iowa may have the opportunity to show title "good in Nebraska" on the Compact date.

12. Although under the Nebraska law of accretion private titles to riparian lands run to the thread of the contiguous stream, whether a Nebraska riparian owner has title to the accretions that cross the boundary into Iowa is determined by Iowa law.

13. The counterclaim of Iowa is dismissed.

14. The parties having paid their own costs and having contributed equally to a fund for expenses of the Special Master, any amounts remaining in said fund after deduction of all expenses by the Special Master shall be divided equally and returned to each state by the Special Master.

It is so ordered.

RICCI *v.* CHICAGO MERCANTILE EXCHANGE ET AL.

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

No. 71–858. Argued October 18, 1972—Decided January 9, 1973

Petitioner filed an antitrust complaint charging respondents with conspiring to restrain his business by transferring to another person petitioner's Chicago Mercantile Exchange membership, without notice and hearing, and in violation of Exchange rules and the Commodity Exchange Act. The District Court dismissed the complaint. The Court of Appeals reversed but held that the antitrust action should be stayed. *Held:* The Court of Appeals correctly determined that the antitrust proceedings should be stayed until the Commodity Exchange Commission can pass on the validity of respondents' conduct under the Commodity Exchange Act. Though the Commission cannot decide whether the Act and rules immunize conduct from the antitrust laws, the Commission's determination of whether the Exchange's rules were violated as petitioner claims or were followed requires a factual determination within the special competence of the Commission. That determination will greatly aid the antitrust court in arriving at the essential accommodation between the antitrust and regulatory regimes. Pp. 298–308.

447 F. 2d 713, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 308. DOUGLAS, J., filed a dissenting opinion, *post*, p. 308. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, STEWART, and POWELL, JJ., joined, *post*, p. 309.

Jerome H. Torshen argued the cause for petitioner. With him on the briefs was *Lawrence H. Eiger*.

Lee A. Freeman argued the cause for respondents. With him on the brief for respondents Chicago Mercantile Exchange et al. was *Lee A. Freeman, Jr.* *Max*

Chill, Herman Chill, and *Charles B. Bernstein* filed a brief for respondents Siegel Trading Co., Inc., et al.

Solicitor General Griswold, Acting Assistant Attorney General Comegys, Samuel Huntington, and *Seymour H. Dussman* filed a brief for the United States as *amicus curiae* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question before us is whether in this antitrust case the Court of Appeals for the Seventh Circuit properly stayed further judicial action pending administrative proceedings which the court deemed available under the Commodity Exchange Act, 42 Stat. 998, as amended, 7 U. S. C. § 1 *et seq.*

The case began when petitioner Ricci filed a complaint against the Chicago Mercantile Exchange, its president, vice president, and chairman of the board, and against the Siegel Trading Company, a member of the Exchange, and its president, charging a conspiracy in violation of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. The complaint alleged that Ricci had purchased a membership in the Exchange in 1967, using funds borrowed from the Trading Company, and that in February 1969 the Exchange, at the instance of the Trading Company, transferred the membership to another, without notice and hearing, utilizing a blank transfer authorization that had previously been revoked.[1] Al-

[1] Petitioner alleged in his complaint that when he was informed that Siegel Trading Company claimed to be the owner of his membership, he notified the Exchange that he was the owner of the membership; that the Trading Company was indebted to him for $18,000 in brokerage fees which offset the $15,000 he had borrowed to acquire his membership; and that the Trading Company did not have a lien on his membership under the rules of the Exchange. App. 11.

legedly, this course of conduct violated both the rules of the Exchange and the Commodity Exchange Act and was pursuant to an unlawful conspiracy aimed at restraining the conduct of Ricci's business. The result was, the complaint asserted, that Ricci was excluded from trading on the Exchange from February 11, 1969, until March 4, 1969, when he purchased another membership at a considerably higher price than the transferred membership had previously cost.

On motion of respondents, the District Court dismissed the complaint. The Court of Appeals reversed that judgment; but because the challenged conduct was deemed subject to the jurisdiction of the Secretary of Agriculture (Secretary) or the Commodity Exchange Commission (Commission) by virtue of the provisions of the Commodity Exchange Act, the District Court was directed to stay further proceedings to permit administrative action to take place. 447 F. 2d 713 (CA7 1971). We granted certiorari, 405 U. S. 953 (1972), and now affirm the judgment of the Court of Appeals.

I

The Commodity Exchange Act,[2] first passed in 1922 and from time to time amended—the most recent sub-

[2] Recognizing the public interest involved in "[t]ransactions in commodity involving the sale thereof for future delivery [futures]" and the burden upon interstate commerce imposed by "sudden or unreasonable fluctuations in . . . prices," 7 U. S. C. § 5, Congress, to regulate "futures" transactions, passed the "Grain Futures Act," 42 Stat. 998, the title being changed to the present "Commodity Exchange Act" in 1936, 49 Stat. 1491. The constitutionality of regulating futures trading under the Commerce Clause, Art. I, § 8, cl. 3, of the Constitution was upheld in *Board of Trade of the City of Chicago* v. *Olsen,* 262 U. S. 1 (1923).

The following will indicate the content and scope of the Act: Trading in futures is to be done only by or through a member of a "contract market," 7 U. S. C. §§ 6 and 6h. The Commodity Exchange Commission (Commission) may take measures to prevent

stantial amendments being in 1968—makes dealing in commodity futures a crime except when undertaken by or through members of a board of trade that meets certain statutory criteria and that is designated as a "contract market" by the Secretary. 7 U. S. C. §§ 6 and 6h.[3] Contract markets must file with the Sec-

excessive speculation, *id.*, § 6a, and certain other transactions are prohibited, *id.*, §§ 6a and 6c. Futures commission merchants and floor brokers must register with the Secretary of Agriculture (Secretary) (a member of the Commission, *id.*, § 2), *id.*, §§ 6d and 6e, and to do so, must meet certain financial requirements, *id.*, § 6f. Customers' money, securities, and property must be handled in a prescribed fashion, *id.*, § 6d, and futures commission merchants and floor brokers must meet reporting and recordkeeping requirements established by the Secretary and keep such books and records open for inspection, *id.*, § 6g. Specified transactions must be reported to the Secretary and books and records of same kept, which shall be subject to inspection, *id.*, § 6i. To be designated a "contract market" a board of trade must meet certain conditions and requirements, *id.*, § 7; and a contract market must perform certain duties, *id.*, § 7a. The contract market can have its designation suspended or revoked, *id.*, §§ 7b and 8, or be subjected to cease-and-desist orders, *id.*, § 13a. For stated reasons persons may be excluded from trading on a contract market by the Secretary, *id.*, § 9, or be subjected to a cease-and-desist order, *id.*, § 13b, and it is unlawful for such persons to trade while banned, *id.*, § 12b. Contract markets are not to exclude from membership cooperative associations or corporations except under certain conditions, *id.*, § 10a. A contract market may have its designation vacated and subsequently be redesignated, *id.*, § 11. The Secretary may make investigations and reports, *id.*, § 12, and may disclose the names of traders on commodity markets, *id.*, § 12–1. Certain acts may be punished as felonies or misdemeanors, *id.*, §§ 13, 13–1, 13a, and 13b. Persons involved in violations of the Act or rules issued thereto may be held responsible as principals, *id.*, § 13c (a). The Secretary or Commission is not required to report minor violations of the Act "for prosecution, whenever it appears that the public interest does not require such action," *id.*, § 13c (b).

[3] Title 7 U. S. C. § 6 provides:

"It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or exe-

retary their bylaws, rules, and regulations, and have the express statutory duty to enforce all such prescriptions (1) "which relate to terms and conditions in

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cute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of commodity for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in commodity or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering commodity sold, shipped, or received in interstate commerce for the fulfillment thereof, except, in any of the foregoing cases, where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market,' as hereinafter provided in this chapter, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided,* That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice."

Title 7 U. S. C. § 6h states:

"It shall be unlawful for any person—

"(1) to conduct any office or place of business anywhere in the United States or its territories for the purpose of soliciting or accepting any orders for the purchase or sale of any commodity for future delivery, or for making or offering to make any contracts for the purchase or sale of any commodity for future delivery, or for conducting any dealings in commodities for future delivery, that are or may be used for

"(A) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or

"(B) determining the price basis of any such transaction in interstate commerce, or

"(C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof,

"if such orders, contracts, or dealings are executed or consum-

contracts of sale . . . or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture pursuant to" his statutory authority, *id.*, § 7a (8),[4] or (2) "which provide minimum financial

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mated otherwise than by or through a member of a contract market; or

"(2) falsely to represent such person to be a member of a contract market, or the representative or agent of such member, or to be a futures commission merchant registered under this chapter, or the agent of such registered futures commission merchant, in soliciting or handling any order or contract for the purchase or sale of any commodity in interstate commerce or for future delivery, or falsely to represent in connection with the handling of any such order or contract that the same is to be or has been executed on, or by or through any member of, any contract market."

[4] Title 7 U. S. C. § 7a provides:

"Each contract market shall—

. . . . . .

"(8) Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture pursuant to paragraph (7) of section 12a of this title; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been so disapproved . . . ."

Disapproval by the Secretary is to be pursuant to 7 U. S. C. § 12a, which provides:

"The Secretary of Agriculture is authorized—

. . . . . .

"(7) to disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market or by the governing board thereof or any committee which relates to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relates to other trading requirements, when he finds that such bylaw, rule, regulation, or resolution violates or will violate any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder."

standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture," *id.*, § 7a (9).[5] If any contract market is not enforcing its rules of government made a condition of its designation, or if it is violating any provision of the Act, the Commission, an official agency established by the Act,[6] is authorized, upon notice and hearing and subject to judicial review, to suspend or revoke the designation of the board of trade as a contract market, *id.*, § 8 (a),[7] or may

[5] Title 7 U. S. C. § 7a states:

"Each contract market shall—

. . . . . .

"(9) Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture."

[6] The Commission is composed of the Secretaries of Agriculture and Commerce and the Attorney General, or their designees, the Secretary of Agriculture or his designee serving as chairman, 7 U. S. C. § 2.

[7] Title 7 U. S. C. § 8 (a) provides:

"The commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a 'contract market' upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided,* That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the commission such board of trade appeals to the court of appeals for the circuit in which it has its principal place of business, by filing with the clerk of such court a written petition praying that the order of the

order such contract market and any director, officer, agent, or employee to cease and desist from such conduct, *id.*, § 13a.[8] Under the relevant regulations, any inter-

commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, who shall thereupon notify the other members of the commission and file in the court the record in such proceedings, as provided in section 2112 of Title 28. The testimony and evidence taken or submitted before the commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the commission or may direct it to modify its order. No such order of the commission shall be modified or set aside by the court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the commission."

[8] Title 7 U. S. C. § 13a states:

"If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and if such contract market, director, officer, agent, or employee thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon

ested person having information concerning such violation may request the Commission to institute proceedings, or the Commission may initiate proceedings on its own motion,[9] and there is provision for persons seeking intervention in such proceedings.[10]

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conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such order continues shall be deemed a separate offense."

[9] Title 17 CFR § 0.53 provides:

"(a) *Application to institute proceedings.* Any interested person having any information of any violation of the act, or of any of the orders or regulations promulgated thereunder, by any board of trade or by any director, officer, agent, or employee thereof may file with the Act Administrator [see *infra*] an application requesting the institution of such proceeding as is authorized under the act. Such application shall be in writing, signed by or on behalf of the applicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains." (The "Act Administrator," who "administers and is responsible for the enforcement of the [Act]," *id.*, § 140.1, is the Administrator of the Commodity Exchange Authority, United States Department of Agriculture, *id.*, § 0.52 (r).)

"(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner provided in this subpart, or may be called as a witness, and the applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

"(c) *Who may institute.* If, after investigation [by regional offices of the Commodity Exchange Authorities, *id.*, § 140.1 (d)] of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on its own motion, the Commission has reason to believe that any board of trade or any director, officer, agent, or employee thereof has violated or is violating any of the provisions of the act, or of any of the regulations promulgated thereunder, the Commission will institute an appropriate pro-

[*Footnote 10 begins on p. 298*]

II

It was against this statutory background that petitioner alleged he had been deprived of his membership contrary to the rules of the Exchange, the Commodity

ceeding: *Provided,* That in any case, except one of willfullness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of any designation of a contract market, facts or conditions which may warrant such action shall be called to the attention of the market in writing and such market shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued by the Commission and will not be instituted upon pleadings filed by private persons."

Should the Commission institute proceedings after investigation, *ibid.,* unless the respondent is allowed by the Commission to consent to an order, *id.,* § 0.54, proceedings are held before a referee from the Department of Agriculture, *id.,* §§ 0.52 (p) and (s) and 0.55 *et seq.,* an oral hearing being granted on request, *id.,* § 0.61. The Commission prepares its order based on consideration of the record of the proceedings, including a report prepared by the referee, *id.,* §§ 0.66, 0.68, and 0.70, oral argument being held before the Commission in certain instances, *id.,* § 0.69.

[10] Title 17 CFR § 0.58 states:

"At any time after the institution of a proceeding, and before it has been submitted to the Commission for final consideration, the Commission or the referee may, upon petition in writing and for good cause shown, permit any person to intervene therein. The petition shall state with preciseness and particularity: (a) The petitioner's relationship to the matters involved in the proceeding, (b) the nature of the material he intends to present in evidence, (c) the nature of the argument he intends to make, (d) any other reason that he should be allowed to intervene."

As indicated in n. 2, *supra,* while the Commission has been vested with authority to take disciplinary action against a contract market and its officers, agents, and employees, the Secretary has been given such authority against persons other than contract markets, including individuals, associations, partnerships, corporations, and trusts, 7 U. S. C. § 2, and may either exclude them from trading on a contract market, *id.,* § 9, or may issue a cease-and-desist order, *id.,*

Exchange Act, and the Sherman Act. And it was in this context that the Court of Appeals, having concluded that the specific Exchange rules allegedly violated [11] were within the bounds of adjudicative and remedial jurisdiction of the Commodity Exchange Commission, directed the District Court to hold its hand and afford the opportunity for administrative consideration of the dispute between petitioner and the alleged coconspirator-defendants.

The problem to which the Court of Appeals addressed itself is recurring.[12] It arises when conduct seemingly

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§ 13b. The regulations providing for institution of and intervention in disciplinary proceedings before the Secretary, 17 CFR §§ 0.3 and 0.8, are virtually identical to the regulations for Commission proceedings quoted above and in n. 9, *supra*.

[11] Rules the Court of Appeals found related to "trading requirements" were Rule 307, which provides for the sale of membership, and Rule 322, which concerns qualifications to trade.

Rule 307 provides:

"Membership in the Exchange is a personal privilege subject to sale and transfer only as authorized herein. When a member or the legal representative of a deceased or incompetent member desires to sell a membership, he shall sign an authorization to transfer in such form as shall be prescribed by the Board. An individual who desires to purchase a membership shall notify the President to such effect and when an agreement with a seller shall have been made shall sign a confirmation of purchase and shall deposit with the President a transfer fee in the amount of $100.00 and also a certified check, payable to the Exchange, for the amount of the agreed purchase price."

Rule 322 states:

"A member may be qualified to trade on the Spot and To-Arrive Calls provided he has been authorized by a firm or corporation which has been qualified pursuant to Rule 810 to engage in trading on said calls. A member may be qualified to trade on the futures call provided he has been authorized by a firm or corporation which is a Clearing Member."

[12] See, *e. g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966); *United States* v. *Philadelphia National Bank*, 374

within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress. Often, but not always, the other regime includes an administrative agency with authority to enforce the major provisions of the statute in accordance with that statute's distinctive standards, which may or may not include concern for competitive considerations.

Silver v. *New York Stock Exchange,* 373 U. S. 341 (1963), was a case where the conduct challenged in an antitrust complaint was not within the jurisdiction of an administrative agency but was nevertheless claimed to be immune from antitrust challenge by virtue of the Securities Exchange Act of 1934. Silver sought to recover damages allegedly suffered when his wire connections with Exchange members were terminated without notice or hearing under Exchange rules adopted pursuant to the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* Under this Act, the Securities and Exchange Commission had general power to approve or disapprove Exchange rules, but it had no authority to deal with challenges, such as Silver's, to specific applications of Exchange rules. Moreover, the statute conferred on the Exchange no express exemption from the antitrust laws. We declined to hold that Congress intended to oust completely the antitrust laws and supplant them with the self-regulatory scheme authorized

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U. S. 321 (1963); *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963); *Pan American World Airways* v. *United States,* 371 U. S. 296 (1963); *California* v. *FPC,* 369 U. S. 482 (1962); *United States* v. *Radio Corp. of America,* 358 U. S. 334 (1959); *Far East Conference* v. *United States,* 342 U. S. 570 (1952); *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439 (1945); *United States* v. *Borden Co.,* 308 U. S. 188 (1939); *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474 (1932); *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 156 (1922).

by the Exchange Act. Repeal of the antitrust laws was to be implied "only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U. S., at 357. The question thus became the extent to which, if any, the "character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action." *Id.*, at 358. Conceding that the "entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act," *id.*, at 360, and hence that "particular instances of exchange self-regulation which fall within the scope and purpose of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim," *id.*, at 361, the Court finally concluded that nothing in the terms or policy of the Act required or contemplated that a self-regulating exchange be permitted to impose serious deprivations without notice and opportunity for a hearing, and that neither the statute nor Exchange rules posed any legal barrier to the antitrust action.

In arriving at this conclusion, the Court expressly noted that the Securities and Exchange Commission had no authority to review specific instances of enforcement of Exchange rules; that this "obviate[d] any need to consider whether petitioners were required to resort to the Commission for relief before coming into court," *id.*, at 358, and avoided "any problem of conflict or coextensiveness of coverage with the agency's regulatory power," *ibid.*; and that if there had been such jurisdiction in the Commission with "ensuing judicial review . . . a different case would arise concerning exemption from

the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." *Id.*, at 358 n. 12.

That "different case" is now before us, but in the context of the Commodity Exchange Act, and we agree with the Court of Appeals that, given administrative authority to examine the Ricci-Exchange dispute in the light of the regulatory scheme and Exchange rules, the antitrust action should be stayed until the administrative officials have had opportunity to act. This judgment rests on three related premises: (1) that it will be essential for the antitrust court to determine whether the Commodity Exchange Act or any of its provisions are "incompatible with the maintenance of an antitrust action," *id.*, at 358; (2) that some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question.[13]

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[13] Thus our judgment is not that Congress intended the Commodity Exchange Act to be the exclusive instrument for the governance of the Exchange and its members. The purpose and structure of the Act and our past cases appear to foreclose any such conclusion. *Carnation Co.* v. *Pacific Westbound Conference, supra; United States* v. *Philadelphia National Bank, supra; Silver* v. *New York Stock Exchange, supra; Pan American World Airways* v. *United States, supra; United States* v. *Borden Co., supra.* Nor do we find that Congress intended the Act to confer general antitrust immunity on the Exchange and its members with respect to that area of conduct within the adjudicative or rule-making authority of the Commission or the Secretary. See *United States* v. *Philadelphia National Bank,* 374 U. S., at 350–354; *California* v. *FPC, supra; Maryland & Virginia Milk Producers* v. *United States,* 362 U. S. 458 (1960); *United States* v. *Radio Corp. of America,* 358 U. S., at 339–352. The Act contains no categorical

As to the first premise, the argument that the Commodity Exchange Act to some extent limits the applicability of the antitrust laws, and may limit them in this case, is plainly substantial. Repeal of the antitrust laws is not to be lightly assumed. *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350 (1963); *Silver* v. *New York Stock Exchange, supra,* at 357; *California* v. *FPC,* 369 U. S. 482, 485 (1962); *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 456–457 (1945); *United States* v. *Borden Co.,* 308 U. S. 188, 198 (1939). But here the express will of Congress is that to deal in commodity futures one must either be, or deal through, a member of a board of trade having specified qualifications and carrying official designation as a contract market. The Act clearly contemplates a membership organization and hence the existence of criteria for the acquisition, transfer, and loss of membership. The Chicago Mercantile Exchange has such membership rules, and it had the statutory duty to enforce them to the extent that they constituted or were related to "trading requirements," 7 U. S. C. § 7a (8). If the transfer of Ricci's membership was pursuant to a valid rule, the immediate question for the antitrust court is whether the rule itself and Ricci's exclusion under it are insulated from antitrust attack. The question has substance, for the Commodity Exchange Act, like the Securities Exchange

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exemption of this kind; indeed, it confers no express exemption at all, not even with respect to conduct that is directed or authorized by the Commission or the Secretary. Moreover, the area of administrative authority does not appear to be particularly focused on competitive considerations; there is no express provision in the Act directing administrative officials to consider the policies of the antitrust laws in carrying out their duties and there is no other indication that Congress intended the adjudicative authority given the Commission and the Secretary to be a complete substitute for judicial enforcement of the antitrust laws. Cf. *California* v. *FPC, supra.*

Act, contemplates that the Exchange and its members will "engage in restraints of trade which might well be unreasonable absent sanction" by the Act. *Silver* v. *New York Stock Exchange, supra,* at 360. See *Board of Trade of the City of Chicago* v. *United States,* 246 U. S. 231, 238 (1918). On the other hand, if, as Ricci alleges, loss of his membership was contrary to Exchange rules, the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commission are exclusive.

The question whether this membership dispute is within the jurisdiction of the Commodity Exchange Commission, the second premise for our judgment, was answered in the affirmative by the Court of Appeals. Because trading in futures may be done only by or through members, the membership rules of the Exchange were held to relate to "trading requirements" and were thus among those rules which the Exchange could not ignore without violating the Act and bringing itself within the jurisdiction of the Commission to adjudicate and remedy any violation "of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary . . . or the commission thereunder . . . ." 7 U. S. C. §§ 8 (a) and 13a. We need not finally decide the jurisdictional issue for present purposes, but there is sufficient statutory support for administrative authority in this area that the agency should at least be requested to institute proceedings.[14]

[14] Mr. Justice Marshall's dissent complains that jurisdiction of the Commodity Exchange Commission is not clear, that the Commission need not institute proceedings, that the complainant must intervene to become a party, and that agency remedies are discretionary. But proceeding by complaint and intervention is not an unusual system for invoking administrative action. And surely if administrative

We also think it very likely that a prior agency adjudication of this dispute will be a material aid in ultimately deciding whether the Commodity Exchange Act forecloses this antitrust suit, a matter that seems to depend in the first instance on whether the transfer of Ricci's membership was in violation of the Act for failure to follow Exchange rules. That issue in turn appears to pose issues of fact [15] and questions about the scope, meaning, and significance of Exchange membership rules. These are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in this case. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 64–65, 65–66 (1956); *Far East Conference* v. *United States*, 342 U. S. 570, 574–575 (1952). They are matters typically lying at the heart of an administrative agency's task and here they appear to be matters that Congress has placed within the jurisdiction of the Commodity Exchange Commission. We should recognize "that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in

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proceedings are sought in vain, there would be no further problem for the antitrust court. In any event it should be pointed out that the regulations require investigation of complaints and provide that "the Commission *will institute* an appropriate proceeding" if investigation reveals reason to believe that the Act is being violated. 17 CFR § 0.53 (c). (Emphasis added.) See n. 9, *supra*.

[15] Likely issues for the factfinder are whether Ricci revoked the transfer authorization before or after he was informed that his membership was transferred; whether the transfer authorization was valid; whether the Trading Company had a lien against Ricci's membership because of its loan to Ricci for the purchase of a membership; whether the Trading Company owed brokerage fees to Ricci; and, if so, whether these brokerage fees could be offset against the debt for the membership purchase.

the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 498 (1958). The adjudication of the Commission, if it is forthcoming, will be subject to judicial review and would obviate any necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision. Cf. *United States* v. *Philadelphia National Bank*, 374 U. S., at 353–354; *Federal Maritime Board* v. *Isbrandtsen Co., supra*, at 498–499. Of course, the question of immunity, as such, will not be before the agency; but if Ricci's complaint is sustained, the immunity issue will dissolve, whereas if it is rejected and the conduct of the Exchange warranted by a valid membership rule, the court will be in a much better position to determine whether the antitrust action should go forward. Affording the opportunity for administrative action will "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to [these] particular circumstances." *Ibid.*

III

MR. JUSTICE MARSHALL'S dissent concedes, as it must, that it is essential for the antitrust court to make proper accommodation "between usual antitrust principles and the self-regulatory and exclusionary powers that the exchanges were obviously intended to exercise." It also concedes that where the regulatory regime is administered by an agency, the antitrust court will stay its hand to permit institution of administrative proceedings if they are "likely to make a meaningful contribution to the resolution of this lawsuit." Our differences thus narrow to whether proceedings in the Commodity Exchange

Commission would be of sufficient aid to justify a stay of this antitrust action.

The dissent asserts that for present purposes the only relevant issue in the antitrust action is "whether either the rules, or their application, serves a legitimate self-regulatory goal," that the Commission has no jurisdiction to determine facts relevant to whether Exchange rules are consistent with or essential to legitimate self-regulatory ends, and that we have mistakenly premised our opinion on the existence of such jurisdiction, without which there is no basis for deferring to agency proceedings.[16] This misapprehends our opinion and fails to come to grips with reality. We make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and Exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regimes: The problem disappears entirely if it is found that there has been a violation of the rule; on the other hand, if it is found that the Exchange has merely followed and enforced its own rules, the antitrust court will be in a posi-

[16] Mr. Justice Marshall's dissent also asserts that because Ricci's complaint asserts a conspiracy, the matter at issue lies beyond any possible self-regulatory goals of the Exchange. But this simply ignores and refuses to accept the factfinding function of the Commission. It also fails to recognize that the allegation simply characterizes as a conspiracy what may be an attempt to invoke the membership rules of the Exchange.

tion to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits.

Accordingly, the judgment is affirmed.

So ordered.

MR. CHIEF JUSTICE BURGER, concurring.

As I read the Court's opinion, it plainly disclaims any resolution of the issue left open in *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963)—namely, the question of which "particular instances of exchange self-regulation" occurring within a statutory scheme providing for self-regulation may be regarded as "justified in answer to the assertion of an antitrust claim" against the Exchange and its members. Indeed, the *Silver* problem is not before us. The Court of Appeals was careful to note that it expressed "no opinion on any antitrust immunity that might result from action or inaction taken by the Commission or the Secretary of Agriculture in this case." 447 F. 2d 713, 720 n. 18.

The Court holds that the Commodity Exchange Commission may materially aid in proper consideration of petitioner's antitrust claims by determining whether respondents violated a rule of the Exchange. The Court's opinion should not be read to suggest that the Commission's resolution of the dispute either will or will not foreclose subsequent application of the antitrust laws.

With this understanding, I join the Court's opinion.

MR. JUSTICE DOUGLAS, dissenting.

While I concur in my BROTHER MARSHALL'S dissent, I wish to add that even if the Commodity Exchange Commission were empowered to make a determination regarding the relief sought by petitioner, it would appear to be an anomaly to direct the plaintiff in a civil action to a federal supervising agency for a determination as to

whether the regulations which it is charged to enforce have been violated, when the agency has, by its inaction, already shown every indication of sanctioning the alleged violation. By remanding, we are requiring the petitioner to seek from the regulators an admission of their failure to regulate (or negligence in regulating).

The odds of petitioner's getting the Commodity Exchange Commission now to find a violation in contradiction of its past inaction do not, in my view, justify the expense and delay to the petitioner. In the interests of orderly and efficient judicial administration, parties are not generally required to engage in futile gestures. This inequity is even more pronounced since, as MR. JUSTICE MARSHALL points out in his dissent, the Commodity Exchange Commission has neither the authority nor power to make a determination on the issues underlying the civil action.

My concern about remitting parties in federal court litigation to state courts or to federal administrative agencies for resolution of collateral questions of law is stated in my dissent in *Clay* v. *Sun Insurance Office,* 363 U. S. 207, 227–228; see also *England* v. *Louisiana Board of Medical Examiners,* 375 U. S. 411, 429 (concurring opinion). The road this litigant is now required to travel to obtain justice is equally long and expensive and available only to those with long purses, even though he is remitted only to a federal regulatory agency.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, dissenting.

The majority accurately describes the provisions of the Commodity Exchange Act and the facts of this case. But my Brethren nowhere explain why the lower court should stay its hand pending action by an agency which in all likelihood lacks the statutory power to

resolve an issue in the lawsuit. Instead of carefully balancing the advantages and disadvantages of deferral to the agency, the Court seems to apply a mechanical test which requires judicial deference despite the substantial probability that the agency will have nothing of relevance to contribute. The principle that should govern this case can be stated quite adequately in a single sentence: An agency cannot have primary jurisdiction over a dispute when it probably lacks jurisdiction in the first place. The majority seemingly departs from this principle [1] and, hence, needlessly bifurcates and complicates a suit that could readily be resolved by the District Court. I must therefore respectfully dissent.

I

At the outset, it should be noted that the Commodity Exchange Act fails to provide petitioner with a means by which he can require the Commodity Exchange Commission or the Secretary of Agriculture to consider his case. The Act provides that "[t]he Secretary of Agriculture is *authorized* . . . to disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market." 7 U. S. C. § 12a (7) (emphasis added). Similarly, "[i]f any contract market is not en-

[1] The majority suggests that the Court "need not finally decide the jurisdictional issue for present purposes." Rather, it holds that the likelihood of agency jurisdiction is sufficient to require judicial abstention. This approach could well lead to an extraordinary result. Since the Court expressly leaves the jurisdictional issue open, it is possible that at some later date, it will be held that the agency lacks jurisdiction over this dispute. In that event, petitioner will have been forced to resort to possibly lengthy administrative proceedings, only to be told at their conclusion that they were irrelevant to his case. My approach is somewhat different. I submit that the jurisdiction of the relevant agency is a threshold issue in cases such as this and that before a court defers to agency judgment, it should authoritatively determine whether the agency has power to act.

forcing or has not enforced its rules of government made a condition of its designation . . . the commission *may* . . . make and enter an order directing that such contract market . . . shall cease and desist from such violation." 7 U. S. C. § 13a (emphasis added). But although the relevant regulations provide a means by which a private party may report apparent violations—see 17 CFR §§ 0.3 (a), 0.53 (a)—the Act nowhere requires the Secretary or the Commission to act on these reports. Cf. *Vaca* v. *Sipes,* 386 U. S. 171, 182 (1967). On the contrary, the Act expressly provides that "[n]othing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action." 7 U. S. C. § 13c (b).

Moreover, even if the Secretary or the Commission does institute proceedings at petitioner's behest, it is by no means certain that petitioner will be permitted to participate in those proceedings. The Commission's rules state that "[t]he person filing an application [to institute proceedings] shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant *may* be permitted to intervene therein . . . or may be called as a witness." 17 CFR § 0.53 (b) (emphasis added). See also 17 CFR § 0.3 (b). Although Commission rules provide for the intervention of private parties, the Commission apparently has unfettered discretion in deciding whether to allow intervention. See 17 CFR § 0.58. See also 17 CFR § 0.8.[2]

[2] I do not intend to foreclose the possibility that petitioner might be able to intervene under § 6 (a) of the Administrative Procedure Act, 5 U. S. C. § 555 (b). See, *e. g., American Communications Assn.* v. *United States,* 298 F. 2d 648, 650 (CA2 1962). Petitioner's

Should the Commission or the Secretary not allow intervention in this case, this Court's decision will leave the District Judge on the horns of a serious dilemma. Normally, when a court stays its hand to allow agency proceedings, the result of those proceedings may not be collaterally attacked when the case returns to the court. See, *e. g., Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic,* 400 U. S. 62, 71–72 (1970). But if the Commission decides a major issue in this lawsuit without allowing petitioner to intervene, failure to permit collateral attack would result in petitioner's antitrust case being resolved against him without his participation. On the other hand, if the District Court undertakes a *de novo* reconsideration of the issues submitted to the Commission, the Commission's decision, together with the concomitant delay, will be for naught.

II

The Court, then, remands petitioner to a procedure which he has no power to invoke, in which he has no right to participate if it is invoked, and which cannot provide the remedy he seeks even if he is allowed to participate.[3] Yet all this might be justifiable if either the Commission or the Secretary were likely to make a meaningful contribution to the resolution of this lawsuit. We have held that "[w]hen there is a basis for judicial action, independent of agency proceedings, courts

ability to invoke this provision is, however, problematical at best. Cf. *Easton Utilities Comm'n* v. *AEC,* 137 U. S. App. D. C. 359, 362–365, 424 F. 2d 847, 850–853 (1970). See generally Shapiro, Some Thoughts on Intervention before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 764–767 (1968).

[3] Although the Commission may issue cease-and-desist orders and recommend criminal prosecutions, it, of course, lacks authority to award treble damages.

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." *Id.*, at 68. The reason for this policy is self-evident: "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States,* 342 U. S. 570, 574 (1952).

Thus, if the Commodity Exchange Commission had jurisdiction over some aspect of this suit and special expertise in the area of its jurisdiction, a case could, perhaps, be made for awaiting its decision. For example, if the Commission had been given the power to grant general immunity to antitrust violators, sound judicial administration would require consultation with it before proceeding with the antitrust suit. But, as the majority itself recognizes, there is no indication that Congress intended to grant the Commission any such power. As this Court held in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213, 218 (1966), "[w]e have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." In practice, this principle has meant that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350–351 (1963) (footnotes omitted). Such repugnancy

has been found to exist only in those rare cases where regulation of the industry is pervasive and Congress plainly intended to substitute Government supervision for competition. See, *e. g., Pan American World Airways* v. *United States,* 371 U. S. 296 (1963). Cf. *United States* v. *Radio Corp. of America,* 358 U. S. 334 (1959).

Obviously, Congress has not granted the Commission the sort of pervasive power over commodity exchanges that would give rise to antitrust exemption. On the contrary, although the Commission and the Secretary have some general policing duties, day-to-day regulation has been largely left to the industry itself. Where, as here, the industry is given the power to control its own affairs, it is particularly important to make certain that this power is not abused for the purpose of eliminating competition. Cf. *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963).

The majority cannot rely, then, on the Commission's general power to immunize antitrust violations. Its argument, as I understand it, is more subtle and, at the same time, more attenuated. As we recognized in *Silver* v. *New York Stock Exchange, supra,* the very purpose of an exchange is to exclude nonmembers from participation in trading. Were it not for the legislative authorization of such exchanges, they would constitute group boycotts that are *per se* violations of the Sherman Act. See, *e. g., Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U. S. 207 (1959). Thus, although Congress cannot be taken to have granted total antitrust immunity to trading exchanges, some accommodation must be reached between usual antitrust principles and the self-regulatory and exclusionary powers that the exchanges were obviously intended to exercise. In *Silver,* the Court reached such an accommodation by holding that "exchange self-regulation is to be regarded

as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act." 373 U. S., at 361. Thus, if an exchange rule serves a valid self-regulatory purpose, the mere fact that it excludes some individuals from competition does not mean that an antitrust violation has been made out. But where, as in *Silver* itself, the rule fails to serve any legitimate self-regulatory goal, its exclusionary effect can lay the predicate for a Sherman Act violation.

Applying *Silver* to the facts of this case, the majority argues that the Commission has primary jurisdiction to determine facts relevant to the question whether the Chicago Mercantile Exchange's rules and its application of those rules are in conformity with the self-regulatory purposes of the Commodity Exchange Act. Superficially, at least, that argument has considerable force. It is marred, however, by two flaws which, in my view, make it ultimately fallacious.

First, it is important to note that petitioner's complaint does not merely allege that he has been excluded from trading or that an Exchange rule has been broken. Rather, he maintains that the Exchange and certain of its members entered a deliberate conspiracy against him and that this was done "maliciously, wilfully, knowingly, unlawfully and without just cause or provocation, with the unlawful and illegal intent, purpose and object of restraining and preventing plaintiff from exercising an essential and necessary part of his lawful trade or business in interstate commerce." Whatever the legitimate self-regulatory goals of the Chicago Mercantile Exchange, I cannot believe that they include the deliberate and malicious suppression of competition. Surely, the courts do not need the Commodity Exchange Commission to tell them that such conduct is antithetical to the purposes of the Commodity Exchange Act. We have held that prin-

ciples of administrative comity preclude courts from finding antitrust violations "only . . . when the defendants' conduct is arguably lawful" under the administrative scheme. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213, 222 (1966). I would apply that principle here and hold that deliberate conspiracies with the sole purpose of suppressing competition are not "arguably lawful" under the Commodity Exchange Act.[4]

To be sure, it may ultimately develop that petitioner is unable to substantiate all of his allegations and that the actions of the Exchange are less sinister than he has made out. Petitioner might be required to submit affidavits before trial demonstrating that his allegations of a deliberate conspiracy are factually supported in order to forestall a remand to the Commission. And if it becomes clear at any time during trial that the conspiracy allegations are insubstantial, there will then be time enough to reconsider the propriety of a delay pending Commission action. But I would not deprive petitioner of immediate access to the courts until he has had an opportunity to prove that the case is as clear as he says it is.

Moreover, even if petitioner's allegations are for some reason insufficient to forestall a remand to the Commission, I still doubt that the Court of Appeals acted properly in ordering a stay of the litigation. The majority's position is premised on the assumption that the Com-

[4] This position does not, as the majority argues, "[ignore] . . . the factfinding function of the Commission." Rather, it is premised on the seemingly obvious proposition that there must be a jurisdictional predicate to support agency factfinding. I can find nothing in the Commodity Exchange Act that authorizes the Commission to determine whether exchanges and their members are engaged in conspiracies or whether the actions taken by exchanges are motivated by anticompetitive purposes. Nor is it clear to me why such factfinding might be made in the course of determining whether an Exchange rule had been violated.

mission has jurisdiction to determine facts relevant to whether Exchange rules, or the application of those rules, is consistent with legitimate self-regulatory ends.[5] But a careful examination of the Act makes plain that this assumption is simply incorrect.[6] Neither the agency nor the Secretary has been granted a roving commission to oversee the proper functioning of the various exchanges. Rather, the powers conferred in the Act are limited and discrete, and none of them grants to the Commission the tools necessary for resolving any issue in this dispute.

The Commission does have authority to oversee the exchanges' administration of their own rules. 7 U. S. C. § 7a (8) requires exchanges to "[e]nforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to . . . trading requirements," and 7 U. S. C. § 13a permits the Commission to issue a cease-and-desist order "[i]f any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title." But it should be obvious that these provisions do not

[5] But cf. n. 1, *supra*.

[6] To be sure, as the majority recognizes, the Commission does have factfinding power and, in the course of determining whether the Exchange rules have been violated, it might exercise that power to resolve the underlying facts in dispute. But the majority cites no cases where the mere factfinding power of an agency has been used to invoke primary jurisdiction in the absence of an issue of law or a mixed question of law and fact common to the agency proceeding and the court action. The Commission may have special expertise that will aid it to determine whether a given rule has been violated or whether the rule is consistent with the Act. But it has no special ability to determine pure questions of fact unrelated to the legal standard relevant in the antitrust suit. On the contrary, I had thought that it was our court system—with its long tradition of jury trials, adversary proceedings, and highly developed evidentiary principles—that was "expert" in the simple factfinding process.

authorize the Commission to resolve the *Silver* issue. The quoted sections permit the Commission to determine whether the rules made by an exchange are being enforced. But they do not permit the Commission to decide whether either the rules, or their application, serves a legitimate self-regulatory goal, which is the only relevant issue in the antitrust suit. Thus, it is entirely possible that although the Chicago Mercantile Exchange has respected its own rules to the letter, those rules themselves are impermissible under the Sherman Act. Similarly, even if the rules are facially permissible, it is possible that, as applied in this case, they restrain competition without any offsetting self-regulatory gain. The mere fact that an exchange is obeying its own rules—the only question that 7 U. S. C. §§ 7a (8) and 13a permit the Commission to answer—does not tell us whether either the rules or their application meets the *Silver* test.

The Secretary is given supplementary power to invalidate certain exchange rules. But this power, too, is extremely limited. Title 7 U. S. C. § 12a (7) empowers the Secretary to "disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market . . . which relates to . . . trading requirements, when he finds that such bylaw, rule, regulation, or resolution violates or will violate any of the provisions of *this chapter,* or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder." (Emphasis added.) The "chapter" referred to is, of course, the Commodity Exchange Act, not the Sherman Act, and no provision of the Commodity Exchange Act incorporates Sherman Act principles. It follows that § 12a (7) does not empower the Secretary to invalidate exchange rules because they conflict with antitrust policy.

Moreover, as noted above, the restrictions placed on the exchanges by the Act are far from pervasive, and the Secretary's power to invalidate rules is therefore similarly restricted. Surely, this power does not include the ability to invalidate any rule that fails to serve a self-regulatory end. Such a reading of the Act would mean that Congress thought it had prohibited everything an exchange might do that would not serve self-regulatory purposes—a reading that defies common sense. Thus, if the Secretary were to refuse to invalidate the rules involved in this action, his decision would only mean that those rules were not prohibited by any specific provision of the Commodity Exchange Act. The decision could in no way be taken to mean that the rule serves any useful purpose or that it meets the *Silver* requirement.[7]

III

I do not mean to suggest that the Commission's consideration of this case is certain to prove totally useless when the District Court ultimately resumes its deliberations. Should the Secretary invalidate the rules that the Commission relies on, for example, his action would materially aid petitioner, although his claim would still

[7] The *Silver* case itself neatly illustrates this fact. In *Silver*, the rule in question provided for the termination of wire connections with Exchange members without notice or hearing. This Court held that the failure to provide notice or hearing served no legitimate self-regulatory goal and therefore held that an antitrust violation had been made out. Had the *Silver* case arisen in the context of the Commodity Exchange Act, the Secretary could not have invalidated the Exchange rule since no provision of the Act requires an exchange to hold hearings before it takes disciplinary action. But, of course, the Secretary's decision not to invalidate the rule would in no way have changed the Court's ultimate conclusion that the rule served no valid self-regulatory purpose. Hence, invocation of the Secretary's primary jurisdiction would have been a useless act.

not be conclusively established since the Exchange's actions might be justified by a legitimate regulatory purpose, even though the rule relied upon violated a provision of the Act. Similarly, the Commission may make findings of fact or statements as to the law within areas of its expertise which the court might find helpful.

But I had not thought that petitioner need meet the burden of showing that resort to administrative remedies would be totally useless before securing adjudication from a court. Indeed, in virtually every suit involving a regulated industry, there is something of value that an administrative agency might contribute if given the opportunity. But we have never suggested that such suits must therefore invariably be postponed while the agency is consulted.

It has been argued that the doctrine of primary jurisdiction involves a mere postponement, rather than relinquishment of judicial jurisdiction. See, *e. g.*, 3 K. Davis, Administrative Law Treatise 3–4 (1958). However, that observation should not be taken to mean that invocation of the doctrine therefore imposes no costs. On the contrary, in these days of crowded dockets and long court delays, the doctrine frequently prolongs and complicates litigation. More fundamentally, invocation of the doctrine derogates from the principle that except in extraordinary situations, every citizen is entitled to call upon the judiciary for expeditious vindication of his legal claims of right. As we have said in a somewhat different context "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie* v. *Connecticut,* 401 U. S. 371, 377 (1971). And surely the right to a "meaningful opportunity to be heard" comprehends within it the right to be heard without unreasonable delay. This

principle is especially worthy of protection in the antitrust field where it is unmistakably clear that Congress has given courts, rather than agencies, the primary duty to act. Cf. *California* v. *FPC,* 369 U. S. 482, 487–490 (1962).

To be sure, judicial deference to agency jurisdiction remains important, particularly in those areas where the responsibilities of judges and administrators meet and overlap. But the primary jurisdiction doctrine, like the related exhaustion requirement, must not be "applied blindly in every case" without "an understanding of its purposes and of the particular administrative scheme involved." *McKart* v. *United States,* 395 U. S. 185, 193, 201 (1969). Wise use of the doctrine necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay. Where the plaintiff has no means of invoking agency jurisdiction, where the agency rules do not guarantee the plaintiff a means of participation in the administrative proceedings, and where the likelihood of a meaningful agency input into the judicial process is remote, I would strike a balance in favor of immediate court action. Since the majority's scale is apparently differently calibrated, I must respectfully dissent.

COUCH *v.* UNITED STATES ET AL.

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

No. 71–889. Argued November 14, 1972—Decided January 9, 1973

Petitioner challenges an Internal Revenue Service (IRS) summons directing an accountant, an independent contractor with numerous clients, to produce business records that she had been giving to him for preparation of her tax returns from 1955 to 1968, when the summons was issued. The District Court and the Court of Appeals concluded that the privilege against self-incrimination asserted by petitioner was not available. *Held:* On the facts of this case, where petitioner had effectively surrendered possession of the records to the accountant, there was no personal compulsion against petitioner to produce the records. The Fifth Amendment therefore constitutes no bar to their production by the accountant, even though the IRS tax investigation may entail possible criminal as well as civil consequences. Nor does petitioner, who was aware that much of the information in the records had to be disclosed in her tax returns, have any legitimate expectation of privacy that would bar production under either the Fourth or Fifth Amendment. Pp. 327–336.

449 F. 2d 141, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 337. DOUGLAS, J., *post*, p. 338, and MARSHALL, J., *post*, p. 344, filed dissenting opinions.

John G. Rocovich, Jr., argued the cause for petitioner. With him on the briefs was *Claude D. Carter.*

Lawrence G. Wallace argued the cause for the United States et al. On the brief were *Solicitor General Griswold, Assistant Attorney General Crampton, Keith A. Jones, John P. Burke,* and *John M. Brant.*

MR. JUSTICE POWELL delivered the opinion of the Court.

On January 7, 1970, the Government filed a petition in the United States District Court for the Western District of Virginia, pursuant to 26 U. S. C. §§ 7402 (b) and 7604 (a),[1] seeking enforcement of an Internal Revenue summons in connection with an investigation of petitioner's tax liability from 1964–1968. The summons was directed to petitioner's accountant for the production of:

> "All books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer." [2]

The question is whether the taxpayer may invoke her Fifth Amendment privilege against compulsory self-incrimination to prevent the production of her business and tax records in the possession of her accountant.

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[1] SEC. 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."

SEC. 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."

[2] App. 59–60.

Both the District Court [3] and the Court of Appeals for the Fourth Circuit [4] held the privilege unavailable. We granted certiorari, 405 U. S. 1038.

Petitioner is the sole proprietress of a restaurant. Since 1955 she had given bank statements, payroll records, and reports of sales and expenditures to her accountant, Harold Shaffer, for the purpose of preparing her income tax returns. The accountant was not petitioner's personal employee but an independent contractor with his own office and numerous other clients who compensated him on a piecework basis. When petitioner surrendered possession of the records to Shaffer, she, of course, retained title in herself.

During the summer of 1969, Internal Revenue Agent Dennis Groves commenced an investigation of petitioner's tax returns. After examining her books and records in Shaffer's office with his permission, Groves found indications of a substantial understatement of gross income. Groves thereupon reported the case to the Intelligence Division of the Internal Revenue Service.

Special Agent Jennings of the Intelligence Division next commenced a joint investigation with Groves to determine petitioner's correct tax liability, the possibility of income tax fraud and the imposition of tax fraud penalties, and, lastly, the possibility of a recommendation of a criminal tax violation. Jennings first introduced himself to petitioner, gave her *Miranda* warnings

[3] The District Court held that "[s]ince, at the time the summons was served, the taxpayer, Lillian V. Couch, was not in possession of the books, records and documents described in the summons, she may not assert any Fifth Amendment privilege against self-incrimination as a bar to the enforcement of the summons." App. 6, 11. The opinion of the District Court (WD Va.) is not reported.

[4] The Court of Appeals also noted that the answer to petitioner's Fifth Amendment contentions lay in the fact that "the records were not in the intervenor's [taxpayer's] possession but were in the custody of her accountant," 449 F. 2d 141, 143 (1971).

as required by IRS directive, and then issued the summons to Shaffer[5] after the latter refused to let him see, remove, or microfilm petitioner's records.

When Jennings arrived at Shaffer's office on September 2, 1969, the return day of the summons, to view the records, he found that Shaffer, at petitioner's request, had delivered the documents to petitioner's attorney. Jennings thereupon petitioned the District Court for enforcement of the summons, and petitioner intervened, asserting that the ownership of the records warranted a Fifth Amendment privilege to bar their production.[6]

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[5] The summons, which is printed in full in App. 59–60, was issued on August 18, 1969, pursuant to 26 U. S. C. § 7602, which provides:

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 of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of 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 required to perform the act, or any officer or employee of such person, 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 required to perform the act, 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."

[6] Petitioner also claimed that enforcement of the summons would violate her Fourth Amendment right to be secure from unreasonable searches and seizures. We agree with the Government, however, that "this claim is not further articulated and does not appear to

I

It is now undisputed that a special agent is authorized, pursuant to 26 U. S. C. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences.[7] In *Donaldson* v. *United States*, 400 U. S. 517 (1971), the Court upheld such a summons, noting that:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be 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. . . . To draw a line where a special agent appears would require the 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." *Id.*, at 535–536.[8]

The Court in *Donaldson* noted that the taxpayer there had attempted to intervene, pursuant to Fed. Rule Civ. Proc. 24 (a)(2), to bar production of records "in which the taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in his

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be independent of her Fifth Amendment argument." Brief for United States 21–22. See part IV, *infra*.

[7] There is clearly the joint civil and possibly criminal investigatory purpose in the instant case, see *supra*, at 324.

[8] *Donaldson* cautioned only that the summons be issued in good faith and prior to a recommendation for criminal prosecution. 400 U. S., at 536. Neither of those conditions is successfully challenged here.

hands, and which relate to the third person's business transactions with the taxpayer." *Id.,* at 523. The Court quite properly concluded that, under those facts, no absolute right to intervene existed. *Id.,* at 530–531. The instant case, however, presents a different question. Here petitioner does own the business records which the Government seeks to review and the courts below did permit her to intervene. The essential inquiry is whether her proprietary interest further enables her to assert successfully a privilege against compulsory self-incrimination to bar enforcement of the summons and production of the records, despite the fact that the records no longer remained in her possession.

II

The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated by this Court and need not be elaborated. *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892); *Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Miranda* v. *Arizona,* 384 U. S. 436 (1966). By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation. Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth. *United States* v. *White,* 322 U. S. 694, 698 (1944). The Court has thought the privilege necessary to prevent any "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality," *Ullmann* v. *United States,* 350 U. S. 422, 428 (1956).

In *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964), the Court articulated the policies and purposes of the privilege:

> "[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 . . . 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' . . . ."

It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States,* 228 U. S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself"; it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from *him,*" *Holt* v. *United States,* 218 U. S. 245, 252–253 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice.

In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and the order of the District Court enforcing it are directed against the accountant.[9] He, not the taxpayer, is the only one compelled to do anything. And the accountant makes no claim that he may tend to be incriminated by the production. Inquisitorial pressure or coercion against a potentially accused person, compelling her, against her will, to utter self-condemning words or produce incriminating documents is absent. In the present case, no "shadow of testimonial compulsion upon or enforced communication by the accused" is involved. *Schmerber* v. *California,* 384 U. S. 757, 765 (1966).

The divulgence of potentially incriminating evidence against petitioner is naturally unwelcome. But petitioner's distress would be no less if the divulgence came not from her accountant but from some other third party with whom she was connected and who possessed substantially equivalent knowledge of her business affairs. The basic complaint of petitioner stems from the fact of divulgence of the possibly incriminating information, not from the manner in which or the person from whom it was extracted. Yet such divulgence, where it does not result from coercion of the suspect herself, is a necessary part of the process of law enforcement and tax investigation.

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[9] Technically the order to produce the records was directed to petitioner's attorney since, after the summons was served upon the accountant, he ignored it and surrendered the records to the attorney. But constitutional rights obviously cannot be enlarged by this kind of action. The rights and obligations of the parties became fixed when the summons was served, and the transfer did not alter them. See *United States* v. *Zakutansky,* 401 F. 2d 68, 72 (CA7 1968), cert. denied, 393 U. S. 1021 (1969); *United States* v. *Lyons,* 442 F. 2d 1144 (CA1 1971).

III

Petitioner's reliance on *Boyd* v. *United States,* 116 U. S. 616 (1886), is misplaced. In *Boyd,* the person asserting the privilege was in possession of the written statements in question. The Court in *Boyd* did hold that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime," violated the Fourth and Fifth Amendments. *Id.,* at 630. That case did not, however, address or contemplate the divergence of ownership and possession,[10] and petitioner concedes that court decisions applying *Boyd* have largely been in instances where possession and ownership conjoined,[11] see, *e. g., Hill* v. *Philpott,* 445 F. 2d 144 (CA7 1971); *United States* v. *Judson,* 322 F. 2d 460, 63–2 USTC ¶ 9658 (CA9 1963).[12] In *Boyd,* the production order was directed against the owner of the property who, by responding, would have been forced "to produce and authenticate any personal documents or effects that might incriminate him." *United States* v. *White,* 322

[10] A later Court commenting on the *Boyd* privilege noted that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.*" *United States* v. *White,* 322 U. S. 694, 699 (1944). (Emphasis added.)

[11] Brief for Petitioner 13–14.

[12] See also *United States* v. *Cohen,* 388 F. 2d 464, 468 (CA9 1967), where the court, in upholding the right of a possessor, nonowner. to assert the privilege, noted that "it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit." Though the instant case concerns the scope of the privilege for an owner, nonpossessor, the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate.

We do not, of course, decide what qualifies as rightful possession enabling the possessor to assert the privilege.

U. S., at 698. But we reiterate that in the instant case there was no enforced communication of any kind from any accused or potential accused.

Petitioner would, in effect, have us read *Boyd* to mark ownership, not possession, as the bounds of the privilege,[13] despite the fact that possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. It would hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her accountant by letter and conversations in which the accountant took notes, in addition to the accountant's own workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant. Such a holding would thus place unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections.

Other precedents debated by the parties lend no support to petitioner's contention that ownership of documents should determine the availability of the privilege.[14]

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[13] Brief for Petitioner 11–17.

[14] *Burdeau* v. *McDowell*, 256 U. S. 465 (1921), also debated and cited in the briefs, held that the Government may retain for use against their owner in a criminal proceeding incriminating documents which were stolen by private individuals, without any governmental knowledge or complicity, and turned over to the Government. The Court, in denying the owner's privilege, alluded primarily to the absence of any governmental compulsion against the accused, the precise factor considered in the instant case. It is true, as petitioner argues, that the case turns somewhat on a discussion of governmental versus private compulsion and invasion, but it is

In *Perlman* v. *United States,* 247 U. S. 7 (1918), the Court held the privilege unavailable to a party seeking to suppress the admission of incriminating documents and exhibits before a grand jury. The movant's expectations of privacy in the exhibits had, according to the Court, been destroyed when he voluntarily surrendered the exhibits as evidence in a patent infringement case he had earlier brought in Federal District Court. Petitioner's claims of ownership failed to overcome this fact. The Court noted pertinently:

> "But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it

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equally true that the Court in *Burdeau* failed to find any impermissible public compulsion on the owner absent his possession:

"We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself." *Id.,* at 476.

In *Johnson* v. *United States,* 228 U. S. 457 (1913), the Court held that the books and records of a bankrupt transferred to a trustee in bankruptcy could be used as evidence against the bankrupt in a prosecution for concealing money from the trustee. Unlike the instant case, both title and possession passed in that transfer and the records were, in one sense, "published" by it. But the Court, in denying the privilege, recognized that the transfer also succeeded in removing the important element of personal compulsion against the accused, *id.,* at 459, just as, in this case, the nature of the divestment of possession did.

> be and in whosesoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. And to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the 'physical or moral compulsion' exerted." *Id.*, at 15.

Petitioner argues, nevertheless, that grave prejudice will result from a denial of her claim to equate ownership and the scope of the privilege. She alleges that "[i]f the IRS is able to reach her records the instant those records leave her hands and are deposited in the hands of her retainer whom she has hired for a special purpose then the meaning of the privilege is lost." [15] That is not, however, the import of today's decision. We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.[16] But this is not the

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[15] Brief for Petitioner 13. At oral argument petitioner raised a similar concern:

"The Government goes so far as to contend, I believe, with their theory that any time it is out of your actual physical possession it is subject to subpoena . . . . If I were helping you across Constitution Avenue by carrying your briefcase, the Government holds that they could hand me a summons in the middle of Constitution Avenue and seize your documents to use against you in a criminal trial." Tr. of Oral Arg. 14.

[16] See, *e. g., Schwimmer* v. *United States,* 232 F. 2d 855 (CA8 1956), which involved an attorney's partially successful motion to quash two subpoenas *duces tecum* issued in a grand jury proceeding against a corporation where the attorney had stored his office files.

case before us. Here there was no mere fleeting divestment of possession: the records had been given to this accountant regularly since 1955 and remained in his continuous possession until the summer of 1969 when the summons was issued.[17] Moreover, the accountant himself worked neither in petitioner's office nor as her employee.[18] The length of his possession of petitioner's records and his independent status confirm the belief that petitioner's divestment of possession was of such a char-

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See also *United States* v. *Guterma,* 272 F. 2d 344 (CA2 1959), concerning the storage of taxpayer's personal records in a safe in offices of a corporation which the taxpayer had served as Chairman of the Board. Only the taxpayer and an indicted co-defendant knew the combination of the safe, and the corporation had no access to it. The Court of Appeals upheld the taxpayer's assertion of Fifth Amendment privilege as to his personal records in the face of a grand jury subpoena directed to the corporation.

Petitioner argues these cases support her position (Brief for Petitioner 14–15); the Government argues they can be distinguished from the instant case as involving mere custodial safekeeping of records, not disclosure of their information to a third person (Brief for United States 21). We refrain from judging the merits of such distinctions today.

[17] Tr. of Oral Arg. 31.

[18] As we noted, *supra,* at 324, his status is that of an independent contractor. He actually did "very little work for the petitioner," had many other clients, and was compensated by the job. Tr. of Oral Arg. 8.

This is a significant point. The Government noted in oral argument:

"In the Internal Revenue Service practice, so long as the taxpayer has retained possession of the records and they are being used only by his full-time employees or others on the taxpayer's premises, without the taxpayer having relinquished possession and control of the records, we ordinarily in those situations issue the summons to the taxpayer, because it is the taxpayer who has the dominion over the records and the authority to return the summons. And if the taxpayer chooses to plead the privilege against self-incrimination, that is up to the taxpayer." Tr. of Oral Arg. 30.

acter as to disqualify her entirely as an object of any impermissible Fifth Amendment compulsion.

IV

Petitioner further argues that the confidential nature of the accountant-client relationship and her resulting expectation of privacy in delivering the records protect her, under the Fourth and Fifth Amendments, from their production. Although not in itself controlling, we note that no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases, *Falsone* v. *United States,* 205 F. 2d 734 (CA5 1953), cert. denied, 346 U. S. 864; *Gariepy* v. *United States,* 189 F. 2d 459, 463–464 (CA6 1951); *Himmelfarb* v. *United States,* 175 F. 2d 924, 939 (CA9 1949), cert. denied, 338 U. S. 860; *Olender* v. *United States,* 210 F. 2d 795, 806 (CA9 1954). Nor is there justification for such a privilege where records relevant to income tax returns are involved in a criminal investigation or prosecution. In *Boyd,* a pre-income tax case, the Court spoke of protection of privacy, 116 U. S., at 630, but there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he willfully assists in the preparation of a false return. 26 U. S. C. § 7206 (2). His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here

cannot reasonably claim, either for Fourth [19] or Fifth Amendment purposes, an expectation of protected privacy or confidentiality.

V

The criterion for Fifth Amendment immunity remains not the ownership of property but the " 'physical or moral compulsion' exerted." *Perlman,* 247 U. S., at 15. We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.[20] It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws and collection of the revenues.

The judgment of the Court of Appeals is

Affirmed.

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[19] See n. 6, *supra.* The summons satisfied the requirements in *United States* v. *Powell,* 379 U. S. 48, 57–58 (1964), and, as explained above, the necessary expectation of privacy to launch a valid Fourth Amendment claim does not exist. *Katz* v. *United States,* 389 U. S. 347 (1967).

[20] The dissenting opinion of MR. JUSTICE MARSHALL implies that the Court has created a "bright-line rule that no constitutional right of petitioner is violated by enforcing a summons of papers not in her possession." *Post,* at 344. This implication does not reflect accurately the position of the Court. Indeed, it ignores the language of the Court, *supra,* at 333–335, and nn. 15–18. We do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids. Yet, contrary to any intimation in the dissent, we do not adopt any *per se* rule. We also decline to conjecture broadly on the significance of possession in cases and circumstances not before this Court.

MR. JUSTICE BRENNAN, concurring.

I join the opinion of the Court on the understanding that it does not establish a *per se* rule defeating a claim of Fifth Amendment privilege whenever the documents in question are not in the possession of the person claiming the privilege. In my view, the privilege is available to one who turns records over to a third person for custodial safekeeping rather than disclosure of the information, *United States* v. *Guterma,* 272 F. 2d 344 (CA2 1959), cf. *Schwimmer* v. *United States,* 232 F. 2d 855 (CA8 1956); to one who turns records over to a third person at the inducement of the Government, *Stuart* v. *United States,* 416 F. 2d 459 (CA5 1969); to one who places records in a safety deposit box or in hiding; and to similar cases where reasonable steps have been taken to safeguard the confidentiality of the contents of the records.* The privilege cannot extend, however, to the protection of a taxpayer's records conveyed to a retained accountant for use in preparation of an income tax return, where the accountant is himself obligated to prepare a complete and lawful return. 26 U. S. C. § 7206

*In some of these instances, to be sure, the person claiming the privilege would not himself have been the subject of direct Government compulsion. And there is no doubt that the Fifth Amendment is concerned solely with *compulsory* self-incrimination. But surely the availability of the Fifth Amendment privilege cannot depend on whether or not the owner of the documents is compelled personally to turn the documents over to the Government. If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to take them in hand and personally present them to the Government agents. Where the Government takes private records from, for example, a safety deposit box against the will of the owner of the documents, the owner has been compelled, in my view, to incriminate himself within the meaning of the Fifth Amendment.

(2). It is clear on the facts of this case that the taxpayer has voluntarily removed these records from that "'private enclave where [she] may lead a private life . . . ,'" *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964), quoting *United States* v. *Grunewald,* 233 F. 2d 556, 581–582 (CA2 1956) (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957), and for that reason I would affirm the judgment below.

MR. JUSTICE DOUGLAS, dissenting.

I cannot agree with the majority that the privilege against self-incrimination was not available to the petitioner merely because she did not have possession of the documents in question and was not herself subject to compulsory process. The basic concerns which, in my opinion, underlie the privilege are more subtle and far-reaching than mere aversion to the methods of the Inquisition and the Star Chamber and their modern counterparts.[1] The decision today sanctions yet another tool of the ever-widening governmental invasion and oversight of our private lives. As I urged in dissent in *Warden* v. *Hayden,* 387 U. S. 294, 325, without the right of privacy "the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid."

I

By looking solely to the historical antecedents of the privilege and focusing on "the ingredient of personal compulsion," the majority largely ignores the interplay

[1] This is not to say, of course, that we must not be acutely alert to any "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann* v. *United States,* 350 U. S. 422, 428 (1956). See, *e. g., Miranda* v. *Arizona,* 384 U. S. 436 (1966).

of the fundamental values protected by the Fourth and Fifth Amendments. As early as 1886, the Court recognized that issues often cannot be pigeonholed within one amendment or the other, thereby foreclosing consideration of related policies. *Boyd* v. *United States,* 116 U. S. 616. In dealing with the compulsory production of a private paper for use in a forfeiture proceeding, the Court stated:

> "The principles laid down [in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807] affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employés, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." *Id.,* at 630.

Although the subpoena in *Boyd* was directed at the person asserting the privilege, that fact cannot be allowed to obscure the basic thrust of the Court's reasoning: the Fourth and Fifth Amendments delineate a "sphere of privacy" which must be protected against governmental

intrusion.[2] We confirmed in *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55, that "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' " is a fundamental policy underlying the Fifth Amendment.

The majority contends, however, that petitioner cannot reasonably claim "an expectation of protected privacy or confidentiality." The reasons asserted for this position overlook the nature of the accountant-client relationship. The accountant, an agent for a specified purpose—*i. e.,* completing the petitioner's tax returns—bore certain fiduciary responsibilities to petitioner. One of those responsibilities was not to use the records given him for any purpose other than completing the returns. Under these circumstances, it hardly can be said that by giving the records to the accountant, the petitioner committed them to the public domain.[3]

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[2] The Court in *Boyd* also stated that it was unable "to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." *Id.,* at 633. Subsequent decisions, however, have refused to apply the privilege to bar the introduction of "testimonial" evidence where the author no longer has any property rights or a valid claim to confidentiality and privacy. See, *e. g., Perlman* v. *United States,* 247 U. S. 7; *Johnson* v. *United States,* 228 U. S. 457. Obviously, the Court is not disposed to reconsider those decisions as they apply to instances where the author has not knowingly and intelligently waived his privilege against self-incrimination. In any event, I do not believe it is necessary to reach that issue here because, as I will discuss below, I believe that the petitioner has a valid claim to confidentiality and privacy.

[3] The majority states that what information to disclose in the petitioner's tax returns is largely in the accountant's discretion. Therefore, it argues, the accountant's own need for self-protection

I defined what I believe to be the boundaries of this right to privacy in *Warden* v. *Hayden,* 387 U. S., at 323:

> "The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a nondescript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing."

The majority, by the seeming implications of its opinion, has cleared the way for investigatory authorities to compel disclosure of facets of our life we heretofore considered sacrosanct. We are told that "situations may well arise where . . . the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." I can see no basis in the majority opinion, however, for stopping short of condemning only those intrusions resting on compulsory process against the author of the thoughts or documents. Are we now to encourage med-

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(to answer a possible charge of assisting in the preparation of a false return) would often require the right to disclose the information given him. It may be that the accountant's fiduciary responsibilities must yield in this event, but that was not the case here.

dling by the Government and ever more ingenious methods of obtaining access to sought-after materials? The premium now will be on subterfuge, on bypassing the master of the domain by spiriting the materials away or compelling disclosure by a trusted employee or confidant.[4] Inevitably, this will lead those of us who cherish our privacy to refrain from recording our thoughts or trusting anyone with even temporary custody of documents we want to protect from public disclosure. In short, it will stultify the exchange of ideas that we have considered crucial to our democracy.

II

The decision may have a more immediate impact which the majority does not consider. Our tax laws have become so complex that very few taxpayers can afford the luxury of completing their own returns without professional assistance. If a taxpayer now wants to insure the confidentiality and privacy of his records, however, he must forgo such assistance. To my mind, the majority thus attaches a penalty to the exercise of the privilege against self-incrimination. It calls for little more discussion than to note that we have not tolerated such penalties in the past. Cf. *Uniformed Sanitation Men* v. *Commissioner of Sanitation,* 392 U. S. 280; *Gardner* v. *Broderick,* 392 U. S. 273.

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[4] The majority notes that "the accountant himself worked neither in petitioner's office nor as her employee." I cannot see how that factor bears on whether the "ingredient of personal compulsion against [the] accused" is present, or whether the accountant was a confidant. The majority would seem to suggest, however, that petitioner, because her business did not call for, or because she could not afford, a full-time accountant, deserves less protection under the Fifth Amendment than a taxpayer more fortunately situated.

III

Thus, I would reverse the decision below, finding that the subpoena violated both petitioner's Fourth and Fifth Amendment rights.[5] I offer one more observation. The majority cautions that respect for our constitutional principles is eroded "when they leap their proper bounds." We should not be swayed by the popular cry for a formalistic and narrow interpretation of those provisions which safeguard our fundamental rights.

It is a Constitution we are construing, not a legislative-judicial code of conduct that suits our private value choices or that satisfies the appetite of prosecutors for more and more shortcuts that avoid constitutional barriers. Those constitutional barriers and the judicial traditions supporting them are the sources of the privacy we value so greatly. That privacy "protects people," not places, under the Fourth Amendment, *Katz* v. *United States,* 389 U. S. 347, 353. And, as already noted, *Boyd* v. *United States, supra,* held that when it comes to the "forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods," that is an illustration of the manner in which "the Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630.

One's privacy embraces what the person has in his home, his desk, his files, and his safe as well as what he

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[5] In holding that "mere evidence" is not protected from seizure under the Fourth Amendment, the Court expressly refused to consider "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Warden* v. *Hayden,* 387 U. S. 294, 303. The answer to that question was clear to me when I dissented in that case and remains clear to me now.

carries on his person. It also has a very meaningful relationship to what he tells any confidant—his wife, his minister, his lawyer, or his tax accountant. The constitutional fences of law are being broken down by an ever-increasingly powerful Government that seeks to reduce every person to a digit.

MR. JUSTICE MARSHALL, dissenting.

I cannot agree with the majority that the Constitution permits the Government to enforce the summons issued in this case. The opinion of the Court fails to articulate the basis of its result in a way that addresses the range of constitutional concerns involved.[1] The majority seems to create a bright-line rule that no constitutional right of petitioner is violated by enforcing a summons of papers not in her possession. Like MR. JUSTICE BRENNAN, I could not accept such a rule. However, the majority blurs the line by suggesting that temporary relinquishment of possession presents a different case, see *ante,* at 333. The Court expressly disclaims the proposition that possession alone is determinative of the availability of constitutional protection for petitioner's papers. *Ante,* at 336, and 333 n. 16. But neither the opinion of the Court nor the concurring opinion of MR. JUSTICE BRENNAN supplies a clearly articulated constitutional basis for the rule adopted. If the considerations that underlie the Court's expressed concerns are stated explicitly, I think it is clear that the Court has failed to apply correctly the standards which

[1] In part this results from the conflation of petitioner's claims under the Fourth and Fifth Amendments. See *ante,* at 325–326, n. 6. But the constitutional claims are complicated, and their articulation is difficult. The opinion of the Court does not, I believe, present an acceptable rationale for its holding.

it appears to find relevant.[2] I agree, of course, that possession does not define the limits of the protection that the Constitution affords to private papers, and add these comments to indicate how I would treat claims like petitioner's.

A. I begin with *Boyd* v. *United States,* 116 U. S. 616 (1886), whose continuing vitality is indicated by the majority's effort to distinguish it. That was a suit for the forfeiture of 35 cases of plate glass alleged to have been illegally imported. In the course of the forfeiture proceeding, the Government introduced into evidence an invoice of a prior shipment. The defendants objected on the ground that the use of the invoice violated their rights under the Fourth and Fifth Amendments, because the invoice was a private paper secured by a subpoena. This Court found a violation of both amendments.

One might interpret *Boyd* as holding that the Fifth Amendment prohibits the use of private papers in a criminal proceeding over the author's objection. The words of the Fifth Amendment surely can be read in that way. The use of the papers over objection "compel[s the author] in [a] criminal case to be a witness against himself." The compulsion occurs when the paper is introduced over objection, not when the paper is written or subpoenaed.

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[2] It may be that everything in this opinion is implicit in the opinion of the Court. The majority recognizes the importance of the purposes of the transfer, *ante,* at 334, the steps taken to protect the privacy of the records, *ibid.,* and the ordinary operations of the recipient, *ibid.* I would be pleased to discover that we had no serious disagreements about the guiding principles in this case, but only a relatively minor disagreement about its proper disposition.

But that interpretation has not been adopted by this Court. See, *e. g., Perlman* v. *United States,* 247 U. S. 7 (1918); *Johnson* v. *United States,* 228 U. S. 457 (1913). And in some possible cases, consistent application of that interpretation of *Boyd* might lead to results at odds with common sense.[3]

Another interpretation of *Boyd* has been accepted by this Court and by the leading commentators. See, *e. g., Curcio* v. *United States,* 354 U. S. 118, 125 (1957); 8 J. Wigmore, Evidence § 2264 (McNaughton rev. 1961); C. McCormick, Evidence §§ 126–127 (2d ed. 1972). When a party produces potentially incriminating evidence in response to a summons or subpoena, he implicitly testifies that the evidence he brings forth is in fact the evidence demanded. "The custodian's act of producing books or records in response to a subpoena *duces tecum*

[3] For example, suppose a noted criminal lawyer walked into a police station and presented the desk sergeant with his handwritten confession to the arson of his neighbor's house. *Boyd* v. *United States,* 116 U. S. 616 (1886), read as suggested in the text, would bar the use of that document if, at trial, the defendant objected.

That case might be analyzed as a problem of waiver: did the manner in which the author revealed the paper indicate a knowing decision to surrender his rights? The cases that stand in the way of the simplest interpretation of *Boyd* might be treated similarly. But the "waiver" in those cases was not a waiver in the ordinary sense. In *Johnson,* for example, the defendant had been indicted for concealing money from his trustee in bankruptcy. The Bankruptcy Act required that he turn over his books to the trustee, and the books were used against Johnson in the criminal case. The transfer of the books was required if Johnson was to have the benefits of bankruptcy available to him. To make that transfer a waiver of Fifth Amendment rights would be to impose an unconstitutional condition.

Still, even if "waiver" is an inappropriate term here, the underlying notion that someone may behave in a way that indicates a relinquishment of his constitutional rights is sound. I rely on it as the proper term to use in analyzing claims like petitioner's. See *infra,* at 350.

is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself." *Curcio* v. *United States,* 354 U. S., at 125.

The potential for incrimination inherent in the act of production is illustrated by this case. The summons here called for the production of "[a]ll books . . . pertaining to the tax liability of" petitioner. Had the summons been directed to her, she would have implicitly testified, on producing some papers, that these were "all" the records sought. The Internal Revenue agents believed that she may have understated her income. Their belief might have been confirmed on examining all of her records, but not on examining only some of them. The records could then be used in a subsequent criminal prosecution for underreporting her income. If she produced only some of her books, though, she would be liable for contempt of the order. The Fifth Amendment was designed to prevent the Government from placing potential defendants in such a position. Cf. *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964).

These considerations operate only against the person in possession of the papers, as the majority correctly points out. In this case, the accountant to whom the summons was directed made no claim that turning over the records he has might incriminate him, for example, by exposing him to the charge that he had perjured himself in representing that the return prepared for petitioner was correct to the best of his knowledge and belief, 26 U. S. C. § 6065, or that he had knowingly aided in the preparation of a false return, 26 U. S. C. § 7206 (2). Nor could he be held to have represented more than that he had produced all the records in his possession.

However, the accepted interpretation of *Boyd* has an odd sound to it. *Boyd* emphasized that the invoice there was a private paper written by the defendants. Yet the accepted interpretation of the case makes the authorship and contents of the paper largely irrelevant. What is incriminating about the production of a document in response to an order is not its contents, as one might have thought, but the implicit authentication that the document is the one named in the order.[4] If that is the only way rationally to interpret *Boyd,* it might make sense to do so.[5] But it makes better sense to devise a rationale that focuses on the obvious concern of the case, the desire of the author of documents to keep them private.

B. This Court also held in *Boyd* that the Fourth Amendment was violated. Indeed, much of the opinion is devoted to a discussion of *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765), a landmark in the development of the prohibition against unreasonable searches and seizures. Here, too, the doctrinal basis of the holding is unclear, in part because the Court

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[4] Another way of seeing the oddity of this interpretation is to consider whether the person who produces documents other than those called for has committed perjury. Perhaps he has, but the perjury is an unusual one. Yet perjury is the third horn of the "cruel trilemma" that the Fifth Amendment was designed to eliminate.

[5] Another interpretation of *Boyd* makes ownership crucial. A person who owns something has the right to exercise a great deal of control over it. When the Government seizes it, the owner is compelled to give up that right. This interpretation is consistent with the observation in *Boyd* that contraband and instrumentalities of crime can be seized because the Government has a superior property right in them. However, this interpretation runs into the same difficulties as the accepted one; in particular, it makes the authorship and content of the property irrelevant. And the emphasis on property rights in this area has since been abandoned. See, *e. g., Warden* v. *Hayden,* 387 U. S. 294 (1967).

correctly perceived that "[i]n this regard the Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630.

Boyd suggested that the Fourth Amendment prohibited the seizure of "mere evidence." 116 U. S., at 623–624. See *Gouled* v. *United States,* 255 U. S. 298 (1921). Searches for mere evidence were unreasonable even if such searches were sure to produce evidence leading to a conviction. The precise contours of the "mere evidence" rule were shaped by concepts of property law which we now see as outmoded. See *Warden* v. *Hayden,* 387 U. S. 294, 303–307 (1967). But those concepts attempted to define, however imprecisely, a sphere of personal privacy that the Government could not enter over objection. See, *e. g., Gouled* v. *United States, supra,* at 304. And when this Court repudiated the "mere evidence" rule, it suggested that Fourth Amendment limitations might be devised precisely in terms of the interest in privacy, prohibiting the seizure of "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Warden* v. *Hayden,* 387 U. S., at 303. Cf. *Stanford* v. *Texas,* 379 U. S. 476, 485 (1965).

The Fourth and Fifth Amendments do not speak to totally unrelated concerns. Cf. *Griswold* v. *Connecticut,* 381 U. S. 479, 484–485 (1965); *Murphy* v. *Waterfront Comm'n,* 378 U. S., at 55. Both involve aspects of a person's right to develop for himself a sphere of personal privacy. Where the Amendments "run almost into each other," I would prohibit the Government from entering.[6] The problem, as I see it, is to develop criteria

[6] I recognize that there is an alternate view, that unless a Fifth Amendment privilege is involved, the Fourth Amendment authorizes intrusion when it is not unreasonable. However, this Court has held that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches. Cf. *Camara* v.

for determining whether evidence sought by the Government lies within the sphere of activities that petitioner attempted to keep private. Cf. *Katz* v. *United States,* 389 U. S. 347, 351–352 (1967).

The first criterion, as *Hayden* suggests, is the nature of the evidence. Diaries and personal letters that record only their author's personal thoughts lie at the heart of our sense of privacy. In contrast, I see no bar in the Fourth or Fifth Amendment to the seizure of a letter from one conspirator to another directing the recipient to take steps that further the conspiracy. Business records like those sought in this case lie between those cases. We are not so outraged by the intrusion on privacy that accompanies the seizure of these records as we are by the seizure of a diary, yet the records could not easily be called "instrumentalities" of tax evasion, particularly if they are accurate.

Second, we must consider the ordinary operations of the person to whom the records are given. A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given. Again in contrast, a transfer to a trustee in bankruptcy or to a clerk of a court does not usually carry with it such expectations. That is how I would justify *Johnson* and *Perlman.* Here, too, the transfer in this case lies between the extremes. It would be relevant to a decision about the expectation of privacy that an accountant-client priv-

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Municipal Court, 387 U. S. 523 (1967); *Terry* v. *Ohio,* 392 U. S. 1 (1968); *Stanford* v. *Texas,* 379 U. S. 476 (1965). The precise elements required of a Fifth Amendment violation need not coincide exactly with the elements of an invasion of privacy that should be considered unreasonable, and I see no reason to confine the sphere of privacy free from intrusion to just what the Fifth Amendment protects.

ilege existed under local law, but not determinative. Petitioner disclaimed reliance on such a privilege. Tr. of Oral Arg. 7. But I would think that, privileged or not, a disclosure to an accountant is rather close to disclosure to an attorney.

Third, the purposes for which the records were transferred is an element of an informed judgment about the author's interest in the privacy of the papers. That a transfer is compelled by practical considerations if the author is to claim benefits available under the law, seems to me quite important. If petitioner had sought to take advantage of some complicated provision of the tax laws, and needed the help of an accountant to do so, I would be quite reluctant to hold that the transfer of her records was a surrender of the privacy of the papers. But cf. *Johnson* v. *United States,* 228 U. S. 457 (1913). As I understand it, the majority's exception for temporary relinquishment of possession, and several of MR. JUSTICE BRENNAN'S exceptions, recognize the importance of this criterion.

Finally, we must take into account the steps that the author took to insure the privacy of the records. Cf. *In re Harris,* 221 U. S. 274, 280 (1911). Placing them in a safe deposit box is different from letting them remain for many years with an accountant.

It is not impossible that petitioner had indeed abandoned her claim to privacy in the papers sought by summons in this case. But the District Court and the Court of Appeals applied a rather rigid test which made possession alone conclusive. Those courts have more experience than we do with the ordinary practices of taxpayers, accountants, and Internal Revenue agents. They are therefore better able, in the first instance, to apply the criteria I believe are relevant, in light of their understanding of the ordinary practices in such cases. I would vacate the judgment and remand the case to the District Court for consideration of those criteria.

BRONSTON *v.* UNITED STATES

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

No. 71–1011. Argued November 15, 1972—
Decided January 10, 1973

Federal perjury statute, 18 U. S. C. § 1621, does not reach a witness' answer that is literally true, but unresponsive, even assuming the witness intends to mislead his questioner by the answer, and even assuming the answer is arguably "false by negative implication." A perjury prosecution is not, in our adversary system, the primary safeguard against errant testimony; given the incongruity of an unresponsive answer, it is the questioner's burden to frame his interrogation acutely to elicit the precise information he seeks. Pp. 357–362.

453 F. 2d 555, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Sheldon H. Elsen argued the cause for petitioner. With him on the briefs were *Lewis Shapiro* and *John S. Martin, Jr.*

Andrew L. Frey argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Beatrice Rosenberg,* and *Marshall Tamor Golding.*

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

We granted the writ in this case to consider a narrow but important question in the application of the federal perjury statute, 18 U. S. C. § 1621: [1] whether a witness

[1] 18 U. S. C. § 1621 provides:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare,

may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication.

Petitioner is the sole owner of Samuel Bronston Productions, Inc., a company that between 1958 and 1964, produced motion pictures in various European locations. For these enterprises, Bronston Productions opened bank accounts in a number of foreign countries; in 1962, for example, it had 37 accounts in five countries. As president of Bronston Productions, petitioner supervised transactions involving the foreign bank accounts.

In June 1964, Bronston Productions petitioned for an arrangement with creditors under Chapter XI of the Bankruptcy Act, 11 U. S. C. § 701 *et seq.* On June 10, 1966, a referee in bankruptcy held a § 21 (a) hearing to determine, for the benefit of creditors, the extent and location of the company's assets.[2] Petitioner's perjury

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depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

[2] Under § 334 of the Bankruptcy Act, 11 U. S. C. § 734, the court must hold a first meeting of creditors within a limited period of time after the Chapter XI petition is filed. Section 336, 11 U. S. C. § 736, provides that the judge or court-appointed referee shall preside at the meeting and "shall examine the debtor or cause him to be examined and hear witnesses on any matter relevant to the proceeding."

Section 21 (a) of the Act, 11 U. S. C. § 44 (a), is applicable to a Chapter XI proceeding because it is a provision of Chapters I through VII "not inconsistent with or in conflict with the provisions of [Chapter XI]." 11 U. S. C. § 702. Section 21 (a) provides, in pertinent part, that "[t]he court may, upon application of any officer, bankrupt, or creditor, by order require any designated

conviction was founded on the answers given by him as a witness at that bankruptcy hearing, and in particular on the following colloquy with a lawyer for a creditor of Bronston Productions:

> "Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> "A. No, sir.
>
> "Q. Have you ever?
>
> "A. The company had an account there for about six months, in Zurich.
>
> "Q. Have you any nominees who have bank accounts in Swiss banks?
>
> "A. No, sir.
>
> "Q. Have you ever?
>
> "A. No, sir."

It is undisputed that for a period of nearly five years, between October 1959 and June 1964, petitioner had a personal bank account at the International Credit Bank in Geneva, Switzerland, into which he made deposits and upon which he drew checks totaling more than $180,000. It is likewise undisputed that petitioner's answers were literally truthful. (a) Petitioner did not at the time of questioning have a Swiss bank account. (b) Bronston Productions, Inc., did have the account in Zurich described by petitioner. (c) Neither at the time

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persons . . . to appear before the court . . . to be examined concerning the acts, conduct, or property of a bankrupt." Numerous statements of the broad scope of a § 21 (a) inquiry are collected in 2 W. Collier, Bankruptcy ¶ 21.11 (14th ed. 1971). The officers of a bankrupt may be required to undergo a § 21 (a) examination even if they are not still officers at the time of filing. *Id.*, ¶ 21.09. If it appears that the interest of a witness is adverse to the party calling him to testify, under § 21 (j), 11 U. S. C. § 44 (j), the party may examine the witness as if under cross-examination, and the examining party is not bound by the witness' testimony. 1A W. Collier, Bankruptcy ¶ 5.22 (14th ed. 1972).

of questioning nor before did petitioner have nominees who had Swiss accounts. The Government's prosecution for perjury went forward on the theory that in order to mislead his questioner, petitioner answered the second question with literal truthfulness but unresponsively addressed his answer to the company's assets and not to his own—thereby implying that he had no personal Swiss bank account at the relevant time.

At petitioner's trial, the District Court instructed the jury that the "basic issue" was whether petitioner "spoke his true belief." Perjury, the court stated, "necessarily involves the state of mind of the accused" and "essentially consists of wilfully testifying to the truth of a fact which the defendant does not believe to be true"; petitioner's testimony could not be found "wilfully" false unless at the time his testimony was given petitioner "fully understood the questions put to him but nevertheless gave false answers knowing the same to be false." The court further instructed the jury that if petitioner did not understand the question put to him and for that reason gave an unresponsive answer, he could not be convicted of perjury. Petitioner could, however, be convicted if he gave an answer "not literally false but when considered in the context in which it was given, nevertheless constitute[d] a false statement." [3]

[3] The District Court gave the following example "as an illustration only":

"[I]f it is material to ascertain how many times a person has entered a store on a given day and that person responds to such a question by saying five times when in fact he knows that he entered the store 50 times that day, that person may be guilty of perjury even though it is technically true that he entered the store five times."

The illustration given by the District Court is hardly comparable to petitioner's answer; the answer "five times" is responsive to the hypothetical question and contains nothing to alert the questioner that he may be sidetracked. See *infra,* at 358. Moreover, it is very

The jury began its deliberations at 11:30 a. m. Several times it requested exhibits or additional instructions from the court, and at one point, at the request of the jury, the District Court repeated its instructions in full. At 6:10 p. m., the jury returned its verdict, finding petitioner guilty on the count of perjury before us today and not guilty on another charge not here relevant.

In the Court of Appeals, petitioner contended, as he had in post-trial motions before the District Court, that the key question was imprecise and suggestive of various interpretations. In addition, petitioner contended that he could not be convicted of perjury on the basis of testimony that was concededly truthful, however unresponsive. A divided Court of Appeals held that the question was readily susceptible of a responsive reply and that it adequately tested the defendant's belief in the veracity of his answer. The Court of Appeals further held that, "[f]or the purposes of 18 U. S. C. § 1621, an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury." 453 F. 2d 555, 559. In this Court, petitioner renews his attack on the specificity of the question asked him and the legal sufficiency of his answer to support a conviction for perjury. The problem of the ambiguity of the question is not free from doubt, but we need not reach that issue.

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doubtful that an answer which, in response to a specific quantitative inquiry, baldly understates a numerical fact can be described as even "technically true." Whether an answer is true must be determined with reference to the question it purports to answer, not in isolation. An unresponsive answer is unique in this respect because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question—unless there is to be speculation as to what the unresponsive answer "implies." See *infra*, at 359.

Even assuming, as we do, that the question asked petitioner specifically focused on petitioner's personal bank accounts, we conclude that the federal perjury statute cannot be construed to sustain a conviction based on petitioner's answer.

The statute, 18 U. S. C. § 1621, substantially identical in its relevant language to its predecessors for nearly a century, is "a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury." *United States* v. *Williams,* 341 U. S. 58, 68 (1951). We have held that the general federal perjury provision is applicable to federal bankruptcy proceedings. *Hammer* v. *United States,* 271 U. S. 620 (1926). The need for truthful testimony in a § 21 (a) bankruptcy proceeding is great, since the proceeding is "a searching inquiry into the condition of the estate of the bankrupt, to assist in discovering and collecting the assets, and to develop facts and circumstances which bear upon the question of discharge." *Travis* v. *United States,* 123 F. 2d 268, 271 (CA10 1941). Here, as elsewhere, the perpetration of perjury "well may affect the dearest concerns of the parties before a tribunal. . . ." *United States* v. *Norris,* 300 U. S. 564, 574 (1937).

There is, at the outset, a serious literal problem in applying § 1621 to petitioner's answer. The words of the statute confine the offense to the witness who "willfully . . . states . . . any material matter which he does not believe to be true." Beyond question, petitioner's answer to the crucial question was not responsive if we assume, as we do, that the first question was directed at personal bank accounts. There is, indeed, an implication in the answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully

state any material matter that *implies* any material matter that he does not believe to be true.[4]

The Government urges that the perjury statute be construed broadly to reach petitioner's answer and thereby fulfill its historic purpose of reinforcing our adversary factfinding process. We might go beyond the precise words of the statute if we thought they did not adequately express the intention of Congress, but we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer. Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. It should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so, or that a debtor may be embarrassed at his plight and yield information reluctantly. It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to

[4] Petitioner's answer is not to be measured by the same standards applicable to criminally fraudulent or extortionate statements. In that context, the law goes "rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations." In contrast, "under our system of adversary questioning and cross-examination the scope of disclosure is largely in the hands of counsel and presiding officer." A. L. I. Model Penal Code § 208.20, Comment (Tent. Draft No. 6, 1957, p. 124).

the mark, to flush out the whole truth with the tools of adversary examination.

It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether "he does not believe [his answer] to be true." To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of "intent to mislead" or "perjury by implication." The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: "that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying." Study of Perjury, reprinted in Report of New York Law Revision Commission, Legis. Doc. No. 60, p. 249 (1935). A leading 19th century commentator, quoted by Dean Wigmore, noted that the English law "throws every fence round a person accused of perjury," for

> "the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges, of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure: and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission,—such as publicity,

> cross-examination, the aid of a jury, etc.; and on the infliction of a severe, though not excessive punishment, wherever the commission of the crime has been clearly proved." W. Best, Principles of the Law of Evidence § 606 (C. Chamberlayne ed. 1883).

See J. Wigmore, Evidence 275–276 (3d ed. 1940). Addressing the same problem, Montesquieu took as his starting point the French tradition of capital punishment for perjury and the relatively mild English punishment of the pillory. He thought the disparity between the punishments could be explained because the French did not permit the accused to present his own witnesses, while in England "they admit of witnesses on both sides, and the affair is discussed in some measure between them; consequently false witness is there less dangerous, the accused having a remedy against the false witnesses, which he has not in France." Montesquieu, The Spirit of the Laws, quoted in Study of Perjury, *supra,* p. 253.

Thus, we must read § 1621 in light of our own and the traditional Anglo-American judgment that a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony. While "the lower federal courts have not dealt with the question often," and while their expressions do not deal with unresponsive testimony and are not precisely in point, "it may be said that they preponderate against the respondent's contention." *United States* v. *Norris,* 300 U. S., at 576. The cases support petitioner's position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. *United States* v. *Wall,* 371 F. 2d 398 (CA6 1967); *United States* v. *Slutzky,* 79 F. 2d 504 (CA3

1935); *Galanos* v. *United States,* 49 F. 2d 898 (CA6 1931); *United States* v. *Cobert,* 227 F. Supp. 915 (SD Cal. 1964).

The Government does not contend that any misleading or incomplete response must be sent to the jury to determine whether a witness committed perjury because he intended to sidetrack his questioner. As the Government recognizes, the effect of so unlimited an interpretation of § 1621 would be broadly unsettling. It is said, rather, that petitioner's testimony falls within a more limited category of intentionally misleading responses with an especially strong tendency to mislead the questioner. In the federal cases cited above, the Government tells us the defendants gave simple negative answers "that were both entirely responsive and entirely truthful . . . . In neither case did the defendant—as did petitioner here—make affirmative statements of one fact that in context constituted denials by negative implication of a related fact." Thus the Government isolates two factors which are said to require application of the perjury statute in the circumstances of this case: the unresponsiveness of petitioner's answer and the affirmative cast of that answer, with its accompanying negative implication.

This analysis succeeds in confining the Government's position, but it does not persuade us that Congress intended to extend the coverage of § 1621 to answers unresponsive on their face but untrue only by "negative implication." Though perhaps a plausible argument can be made that unresponsive answers are especially likely to mislead,[5] any such argument must,

[5] Arguably, the questioner will assume there is some logical justification for the unresponsive answer, since competent witnesses do not usually answer in irrelevancies. Thus the questioner may conclude that the unresponsive answer is given only because it is intended to make a statement—a negative statement—relevant to the ques-

we think, be predicated upon the questioner's being aware of the unresponsiveness of the relevant answer. Yet, if the questioner is aware of the unresponsiveness of the answer, with equal force it can be argued that the very unresponsiveness of the answer should alert counsel to press on for the information he desires. It does not matter that the unresponsive answer is stated in the affirmative, thereby implying the negative of the question actually posed; for again, by hypothesis, the examiner's awareness of unresponsiveness should lead him to press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury.

It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the "questioner's acuity" and not by a federal perjury prosecution.

Reversed.

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tion asked. In this case, petitioner's questioner may have assumed that petitioner denied having a personal account in Switzerland; only this unspoken denial would provide a logical nexus between inquiry directed to petitioner's personal account and petitioner's adverting, in response, to the company account in Zurich.

HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC.

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

No. 71–827. Argued October 10, 1972—Decided January 10, 1973*

Trans World Airlines (TWA) brought this antitrust action against the Hughes Tool Co. (Toolco) and others for treble damages as a result of the manner in which Toolco had exercised its controlling interest in TWA, with particular reference to Toolco's asserted acts to control and dictate the acquisition and financing of aircraft by TWA. As an organization engaged in phases of aeronautics, Toolco could not acquire control of an air carrier such as TWA without consent of the Civil Aeronautics Board (CAB). In 1944 the CAB approved *de facto* control of TWA by Toolco as comporting with the provisions of § 408 of the Federal Aviation Act. That provision permits acquisitions of control that the CAB finds are not inconsistent with the public interest and that will not result in monopoly. Section 414 immunizes from antitrust liability any conduct approved by a CAB order issued under § 408. The approval narrowly limited intercompany sales transactions without specific CAB approval, and required annual reporting. A few years later, Toolco and TWA made an agreement permitting Toolco to obtain full legal control of TWA. The CAB, after full hearings into the Toolco-TWA relationship, found that Toolco's financial and other support was of great importance to TWA and concluded that "the continued interest of Toolco in TWA appears essential to the best interests of the carrier and the public." The CAB's approval was made subject to the conditions of the 1944 order. As a result, from 1944 to 1960, every acquisition and lease of aircraft by TWA from Toolco and each financing by TWA from Toolco received CAB approval pursuant to § 408. In 1960, Toolco's stock in TWA was placed in a voting trust in connection with a program for financing TWA's acquisition of jet equipment. Shortly thereafter, TWA brought this suit. As a defense, Toolco relied on *Pan American World Airways* v. *United States*, 371 U. S. 296. The District Court entered a default judgment against

*Together with No. 71–830, *Trans World Airlines, Inc.* v. *Hughes Tool Co. et al.*, on certiorari to the same court.

Toolco. The Court of Appeals affirmed, concluding that *Pan American* was inapplicable because, unlike the situation in that case, the conduct challenged in TWA's complaint was "unrelated to any specific function of the CAB" and not within the CAB's exclusive competence. *Held:* The transactions that TWA challenged as violative of the antitrust laws were under the CAB's control and surveillance, and, by virtue of §§ 408 and 414 of the Federal Aviation Act, had immunity under the antitrust laws. The Court of Appeals, therefore, erred in holding that *Pan American, supra,* is not controlling on the facts involved here. Pp. 366–389.

449 F. 2d 51, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post,* p. 389. MARSHALL, J., took no part in the consideration or decision of the cases.

Charles Alan Wright argued the cause for petitioners in No. 71–827 and respondents in No. 71–830. With him on the briefs were *Clark M. Clifford, Thomas D. Finney, Jr., E. Barrett Prettyman, Jr., Chester C. Davis,* and *Maxwell E. Cox.*

Dudley B. Tenney argued the cause for respondent in No. 71–827 and petitioner in No. 71–830. With him on the briefs were *James Wm. Moore, Paul W. Williams, Marshall H. Cox., Jr., Raymond L. Falls, Jr.,* and *William T. Lifland.*

Solicitor General Griswold, Assistant Attorney General Kauper, George Edelstein, O. D. Ozment, Warren L. Sharfman, and *Robert L. Toomey* filed a memorandum for the Civil Aeronautics Board as *amicus curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The complaint in this litigation alleged antitrust violations and damages suffered by Trans World Airlines (TWA) while under control of Hughes Tool Co. (Toolco).

A default judgment was entered for over $145 million with interest at the rate of 7½%. The District Court's opinions confirming the damages award are reported at 308 F. Supp. 679, 312 F. Supp. 478. The Court of Appeals affirmed, 449 F. 2d 51. The cases are here on a petition for certiorari [1] and on a cross petition. 405 U. S. 915.

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[1] The District Court's judgment on entry of a default and certifying a controlling question of law is reported at 32 F. R. D. 604. The Court of Appeals affirmed, 332 F. 2d 602. We granted certiorari, 379 U. S. 912, but after argument dismissed the writ as improvidently granted. 380 U. S. 248. Moreover, our dismissal as improvidently granted was in 1965 and involved the 1964 judgment of the Court of Appeals. In 1971 a different panel of the Court of Appeals ruled that its 1964 decision was not binding. It noted that prior to its 1971 decision there had been no "final judgment" with respect to the merits of TWA's cause of action against Toolco and therefore *res judicata* did not apply. 449 F. 2d 51, 58. It went on to say that collateral estoppel likewise did not apply, since the only relevant issue that was actually litigated and determined in the 1964 appeal was that the District Court "properly entered the default on Toolco's counterclaims." *Ibid.* That issue, it said, was "a sharply distinguishable issue from the propriety of a different default judgment in favor of Toolco's adversary." *Ibid.*

No party has suggested that our prior dismissal forecloses us from reaching the issue now presented.

The prior dismissal did not establish the law of the case or amount to *res judicata* on the points raised. *Indianapolis* v. *Chase National Bank,* 314 U. S. 63 (1941), was a diversity action in which the District Court, after realigning the parties, dismissed the action for want of jurisdiction. The Court of Appeals reversed and this Court denied certiorari. Two years later, after the Court of Appeals sustained plaintiff's claims on the merits, certiorari was granted and this Court reversed, holding that proper realignment "precludes assumption of jurisdiction based upon diversity of citizenship." 314 U. S., at 74. Similarly, in *Mercer* v. *Theriot,* 377 U. S. 152 (1964), a diversity action for wrongful death, certiorari was initially denied after the Court of Appeals had set aside a jury verdict on the grounds of various trial errors and insufficiency of the evidence. On remand, the District Court denied a motion for a new trial and the

The crux of TWA's complaint was the use by Toolco of its control over TWA to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing thereof.[2]

Whether or not that complaint states a cause of action under the antitrust laws is a question we do not reach. Another defense of Toolco was that those transactions were under the control and surveillance of the Civil Aeronautics Board and by virtue of the Federal Aviation Act of 1958 those transactions have immunity from the antitrust laws.

It is our view that the Court of Appeals erroneously rejected that defense. This result, we think, is required by §§ 408 and 414 of the Federal Aviation Act and by our prior decision in *Pan American World Airways* v. *United States,* 371 U. S. 296 (1963).

Section 408 of the Act makes illegal certain mergers, consolidations, and other transactions without the approval of the Civil Aeronautics Board.[3] Specifically,

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Court of Appeals affirmed. We then granted certiorari and reversed because the trial errors did not affect substantial rights and the evidence at the trial was sufficient to sustain a verdict in petitioner's favor. See also *Hanover Shoe* v. *United Shoe Machinery Corp.,* 392 U. S. 481, 488 n. 6 (1968).

For the well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits, see *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 919 (Frankfurter, J.).

[2] See 449 F. 2d, at 71.

[3] Section 408, 72 Stat. 767, as amended, 49 U. S. C. § 1378, reads in pertinent part as follows:

"(a) Prohibited acts.

"It shall be unlawful unless approved by order of the Board as provided in this section—

. . . . . .

"(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase

§ 408 (a)(5) requires the approval of the Board when "any person engaged in any other phase of aeronautics" seeks to acquire control of any air carrier in any manner whatsoever. Section 408 (b) authorizes and directs the Board to approve such transactions, including ac-

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of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

. . . . . .

"(5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided,* That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;

. . . . . .

"(b) Application to Board; hearing; approval; disposal without hearing.

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control . . . ."

In 1969, § 408 (a)(5) was amended to include "any other person" acquiring control of an air carrier.

quisitions of control, that are in the "public interest" and prohibits approval of any transaction "which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier" not a party to the transaction. Section 102 of the Act requires that in assessing the public interest and the public convenience and necessity, the Board should consider, among other things, "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States . . . ." [4] Section 408 (e) empowers the Board, upon complaint or its own initiative, to investigate and determine whether any person is violating any provision of subsection (a)

[4] Section 102, 49 U. S. C. § 1302, reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

and, if such violation is found, to "require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision." Under § 408 (d), the Board has broad control over the accounts, records, and reports of anyone controlling an air carrier, and their inspection. The Board is further granted power to control the designation of any officer or director of an air carrier who is an officer, director, member, or the controlling stockholder of any person who is engaged "in any phase of aeronautics." § 409 (a), 49 U. S. C. § 1379 (a). Section 414 relieves from the operation of the antitrust laws any person affected by any order under § 408 "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." [5]

It was against this statutory backdrop that the Civil Aeronautics Board issued a series of decisions and orders with respect to the control of TWA by Toolco, the major decisions being issued in 1944, 1948, 1950, and 1960. The first decision, 6 C. A. B. 153 (1944), authorized control of approximately 45.6% of the outstanding stock of TWA. From the Board's opinion issued at that time, it appears that Howard Hughes first became interested in TWA at the invitation of his friend, Jack Frye, the president of TWA. Hughes began acquiring TWA stock through Toolco, which he solely owned. By 1942,

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[5] Section 414, 49 U. S. C. § 1384, reads:

"Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

See also §§ 1002 (b), (c), of the Act, 49 U. S. C. §§ 1482 (b), (c).

Toolco had acquired 42.1% of TWA's outstanding stock and for all practical purposes was in position to control the day-to-day affairs of the carrier. Meanwhile, Hughes and Frye had jointly designed a four-engine transport, later known as the Constellation, which Lockheed agreed to manufacture under contract with Toolco. The contract was assigned by Toolco to TWA in 1942, Toolco reserving the right to purchase a sizable number of such aircraft through TWA. It was this arrangement by which Toolco might actually acquire for resale a number of commercial aircraft that, together with its experimental work in aviation and its manufacture of aircraft parts for the military, characterized Toolco as an organization engaged in any phase of aeronautics and therefore forbidden to acquire control of an air carrier such as TWA without the consent of the Board. Toolco's control of TWA, by virtue of its stock ownership which had by 1944 increased to 45.6%, was approved by the Board as being in the public interest and consistent with the provisions of § 408, including the prohibition against monopoly. In order to insure that Toolco would not abuse its power over TWA, "to its own profit and to the detriment of the public interest," 6 C. A. B., at 156, the approval was to continue only so long as intercompany purchases did not exceed $200 per item and did not amount to more than $10,000 in any one calendar year. Annual reports were required in this respect.[6] 6 C. A. B., at 158.

[6] The Board's public counsel had opposed such a condition on approval as "imposing far too great a burden upon the Board to ask it to pass upon the wisdom and propriety, in both a technical and business way, of every bargain made by a carrier for the purchase of equipment from a particular manufacturer." Brief for Examiner 25 (filed Apr. 22, 1944). Public counsel's alternative proposed condition required Toolco to forfeit control in the event Toolco should manufacture or sell certain commercial aircraft or Hughes "should attempt to influence TWA with regard to the purchase, ac-

The 1948 and 1950 decisions of the Board originated in a letter agreement presented by Toolco to TWA on January 8, 1947, and accepted by TWA the following day. By this agreement, Toolco agreed to loan $10 million to TWA in return for the latter's interest-bearing notes which were convertible into common stock of the company. On its own initiative, the Board opened an investigation into the matter. At the threshold was the question of Board jurisdiction, which was hotly contested. The Board's June 1948 opinion sustained its jurisdiction, 9 C. A. B. 381. The opinion took a dual approach to the jurisdictional question. It first inquired whether "any change in the activities of Toolco in the field of aeronautics since October 17, 1944, has affected or altered the character of the control approved in Docket No. 1182. It is clear that a substantial change in the activities of Toolco in the field of aeronautics would result in a transaction subject to the Board's jurisdiction under section 408 by reason of the fact that the character and propriety of control originally approved might be altered or changed as a result thereof." 9 C. A. B., at 382.

After reviewing the aeronautical activities of Toolco, it was concluded that the aircraft division of the com-

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ceptance, or use by it of any aircraft or aircraft parts in the development or design of which he himself may have participated to a substantial degree." 6 C. A. B., at 157. The Board rejected this proposal, reasoning as follows:

"The conditions proposed by public counsel are complicated and seem to be somewhat indefinite and difficult of enforcement. The object of any condition . . . should be to protect the public interest from any improper coercion of the air carrier by a controlling company on account of any interest which that controlling company may have in some other phase of aeronautics. This can be accomplished by a reasonable limit upon commercial transactions between the acquirer and the acquired which may be had without further consideration in this proceeding by the Board." *Ibid.*

pany was chiefly a large-scale experimental plant for the military and had not substantially changed its status with respect to its participation in any phase of aeronautics.

The Board's second approach to the jurisdictional question was to inquire whether the letter agreement, which would permit Toolco to increase its shareholdings up to 80% of the outstanding shares of TWA, represented such a change in extent or effectiveness of control as to give the Board jurisdiction and require its consent. Its conclusion was that, although Toolco's 45.6% was obviously enough to dominate the Board and control the day-to-day affairs of the company, the 1947 letter agreement would permit Toolco to translate its *de facto* control into full legal control of the company, which would "obviously impl[y] power to dictate the complete corporate activities of the corporation." 9 C. A. B., at 387. This was sufficient to require an order of the Board in addition to the 1944 order.

With its jurisdiction established, the Board proceeded with hearings and inquiry into whether the additional control was consistent with the public interest. This matter was also contested. Toolco thought that only a narrowly focused inquiry was appropriate, but the Board's public counsel not only insisted that the hearings be far-ranging but urged, as a possible solution, that the additional control be disapproved and that the original 1944 proceedings, Docket No. 1182, be reopened to determine whether all control of TWA by Toolco should be terminated. The Board [7] opted for an investigation

[7] References to the Board's 1950 opinion are actually to the opinion of the Trial Examiner. But the Board adopted as its own "the findings, conclusions, and recommended decision of the examiner" without modification. 12 C. A. B. 192, 193.

sufficiently broad to inquire "into the actions and policies of the controlling company with respect to TWA for the period during which the prior-approved control existed . . . [f]or inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable—as indeed the acquirer here under scrutiny had—for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier." 12 C. A. B. 192, 196 (1950). Before approving the additional acquisition, which would make certain "[c]omplete actual and legal control," *id.*, at 197, the Board determined not only to examine the future plans of Toolco but also its past conduct with respect to TWA.

Accordingly, the Toolco-Hughes-TWA relationship from 1939 to the date of the decision was examined in detail, including the events occurring since the letter agreement of January 1947. The major focus of the inquiry was the differences between TWA management and Toolco with respect to the acquisition of new flight equipment—the quantity, the type, the timing, and the financing thereof. Unquestionably, TWA had been and was in need of additional financing to make possible the purchase of new equipment, particularly that needed to operate its expanded routes. TWA proposed and preferred equity financing in large measure, but Toolco most often insisted on financing new equipment through credit arrangements. Disagreement caused delay, and this, in combination with other factors, brought TWA to the verge of bankruptcy or reorganization in late 1946. It was at this juncture that the January 1947 letter agreement eventuated. Financial failure was averted; but urgent needs for new equipment continued, and substantial additions were made in the years from 1947 to 1950, most of it with the aid of Toolco and some of it

by purchase from Toolco itself.[8] By the time the hearings concluded and the case was under submission, TWA's financial condition had considerably improved, measurably aided by better operating results, better expense control, and a stock offering to stockholders with the unsubscribed amount being underwritten by investment bankers. 12 C. A. B., at 208–209.

In considering whether the additional control by Toolco would be in the public interest, the Board observed that there was no conflict of interest between Toolco's present or contemplated aeronautical activities and its control of an air carrier and that enhanced control presented no problems under the antimonopoly provisions of § 408 (b). *Id.*, at 216. The Board then noted that Toolco's contributions to the science of aeronautics by way of aircraft design and instrumental aids to aviation for both the armed services and civil aviation have been substantial and found that "of specific importance to TWA, have been the contributions of Toolco and Mr. Hughes in the way of financial support to the carrier, in the selection and purchase of its equipment, and their advice and guidance to the engineering and operations departments of the carrier." *Ibid.*[9] Most important,

[8] The Examiner found that it was "necessary" for Toolco to acquire aircraft initially and then resell them to TWA on a conditional sales basis because TWA "could not have purchased [the aircraft] directly without the specific consent of its principal creditors." 12 C. A. B., at 218.

[9] For example, the Examiner found that:

"Even before TWA's financial crisis of late 1946, the financial resources of Toolco were used to provide credit for the carrier. For example, the credit arrangements provided by Toolco made possible the placing of the original order for the Constellation airplane with the Lockheed Aircraft Corporation. There is little doubt that the Constellation would not have been developed as early as it had without the aid of Mr. Hughes and his company. In addition to the technical assistance from Mr. Hughes and his engineers in

however, in the Board's opinion, were the efforts of Toolco to improve the financial position of TWA during the last few years. Although criticizing Toolco, along with others in the aircraft transportation industry, for relying too heavily on debt financing which, in the case of TWA had resulted in a very difficult, lopsided capital structure, the Board concluded that the record would not support a finding that the additional control would be inconsistent with the public interest. Indeed, the Board concluded that "[t]he continued interest of Toolco in TWA appears essential to the best interests of the carrier and the public." *Id.*, at 224.

The Board's approval in 1950 of the complete control of TWA by Toolco was made "subject to the terms and conditions" imposed by the 1944 order with respect to intercompany purchases and annual reporting. See *supra*, at 370. As a result, from 1944 through 1960, every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Applications by Toolco were made to the Board in each instance, with the terms and conditions of the transactions being described.[10] Each was approved by

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Toolco, the financial commitment which was necessary to undertake and continue the project could never have been made and met by TWA." 12 C. A. B., at 216.

[10] For example: On May 15, 1959, the Board authorized Toolco to lease 11 Boeing jets and 30 spare jet engines to TWA. The Board required that a separate lease be executed for each aircraft and modified the previous order under § 408 to permit aircraft lease transactions between TWA and Toolco and to authorize an agreement covering $3½ million worth of spare parts.

On July 1, 1959, Toolco asked that 10 leases of Boeing aircraft to TWA be modified so as to permit the extension of the 10 leases under the same rental until no later than September 30, 1959, and to permit the lease under identical terms of four additional Boeing jets and to permit the purchase from Toolco at actual cost of additional spare parts necessary for the operation of the leased jet

the Board and each was regarded as a modification or interpretation of its antecedent control orders under § 408. Each of these transactional orders recited a finding of the Board that the transaction was "just and reasonable and in the public interest." Then, in December 1960, the Board issued an order approving a major proposal by TWA for the acquisition of jet equipment, which among other things involved fundamental changes in relationship between TWA and Toolco in that the stock of the former, at the insistence of the financial institutions involved in the program, was to be placed in a voting trust and the company's Board of Directors reconstituted. 32 C. A. B. 1363. The dominant position of Toolco thus ended for the period of the trusteeship. In the course of its opinion accompanying the order, the Board stated that although it had not been officially informed of the reasons for the banks' insistence on the voting trust, it was not "unaware of TWA's problems." *Id.*, at 1364. The Board knew, because it was a matter of public record, that TWA had been delayed in financing its jet fleet and the Board's opinion was that TWA had probably suffered because more attractive financing terms were no longer available and because the

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airliners. This order of the Board also constituted a modification of the original order of control granted under § 408.

On September 30, 1959, Toolco asked permission to extend the leases of 10 Boeing jets. The extension was to be under the identical terms of the original leases, the new leases to be terminated by either party within 24 hours on written notice. Here again the Board modified the original transaction under § 408.

On January 29, 1959, Toolco asked permission to lease to TWA on a day-to-day basis up to eight Boeing aircraft and up to eight Convairs, and for TWA to purchase from Toolco at actual cost such spare parts as were necessary and such other equipment as might be required. Here again the Board entered an order that qualified its original "control" order under § 408.

unavailability of equipment may have contributed to the company's failure to maintain its normal share of the transportation market. "Under these circumstances" the Board said, "we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention." *Id.*, at 1365. The Board went on to make clear that its approval would be required before Toolco would be permitted to reassume control over TWA and that any such approval would be forthcoming only after a most "searching inquiry" into the public interest factors involved.[11] *Ibid.*

It was six months later that TWA, now no longer under control of Toolco, filed suit against the latter alleging violations of the antitrust laws to the injury of TWA's business. As analyzed by the Court of Appeals in its opinions filed in this case, the complaint rested principally on Toolco's conduct as controlling stockholder during the years 1955–1960. The assertions were

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[11] In a footnote, the Board amplified what it meant by public-interest factors through reference to the following excerpt from its 1950 decision (12 C. A. B., at 196):

"Aside from any undesirable influence on an air carrier which might arise because of the acquirer's interest in a given phase of aeronautics, an acquirer of an air carrier is not without responsibility in other respects for an air carrier's general capacity to perform its public responsibilities. For inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable . . . for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier. Accordingly, in determining whether or not a particular acquisition should be approved, it is necessary to consider the over-all impact of the acquirer's plans and policies with respect to the controlled carrier."

that in 1955 the commercial air industry was converting to jet aircraft, and that TWA's competitors began in that year "to aid in the development of and to purchase jet planes." 332 F. 2d 602, 605. Toolco and General Dynamics Corp. (Convair) had entered into an arrangement for the joint development of a suitable aircraft but the plan proved abortive, whereupon Toolco considered but ultimately abandoned a plan for itself to enter aircraft production. Meanwhile, Toolco had arranged for the purchase of jet aircraft from Convair and Boeing, the arrangements providing that Toolco could assign its rights to such aircraft to TWA.

As respects its defense that CAB control and surveillance gave it immunity from the antitrust suit, Toolco relies on *Pan American World Airways* v. *United States,* 371 U. S. 296. The Court of Appeals distinguished that case, saying that there the unlawful division of territories and allocation of routes were directly "within the ambit of powers explicitly granted the Board by the Congress," 332 F. 2d, at 608. The Court of Appeals said that the present case was different because, in its view, the continuing supervision of the Board over the Toolco-TWA relationship was general and not related to specific conduct that gave rise to violations of the antitrust laws.

The transactions on the basis of which damages were awarded were based primarily on profits lost as a result of five transactions relating to orders placed by Toolco for a fleet of 63 jet aircraft destined for use by TWA. 449 F. 2d, at 65–66:

(1) The diversion of six Convairs by Toolco to Northeast Airlines;

(2) The temporary retention by Toolco of four other Convairs and their ultimate lease to Northeast Airlines;

(3) The diversion of six Boeing jets out of 33 ordered to Pan American Airways;

(4) The lease, instead of outright sales, of jets in 1959–1960; and

(5) The late delivery of 47 of the 63 jets.

One difficulty with the conclusion of the Court of Appeals that these transactions, unlike those involved in the *Pan American* case, were transactions on which the Board might take action but did not do so, is that it misconstrues the record. As noted, from 1944 through 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Each transaction was approved by the Board and each approval was an order under § 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited a finding of the Board that the transactions were "just and reasonable and in the public interest."

It is said, however, that while the Board modified its original "control" order under § 408 so as to permit sale or lease of the aircraft out of which the alleged antitrust violations occurred, the approval of the Board did not sanction the precise way in which Toolco allegedly used the power to the disadvantage of TWA. But that is not an answer to the problem of exemption.

The Federal Aviation Act as construed and applied by this Court and the Civil Aeronautics Board dictates a contrary result.

In *Pan American World Airways* v. *United States, supra,* the United States brought a civil antitrust action under §§ 1, 2, and 3 of the Sherman Act challenging the joint control of Panagra, an air carrier, by Pan American Airways and W. R. Grace & Co. The allegations were that Pan American, Grace, and Panagra had divided territories, that Pan American and Grace had conspired to monopolize air transportation on the west coast of South America, and that Pan American had used

its power to prevent Panagra from extending its routes from the Canal Zone to the United States. The District Court found no division of territories and no conspiracy between Grace and Pan American but concluded that Pan American had violated the Sherman Act in interfering with Panagra's possible route extension. On cross appeals by Pan American and the United States, this Court held that the complaint should have been dismissed because § 411 of the Act gave the CAB broad power to investigate and bring to a halt unfair practices and unfair methods of competition, including those alleged in the complaint, and because if the courts were to intrude independently with their own construction of the antitrust laws the two regimes might collide. Hence, relief against the alleged division of territories, allocation of routes, and conspiracy to monopolize was a matter exclusively for the Board. The Court also pointed out that under § 414 of the Act, Board orders carried antitrust immunity for any conduct authorized, approved, or required by the order and that it would be odd to hold that an affiliation between an air carrier and others that would pass muster under § 408 could nevertheless run afoul of the antitrust laws: "Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U. S. C. § 1486." 371 U. S., at 309.

As previously indicated, the Court of Appeals did not consider *Pan American* to be relevant or controlling because, different from the situation there, the conduct challenged in TWA's complaint against Toolco was "unrelated to any specific function of the CAB" and hence was not within the exclusive competence of that body. 332 F. 2d, at 608. This view is difficult to square with the statute and the several opinions and

orders issued by the Board with respect to the relationship between Toolco and TWA.

The Act expressly forbade Toolco to acquire control of TWA without approval of the Board. Section 408, however, directed the Board to approve the acquisition if consistent with the public interest and empowered it to remedy any acquisition of control by Toolco obtained otherwise than in accordance with the Act. It is also perfectly clear that in 1944 the Board approved the acquisition of control of TWA by Toolco by virtue of a 45.6% stock ownership and that in 1948 and 1950 the Board approved a transaction that could have increased Toolco's holdings to 80% and transformed its *de facto* control into full legal, as well as practical, control.

In reaching this conclusion, the Board inquired broadly into all phases of the exercise of Toolco's control over TWA during the years 1944–1947. It was not only proper but necessary in determining whether further acquisition of control was consistent with the public interest to examine "into the actions and policies of the controlling company . . . [f]or inevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable . . . for the managerial efficiency, the operating economy, and the financial integrity of the controlled carrier." 12 C. A. B., at 196. Hence, of major interest to the Board were the decisions of Toolco with respect to the type, quantity, timing, and financing of new equipment acquisitions by TWA. It examined and dealt with in great detail the assertions that Toolco had improperly delayed the arrival of new equipment, had insisted on debt rather than equity financing, and itself had sold or leased aircraft to TWA. All of these matters, the Board concluded, were central to proper determination of the issue of the additional con-

trol and, indeed, to the additional question before the Board as to whether the existing relationship should have been completely terminated.

The point is that the conduct of Toolco with which the Board so extensively dealt in 1950 is the same kind of conduct charged to Toolco in the 1950's and alleged by TWA in its complaint to violate the antitrust laws. It is, therefore, difficult to understand how the Court of Appeals could conclude that the acts of Toolco in controlling, allegedly to the injury of TWA, the timing, the financing, and the flow of new equipment to TWA were unrelated to any function of the Board under the Act. Clearly, such considerations were in the mainstream of the Board's § 408 responsibilities to insure that only those acquisitions of control that are in the public interest are approved.

Nor is it tenable to argue that, however relevant Toolco's new equipment decisions might have been to the public-interest standard mandated for Board approval of the additional control obtained in 1947, the Board's authority nevertheless terminated with that approval and that the Board, having issued its approval, was powerless to control or oversee its exercise in the years to come. Section 408 permits only those acquisitions of control that are not inconsistent with the public interest and that will not result in a monopoly. It also authorizes the Board to approve acquisitions subject to such conditions as it may deem desirable. Section 408 (e) empowers the Board to investigate and remedy violations of § 408 (a). If a carrier has acquired control "in any manner whatsoever" other than that approved by the Board, the Board is authorized either on complaint or its own initiative to investigate and if a violation is discovered it is ordered to remedy that situation. Section 204 (a), 49 U. S. C. § 1324 (a), authorizes the Board to issue and amend such orders as it shall deem necessary

to carry out the provisions of and to exercise and perform its powers and duties under the statute.[12]

It seems sufficiently apparent, therefore, that the Board did not exhaust its powers with respect to Toolco's control of TWA when it issued its order of approval in Docket No. 1182 in 1944. Obviously, the Board remained competent to enforce or to waive the conditions attached to that order. It did so many times. See n. 10, *supra.* It also is clear from the 1948 and 1950 proceedings, where the Board's jurisdiction was challenged, that its jurisdiction was triggered not only by substantial additional acquisitions of stock but by any change in the extent or effectiveness of Toolco's control or in Toolco's position in the aeronautics industry. The Board also implied that had Toolco's exercise of control over TWA from 1942 to 1947 been sufficiently unacceptable to foreclose the additional acquisition of control, reopening of Docket No. 1182 and re-examination of the initial approval would have been justified.

We have little doubt that the authority of the Board, either on complaint or its own initiative, extended to forbidding any exercise of control by Toolco which was not authorized or contemplated by the initial or subsequent approval. This seems the clear import of the Act and of the Board's 1948–1950 proceedings.

Also instructive is the Board's response when asked in 1956 to modify its original order so as to permit TWA's purchase of up to 25 jet-powered aircraft from Toolco.

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[12] See also § 415 of the Act, 49 U. S. C. § 1385, which provides that:

"For the purpose of exercising and performing its powers and duties under this chapter, the Board is empowered to inquire into the management of the business of any air carrier and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier, and *from any person controlling . . . such air carrier,* full and complete reports and other information." (Emphasis added.)

Reciting that its prior approvals of Toolco's control of TWA had been premised upon the assumption that Toolco was not engaged in the manufacture or sale of aircraft for commercial use, the Board forthwith opened an investigation to determine whether Toolco's position in the aeronautics industry had so changed as to result in a transaction subject to the Board's jurisdiction under § 408. The motion for waiver of the 1944 condition was consolidated with this new proceeding. The proceeding was later canceled when the motion to waive the 1944 condition was withdrawn, but clearly the Board thought, and rightly so, that it had continuing power to audit the ongoing relationship between TWA and Toolco.

It is also difficult to read in any other manner the recital by the CAB, in the course of approval of the 1960 voting trust arrangement, of Toolco's alleged conduct in delaying the delivery of new equipment and dictating the financing of same, all to TWA's alleged injury, followed by its assertion that such conduct "presented substantial problems requiring the Board's attention." 32 C. A. B., at 1365.

It is therefore no answer to say that our *Pan American* decision does not cover the alleged antitrust violations involved in the Toolco-TWA transactions for which treble damages were sought. As noted, § 408 (b) states that the Board shall not approve any "acquisition of control" which would result "in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier." Moreover, the Board in granting permission to "control" an air carrier must consider the standards of the public interest as defined in § 102 of the Act. Among such standards is that set forth in § 102 (c), which, as indicated, *ante,* at 368 n. 4, provides:

> "The promotion of adequate, economical, and efficient service by air carriers at reasonable charges,

without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

Competition and monopoly [13]—two ingredients of the antitrust laws—are thus standards governing the CAB's exercise of authority in granting, allowing, or expanding or contracting the control which Toolco had over TWA by reason of the various orders issued by the CAB under § 408. In this context, the authority of the Board to grant the power to "control" and to investigate and alter the manner in which that "control" is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, pre-empts the antitrust field.[14] It should be noted in that connection that in

[13] The Board in an early decision refused to approve a joint agreement among carriers because of its antitrust aspects:

"Agreements of this nature, whereby a carrier operating in a particular territory obtains from a prospective competitor an undertaking, express or implied, not to attempt competitive operations, are likely to tend to impede the development of competition to the extent required by the present and future needs of the nation. Accordingly, we are of the opinion that such agreements thwart the purposes of the Act, and that their formation should in general be discouraged." *Pan American Airways,* 3 C. A. B. 540, 546–547.

[14] The *Pan American* case is consistent with the view expressed in *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 360–361, that a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances by implication grant immunity from an antitrust claim.

To the same effect is *United States* v. *Borden Co.,* 308 U. S. 188, 200, where the Court said:

"That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary,

the *Pan American* case, Pan American, which owned 50% of the stock of the air carrier Panagra, was charged with using its control to prevent Panagra from receiving the authority of the CAB to extend its route from the Canal Zone to the United States. That restraint was held beyond the reach of the antitrust laws even though the CAB had taken no action to investigate, let alone act on, the alleged misfeasance as the Board has done here for over 16 years.

We think the Court of Appeals erred also in construing § 414, which immunizes from antitrust liability any conduct approved, authorized, or required by any Board order issued under § 408. As we read this record, the Board not only approved Toolco's ownership of TWA stock but it also contemplated actual and legal control of TWA by Toolco. The Board made it as plain as possible that Toolco's stock ownership would inevitably result in Toolco's exercising authority over the day-to-day affairs of TWA, including the acquisition and financing of equipment. It was precisely this kind of control the Board approved. Toolco's power of decision with respect to these matters was central to the public-interest issue. What is more, the Board not only concluded that Toolco's stewardship, although faulty in some respects, had been a great benefit to TWA and to the public in years gone by, but also determined that the additional control sought by Toolco and continuation of TWA-Toolco relationships were essential to the public interest.

It is too clear for argument that in entering the 1950 order the Board fully realized that Toolco had determined and would determine when and how much new equipment would be purchased, from whom it would be

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the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched."

acquired, and how it would be financed. It was precisely this type of association that it contemplated when it approved the additional control obtained by Toolco in 1947. And it was precisely this same conclusion that the Board was implementing each time during the 1950's that it approved a sale or a lease of an airplane from Toolco to TWA which, without its approval, would have violated the Board's ongoing limitation on the size of intercompany transactions.

We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws.

> "While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total." 371 U. S., at 305.

One of the most conspicuous exceptions would be the combination or agreement between two air carriers involving trade restraints. See *Timken Co.* v. *United States,* 341 U. S. 593, 598.

There may be other exceptions. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between

parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

We cannot believe that if the day after the Board's order of 1950, a minority stockholder had instituted a derivative antitrust suit against Toolco, alleging that Toolco had monopolized the TWA market from 1944 to 1950, delayed deliveries of aircraft, and insisted on improvident financing arrangements, such a suit could have survived a motion to dismiss based on § 414. Such an action would have sought to negate what the Board, after full investigation, had found consistent with § 408's anti-monopoly provision, consistent with § 102's competition standard, and consistent with the public interest.

TWA's suit in 1961 carries no better credentials, for it sought to terminate a relationship the continuation of which the Board had found essential to both TWA and the public interest and to penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming.

It adds nothing to the analysis to characterize Toolco's exercise of power over TWA as monopolization of the TWA market, for it was precisely such control that the Board opted for in 1944 and 1950. Moreover, a condition of the order was that Toolco's sales to TWA could not assume more than negligible proportions without in every instance the Board's approving the transaction as being consistent with the public interest. Nor does it add to the argument to describe Toolco's conduct as furthering a tying or exclusive-dealing arrangement or as a conspiracy to restrain trade in that market represented by TWA.

The short of it is that in our view §§ 408 and 414 of the Act, as construed in *Pan American,* require reversal of the Court of Appeals and dismissal of this action. What TWA charged in its complaint was no more than the kind of conduct the CAB in 1950 had approved and

authorized for the future; and, in any event, such conduct was within the power of the Board to control and was central to the mandate of § 408 to permit control of TWA by Toolco only if consistent with the public interest.

We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American,* 371 U. S., at 305. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

This conclusion necessitates a dismissal of the cross-petition, a reversal of the judgment below, and a remand with directions to dismiss the complaint, as the numerous other points briefed and argued become irrelevant in that posture of the litigation.

Reversed.

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

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The history of this cause is so remarkable—indeed unique in the annals of modern federal jurisprudence, so far as I am aware—that I must preface my dissent on the

merits with a recital of the course of this litigation over nearly a dozen years. This protracted litigation, conducted at enormous cost, now comes to an abrupt end on an issue directly presented to this Court nearly eight years ago but not decided. As the strange history will demonstrate, resolution of the issue when it was first before the Court, as now decided, would have terminated this litigation without having the parties invest untold efforts and vast expense in a now wholly irrelevant contest over the proper measure of damages.

On June 30, 1961, TWA filed a complaint against the Hughes Tool Co. in the United States District Court for the Southern District of New York, charging violations of the antitrust laws. On February 7, 1962, the District Court filed a pretrial order, appointing a Special Master to act in discovery and deposition proceedings. After discovery proceeded to an impasse, on February 1, 1963, the District Court ordered Howard Hughes to appear for a deposition and ordered the defendant Toolco to produce certain documents that it had previously refused to produce. Shortly thereafter, on February 7, 1963, the District Court entered a memorandum opinion and order denying a motion to dismiss TWA's complaint.[1] In response to the order to produce Hughes for examination along with the contested documents, Toolco filed a "notice of position," on February 8, 1963, advising the District Court and TWA that it had chosen to rest on the merits of its positions in order to "avoid the burdens and expenses involved in further pretrial and trial proceedings prior to the time that an appellate court has had the opportunity to rule upon the decisions and orders heretofore made herein."

This "notice of position" constituted a default and accordingly judgment was entered against Toolco, on

[1] 32 F. R. D. 604.

May 3, 1963. The District Court then certified to the United States Court of Appeals for the Second Circuit the question of the sufficiency of the complaint on which the default judgment was based. The issue of damages was referred to the Special Master. On June 2, 1964, the Second Circuit issued an opinion in which it decided that the District Court had jurisdiction of the action and that the orders of the Civil Aeronautics Board affecting the relationship between the parties did not constitute a good defense to the antitrust claims of TWA.[2] On November 16, 1964, this Court granted certiorari to review the judgment of the Court of Appeals.[3] After full argument and briefing, but without opinion, the writ was dismissed as improvidently granted on March 8, 1965,[4] and the case returned to the District Court for further proceedings to determine the amount of TWA's damages.

For nearly three years, proceedings were held before the Special Master [5] to determine the appropriate amount of damages. On December 23, 1969, the District Court filed a new opinion confirming a report of the Special Master awarding damages amounting to $137,611,435.95.[6] On April 14, 1970, the District Court filed a superseding order in which it added to the TWA award $7,500,000 as a reasonable attorney's fee (representing some 56,000 hours of work at a "mixed rate" of $128 per hour) and $336,705.12 in costs, for a total of $145,448,141.07, plus interest. The judgment was stayed pending a renewed appeal to the Court of Appeals, which,

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[2] 332 F. 2d 602.

[3] 379 U. S. 912.

[4] 380 U. S. 248.

[5] Herbert Brownell replaced J. Lee Rankin as Special Master when Rankin resigned in December 1965 to become Corporation Counsel for New York City.

[6] 308 F. Supp. 679.

on September 1, 1971, affirmed the judgment of the District Court, with only slight modification.[7]

This Court again granted certiorari on February 22, 1972,[8] and today—more than 11 years after it all began and more than seven years after the now-determinative issue was brushed aside by this Court—the Court discovers that the actions alleged in TWA's complaint were immunized from the antitrust laws by the Civil Aeronautics Board's role in the Toolco-TWA relationship. This, of course, was the precise issue tendered to this Court for decision in 1964 in order to secure an early decision that might end the contest before enormous additional sums were expended in proving damages resulting from the actions alleged in TWA's complaint.[9]

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[7] 449 F. 2d 51.

[8] 405 U. S. 915.

[9] Toolco's 1964 petition for certiorari posed three questions, the first being as follows:

"1. Where the Civil Aeronautics Board has approved the acquisition of a controlling stock interest in an air carrier by a person engaged in a phase of aeronautics and has further approved or has jurisdiction to approve all relevant transactions between them under an Act which immunizes the approved transactions from the antitrust laws, does the district court have jurisdiction to entertain a complaint by such air carrier alleging that the transactions between the subsidiary air carrier and its parent violated the antitrust laws in that they constituted a conspiracy, an attempt to monopolize and an acquisition in violation of the antitrust laws?"

Toolco's petition in the present case posed seven questions, the fourth of which was as follows:

"4. When the Civil Aeronautics Board has approved an acquisition of control over an air carrier by a person engaged in a phase of aeronautics and has further approved all relevant transactions between them, is the exercise of that control to determine how the air carrier acquires aircraft and the necessary financing therefor immunized from the operation of the antitrust laws under Section 414 of the Federal Aviation Act?"

This capsule chronicle of the present litigation barely suggests its factual complexity. To describe this litigation as a 20th-century sequel to Bleak House is only a slight exaggeration. Dickens himself could scarcely have imagined that 56,000 hours of lawyering at a cost of $7,500,000 would represent the visible expenses of only one party to a modern intercorporate conflict, to say nothing of the time of corporate and management personnel diverted from their daily tasks.[10] Indeed, today's "ending" is quite a surprise—as great a surprise for some of us as it must be for the parties. I suggest it will even surprise the victors, for in the oral argument to this Court only a few fleeting comments were devoted to the point that now becomes the dispositive issue in the case. Of course, this was a sound allocation by counsel of the limited time allowed for argument since the Court had not considered the point worthy of notice in 1964 when the case was first here.

To be sure, all this is secondary to the correctness of today's decision. I am unable to join the Court's disposition because I believe it departs markedly from our prior decisions uniformly holding that repeal of the antitrust laws to accommodate other federal regulatory statutes "is to be regarded as implied only if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary." *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 357 (1963). In particular, the Court today substantially enlarges the scope of *Pan American World Airways* v. *United States,* 371 U. S. 296 (1963), a case which the Court says "requires" the result it reaches today—notwithstanding that

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[10] It is not unreasonable to assume that the battalions of lawyers for these adversaries devoted substantially the same effort and time, thus bringing counsel fees in the aggregate to the sum of $15 million.

Pan American's teaching was available in Volume 371 of the United States Reports when the Court dismissed the writ in this cause as improvidently granted.

I

Passing to the merits of the Court's holding, I find it necessary at the outset to supplement the Court's description of the statutory framework from which this litigation arises. Section 408 of the Federal Aviation Act of 1958, 49 U. S. C. § 1378,[11] requires the approval of the

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[11] Section 408, 49 U. S. C. § 1378, reads in pertinent part as follows:

"(a) Prohibited acts.

"It shall be unlawful unless approved by order of the Board as provided in this section—

. . . . . .

"(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

. . . . . .

"(5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided,* That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;

. . . . . .

"(b) Application to Board; hearing; approval; disposal without hearing.

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation,

CAB when any person [12] seeks to acquire a controlling interest in any air carrier. The Board may approve such acquisition only if it finds that the acquisition will be consistent with the public interest. § 408 (b), 49 U. S. C. § 1378 (b). Specifically, the Board "shall not approve any . . . acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the . . . acquisition of control." *Ibid.*

The Act fails to elaborate on the scope of its command to the CAB not to approve any acquisition that would create a monopoly and thereby restrain competition. In other words, the Act fails to specify the relevant market or markets to which the Board must look in determining whether a particular acquisition or exercise of control is forbidden. Section 102 of the Act,[13]

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merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control . . . ."

[12] Section 408 (a) (5) was amended in 1969 to require Board approval of an acquisition of control of an air carrier by "any other person." 83 Stat. 103, 49 U. S. C. § 1378 (a) (5). Prior to 1969, the Act required Board approval only for acquisition of control of an air carrier by another air carrier, by persons having other specified transportation interests, or by a "person engaged in any other phase of aeronautics."

[13] Section 102, 49 U. S. C. § 1302, reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other

enumerating the general policies that are to guide the Board, is similarly ambiguous. It includes among those factors to be weighed in evaluating the "public interest" factor under the Act "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the . . . commerce of the United States . . . ." Again, though, the question is: competition by whom? In which market or markets?

There can be no doubt the Board is responsible for promoting competition in some sense; our inquiry is whether the Board is charged with fostering competition both within the air transportation market and without, in other markets essentially unrelated to air transportation and alien to the purposes for which the Board was created. Resolution of this ambiguity is

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things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

critical to proper interpretation of § 414 of the Act,[14] which confers antitrust immunity upon "[a]ny person affected by any order made under [§ 408, *inter alia*] . . . insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." What is "authorized, approved, or required" by the CAB must surely be determined, at least to a very large extent, by the scope of the Board's mandate to evaluate potentially anticompetitive conduct.

II

The Court today neglects to resolve, or indeed even mention, this problem, and well it might, for the legislative history of the Act demonstrates that the competitive concerns that troubled the framers of the Aviation Act related exclusively to competition by and among air carriers. A major impetus to federal regulations of air transportation was the failure of the preceding era of freely competitive price and route warfare to bring stability to the Nation's air transport industry. In his statement accompanying the report of the Committee on Commerce on the Civil Aeronautics Act of 1938, Senator Copeland stated:

> "Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public in-

[14] Section 414, 49 U. S. C. § 1384, reads:

"Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

terest, in the interests of the Postal Service, and of the national defense. Aviation in America today, under present laws, is unsatisfactory to investors, labor, and the air carriers themselves. . . . The committee feels that this bill will not only promote an orderly development of our Nation's civil aeronautics, but by its immediate enactment prevent the spread of bad practices and of destructive and wasteful tactics resulting from the intense competition now existing within the air-carrier industry." S. Rep. No. 1661, 75th Cong., 3d Sess., 2 (1938).

Similar views were voiced by the Chairman of the House Committee on Interstate and Foreign Commerce, Congressman Clarence Lea:

"Under existing law there is little economic regulation of air carriers. Routes are awarded not upon the basis of the ability of the particular air carrier to perform the service or the requirements of the public convenience and necessity, but upon the letting of air-mail contracts to the lowest responsible bidders. This system has completely broken down in recent months, because the air carriers, in their desire to secure the right to carry the mail over a new route, have made absurdly low bids, indeed, have virtually evinced a willingness to pay for the privilege of carrying the mail over a particular route. A route once secured, however, under the existing system of air-mail contracts does not protect the air carrier operating that route from possible cutthroat competition, for air carriers are not required to secure a certificate or other authorization from the Government before beginning operations, other than one based upon safety requirements. Nor, is there any authority in the Federal Government under existing law to prevent

competing carriers from engaging in rate wars which would be disastrous to all concerned.

"The result of this chaotic situation of the air carriers has been to shake the faith of the investing public in their financial stability and to prevent the flow of funds into the industry." H. R. Rep. No. 2254, 75th Cong., 3d Sess., 2 (1938).

A key aim of the new legislation, then, was to eliminate "cutthroat competition" among air carriers. From the beginning, the air carriers pushed for a scheme of regulation to control entry and regulate price competition in the air transportation market. Yet equally soon after serious consideration of an air regulation bill began, the prospect of regulation gave rise to concern that the new system of regulation might be used to foster the development of an "airline trust" or similar overconcentration in the air transportation market. In 1937, Commissioner Eastman of the Interstate Commerce Commission, who supported full federal regulation of air transportation, reminded the members of the Senate Commerce Committee that the proposed legislation would give the Commission unlimited authority to consolidate the Nation's airlines and, possibly, to do away with competition altogether. Eastman suggested that language be drafted to preclude undue consolidation among carriers.[15] As one commentator has stated, "Eastman's suggestion appears to have been heeded, for when the [1937] bill was reported, the merger clause contained [the language which became the anti-monopoly restriction of section 408]." Comment, Merger and Monopoly in Domestic Aviation, 62 Col.

[15] Testimony of Joseph B. Eastman, Member, Interstate Commerce Commission, on S. 2 and S. 1760 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess., 334–335 (1937).

L. Rev. 851, 856–857 (1962). Final consideration of the aviation bill was postponed until the next session of Congress, but when Senator McCarran and Representative Lea introduced legislation at the 1938 session to create an independent air regulatory agency, both bills "contained a monopoly proviso virtually identical to the one that had been added to the 1937 bills, as reported." *Id.*, at 857.

To implement § 408's scheme for balancing stability with competition in the air transportation market, the bill provided explicit antitrust immunity in § 414.[16] The debates over § 414—like the origins of § 408—reflect congressional concern with competition in the air transportation market. Senator McKellar asked Senator Truman, a major supporter of the aviation bill, if it were true that the proposed legislation would repeal the antitrust provisions of the existing airmail laws. When Senator Truman answered in the affirmative, Senator McKellar complained that:

> "[S]uch a provision is very inadvisable, and very bad legislation, and ought never to be agreed to.

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[16] At the House hearings, Colonel Edgar Gorrell, President of the Air Transport Assn. of America, testified that a major element of uncertainty that kept money from flowing into commercial aviation was "cutthroat competition, . . . where one company went out to make warfare against another and wound up by destroying the capital of both. . . . That is a fact. It has happened, and the only agency or agent in America today that can stop it is myself; and the moment I stick my neck out to stop it, if I did, I would face a jail sentence and a fine for violating the antitrust laws. Our companies today cannot lawfully agree on prices." Hearings on H. R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., 309.

See *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 347 (1963), where we noted that the relevant "collective action . . . would, had it occurred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act."

> As everyone knows, at the present time the air companies are complaining that they are not allowed to consolidate. Some years ago we allowed them to consolidate, and the result was the greatest ill that ever befell the air companies. The same ill will befall them again if such combinations are permitted.
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> . . . . .
>
> "I desire to state that I cannot vote for any bill which proposes that a commission shall give air companies the right to combine and confederate into a huge monopoly. I regret very much that I shall have to vote against the bill." 83 Cong. Rec. 6728–6729.

Senator McCarran disagreed. He told Senator McKellar that the bill "contain[ed] every protection against the very thing which the Senator from Tennessee fears." Senator Truman reminded his colleagues of the § 408 proviso requiring that the Board approve no acquisition of control that would "result in creating a monopoly or monopolies and thereby unduly restrain competition or unreasonably jeopardize another air carrier not a party to the consolidation . . . ." Senator McCarran agreed that "every precaution has been written into the bill so that the antitrust laws and all laws for the prevention of combinations and monopolies shall be enforced. . . . Protection has been written into the bill against combinations and monopolies in restraint of trade, in restraint of commerce, and in restraint of everything which would constitute a monopoly." *Id.*, at 6729. Senator Copeland recited five different provisions of the bill "where the question of monopoly is dealt with in one way or another with the view to its control and prevention." When the debate turned from the discussion of general principles to ap-

plication of those principles to a particular fact situation, again the Senators spoke of consolidation and competition by air carriers.[17]

Thus, the debates, as well as the remainder of the legislative history of the 1938 Act, reflect that the Congress that enacted the 1938 legislation was concerned only with problems of competition and monopoly in the air carrier market. Moreover, the debates show that there was considerable concern over even the limited grant of antitrust immunity deemed necessary to provide the proposed authority with sufficient flexibility to administer the air carrier market in the public interest. It is most unlikely that the concerns expressed would have been put to rest by extending the new authority's pre-emptive antitrust responsibilities under § 408 beyond the air transportation market into every market that might happen to be touched by transactions with an air carrier.

III

Our holding in *Pan American World Airways* v. *United States,* 371 U. S. 296, becomes important in this setting. There, the Government filed an antitrust complaint alleging, *inter alia,* anticompetitive interference by Pan American with the route acquisitions of Panagra, a joint venture of Pan American World Airways and W. R. Grace & Co. This court held that the complaint should be dismissed. The Court stood behind the presumption against implied antitrust immunity, 371 U. S., at 304–305, n. 9; however, for two interdependent reasons, the Court held that the conduct alleged in Panagra's complaint was immunized from the antitrust laws. First, the conduct specified in the complaint fell within the

[17] 83 Cong. Rec. 6730–6731.

Board's basic mission and competency—the regulation of entry into and competition within the air transportation market:

> "Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme." *Id.*, at 305.

Second, and equally important, we held that § 411 of the Act gave the Board a specific substantive mandate to investigate and regulate unfair practices and unfair methods of competition among air carriers in the air transportation market, *id.*, at 302, 308.

In *Pan American* the Board had not only the statutory power to supervise the relevant transactions but also the statutory responsibility to remedy the abusive features of those transactions specified in the Panagra complaint. Consequently, "If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Id.*, at 310. Even this narrow holding provoked the dissent of MR. JUSTICE BRENNAN, in which Mr. Chief Justice Warren joined.

The present case is different from *Pan American* in a critical respect. Here, we may assume the Board possesses full authority under the Act to supervise § 408 transactions between a controlling person and an air carrier—just as in *Pan American,* the allocation of routes and division of territories constituted the basic stuff of the Board's day-to-day business. Yet, unlike the acts specified by Panagra in *Pan American,* the acts charged in TWA's complaint are components of an antitrust conspiracy to restrain trade in the aircraft supply and manufacturing market. Section 411 does not command Board responsibility for preventing such a conspiracy, since § 411 is in terms restricted to unfair methods of competition "in air transportation or the sale thereof." Thus, to sustain its result in this case, the Court must

fall back on one (or both) of two propositions: it must either find some specific authority in the Federal Aviation Act other than § 411 for its conclusion that the Board's mandate to police anticompetitive practices extends to the subject matter of TWA's complaint; or it must consider such statutory authority irrelevant to a finding of antitrust immunity. Neither approach is, in my view, sound.

IV

A. Improbable as it seems, there is much in the Court's opinion to suggest that its judgment rests upon the assumption that antitrust immunity is conferred here simply by virtue of a rather extensive grant of procedural authority for the Board to intervene in the control-person-air-carrier relationship. The Court recounts in detail the history of the Board's involvement in the Toolco-TWA relationship—though the Court does not suggest, as it cannot, that the Board specifically considered the actions by Toolco alleged in TWA's complaint to violate the antitrust laws.[18] The Court tells

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[18] Between 1956 and 1960, the Board entered various modification orders permitting Toolco and TWA to enter into short-term leases of jets and permitting various limited extensions of those leases. Specifically, the record shows that the Board approved 12 transactions between Toolco and TWA from 1956 to 1960:

—on May 17, 1956, the Board approved sale of 33 Lockheed aircraft, and spare parts, by Toolco to TWA;

—on Dec. 18, 1956, the Board approved a proposal for TWA to borrow some $10 million in operating capital from Toolco;

—on June 11, 1957, the Board approved a proposal whereby Toolco would refinance TWA's May 17, 1956, purchase of Lockheed aircraft;

—on Dec. 30, 1958, the Board again approved a transaction relating to the nonjet Lockheed aircraft;

—on Feb. 26, 1959, the Board approved a proposal whereby TWA would lease one Boeing 707–131 aircraft from Toolco, plus spare parts, for the purpose of training its crews to fly jet aircraft;

—on May 15, 1959, the Board approved the lease by Toolco to

us that in 1950, the Board embarked upon a wide-ranging evaluation of the treatment afforded TWA by Toolco as the controlling person—though the Court does not sug-

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TWA of 11 Boeing 707–131 jet aircraft, with provision for obtaining spare parts from Toolco and leasing spare jet engines;

—on July 1, 1959, the Board approved the lease of four additional aircraft by Toolco to TWA, and the extension of the leases on the previous jet aircraft. The leases were prolonged pending the working out of "definitive financing arrangements" which, presumably, would enable TWA to acquire ownership of the aircraft;

—on Sept. 30, 1959, the Board again approved extension of the jet leases upon the representation of Toolco and TWA that financing arrangements had not yet been completed;

—on Jan. 29, 1960, the Board approved the lease by Toolco to TWA of eight 707–131's and eight Convair 880's (all jet aircraft), on a day-to-day basis, and again with provision for spare parts. This approval was again premised on completion in the near future of "definitive financing arrangements permitting [TWA] to operate these aircraft on a permanent basis";

—on June 23, 1960, the Board approved acquisition—*i. e.*, purchase—by TWA of 25 Boeing 707 and 20 Convair 880 jet aircraft, with $260 million to be raised by an offering of bonds and junior securities. Toolco was to guarantee the subscription and would lend $50 million to TWA to enable it to make the offering;

—on July 21, 1960, the Board approved acquisition of title to two additional jet aircraft by TWA from Toolco; and

—finally, on December 29, 1960, the Board approved creation of a voting trust for the placement of Toolco's holdings in TWA.

As the Court's opinion observes, damages were awarded for those allegations of the TWA complaint that charged that TWA had been damaged by the diversion of six Convairs by Toolco to Northeast Airlines; by the temporary retention by Toolco of four Convairs and the ultimate lease of these aircraft to Northeast; by the diversion of six Boeing jet aircraft, of 33 ordered, to Pan American Airways, TWA's principal trans-Atlantic competitor; by the lease of planes to TWA, in lieu of sales that would have been more to TWA's financial interest; and by the late delivery of 47 of the 63 jets procured for TWA by Toolco.

With the exception of the decision to lease planes to TWA rather than sell them, the actions alleged to have damaged TWA related, not to the documented structure of Toolco's transactions with TWA, as presented to and approved in fact by the Board, but rather to

gest, as again it cannot, that the 1950 proceeding of the Board even remotely considered Toolco's actions as components of an antitrust conspiracy directed toward the aircraft supply and manufacturing market.[19] Finally,

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the manner in which Toolco executed the paper transactions, without Board approval or knowledge. The leases were never considered in relation to other means of aircraft acquisition, as the complaint required they be viewed. The Court dismisses these discrepancies by observing that the restraint alleged in *Pan American* was held to be immune "even though the CAB had taken no action to investigate, let alone act on, the alleged misfeasance as the Board has done here for over 16 years." In other words, if the Board were responsible for complete supervision of the Toolco-TWA transactions, immunity would not be undermined by the Board's failure to undertake such supervision in fact.

At best, though, the Court's historical recitation is irrelevant since it in no way explains why it was the Board's statutory responsibility to consider the transactions between Toolco and TWA as components of an antitrust conspiracy allegedly pointed toward the aircraft supply and manufacturing market.

[19] The Board's 1950 proceeding undertook "to consider the over-all impact of the acquirer's plans and policies with respect to the controlled carrier." 12 C. A. B. 192, 196. The Board reviewed the past transactions involving the financing of aircraft. In particular, the Board considered whether Toolco had properly resolved, in favor of debt financing, a longstanding dispute between the Toolco and TWA managements over the relative merits of debt or equity financing of new aircraft. The Board concluded that Toolco's financial and technical contributions to TWA had been of considerable benefit to the carrier. On the other hand, the Board viewed TWA's capitalization as "neither reasonable nor sound" since "[i]ts proportion of debt to total capitalization is far too large." *Id.*, at 218. Yet "the extent to which Toolco and its principal officers can be held directly or principally responsible for TWA's present capital structure poses a most difficult problem," since "[n]umerous factors . . . operate to complicate and often delay agreement on a financial plan." *Id.*, at 221. On balance, the Board concluded that Toolco control of TWA had been in the public interest, and it approved the additional acquisition by Toolco of TWA stock.

While it is true that the Board's evaluation of Toolco's "stewardship" over TWA involved decisions regarding the acquisition of

the Court makes much of the powers of investigation and continuing supervision provided by § 415 of the Act—though the Court does not acknowledge that those powers are explicitly limited by Congress to Board actions "[f]or the purpose of exercising and performing [the Board's] powers and duties under this Act," and are therefore no indication of the scope of the Board's substantive responsibility.

The weakness inherent in the Court's recitation of "procedural underbrush" is that it leaps from the premise of the Board's acknowledged procedural power to intervene in § 408 "control" transactions to the conclusion that the Board's substantive statutory duty to consider the anticompetitive impact of such transactions is or, for some reason of policy, ought to be equally unlimited. Yet, inescapably, it is the Board's substantive mandate upon which antitrust immunity properly turns; as our prior decisions teach, the potential of colliding substantive judgments forces the carving out of antitrust immunity, not simply the overlapping of jurisdiction to intervene in a particular type of transaction. We have uniformly insisted upon a substantive mandate to the regulatory agency to consider fully and remedy the relevant anticompetitive conduct. See, in addition to *Pan American, supra, United States* v. *Borden Co.*, 308 U. S. 188, 206 (1939) (relevant provision of Capper-Volstead Act "does not cover the entire field of the Sherman Act"); *Georgia* v. *Pennsylvania R. Co.*, 324

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aircraft, including the method of financing and the timing of purchase and lease decisions, there is nothing in the Board's decision to indicate that the Board's 1950 proceeding undertook to analyze Toolco's control of TWA from the perspective of Toolco's own market position. Consequently, the 1950 proceeding in no way suggests that the Board has deviated from its consistent position that Congress did not entrust it with the exclusive responsibility for policing anticompetitive effects of § 408 transactions.

U. S. 439, 458 (1945) ("no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier"); *Milk Producers Assn.* v. *United States,* 362 U. S. 458, 469 (1960) (§ 7 of Clayton Act immunized "transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture" under statutory authority, but this included only marketing agreements and not agreements or restraints of wider scope typically covered by the antitrust laws); *California* v. *Federal Power Comm'n,* 369 U. S. 482, 485 (1962) ("Here . . . while 'antitrust considerations' are relevant to the issue of 'public interest, convenience, and necessity' . . . there is no 'pervasive regulatory scheme' . . . including the antitrust laws that has been entrusted to the Commission"); *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 351–352 (1963) (though Comptroller of Currency was required to consider effect on competition in passing on bank merger, not required to give the factor any particular weight, to hold a hearing, or to subject his determination to judicial review).

B. The major premise of the Court's decision must, then, be that the Federal Aviation Act imposes on the Board full responsibility for evaluating and preventing anticompetitive impact, of whatever variety, flowing from a control transaction touching an air carrier. As the Court puts it, "Competition and monopoly—two ingredients of the antitrust laws—are thus standards governing the CAB's exercise of authority in granting, allowing, or expanding or contracting the control which Toolco had over TWA by reason of the various orders issued by the CAB under § 408."

I cannot agree with the Court's reading of the provisions of the Act that require the Board to maintain competition. The Court offers no support for its reading of those provisions; and, as I have already indicated, the legislative history surely provides none. Moreover, the Board itself has consistently interpreted the Act not to impose on it the expansive role the Court now perceives for the first time. In a brief *amicus curiae* filed in 1964 and again in 1972, the Board disclaimed the mandate or the competency to police the aircraft supply market or any non-air carrier market which may be threatened by anticompetitive acts involving control of an air carrier. We have only recently reaffirmed the well-established doctrine that the consistent administrative construction of federal legislation "is entitled to great weight." *Trafficante* v. *Metropolitan Life Insurance Co., ante,* at 210; *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965); *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 433–434 (1971). As for the Board's competence to do the job assigned it by the Court, we are not tied to the Board's self-appraisal, but "it is entitled to some weight," particularly when the legal issues surrounding Toolco's alleged behavior in the aircraft supply market "are typical antitrust problems and not at all typical airline law problems." "The search for a practical accommodation of court and agency . . . is not advanced by our ignoring the agency's considered sense of self-limitation." *Pan American World Airways, supra,* at 328, 330 (BRENNAN, J., dissenting).

If the Board's basic function, the Act's legislative history, and the Board's view of its own mandate and competence were not enough to convince me that the Court's reading of the Act is erroneous, these factors are at least enough to raise substantial doubts. Such doubts, as our prior cases teach, are enough to secure the continuing availability of anti-

trust or other judicial remedies as additional safeguards for protection of the public interest. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *United States* v. *Philadelphia National Bank, supra,* at 350, *United States* v. *Borden Co.,* 308 U. S., at 198 ("a cardinal principle of construction that repeals by implication are not favored"). See *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226–228 (1940); *Georgia* v. *Pennsylvania R. Co.,* 324 U. S., at 456–457; *California* v. *Federal Power Comm'n,* 369 U. S., at 485, and 14 additional cases cited in MR. JUSTICE BRENNAN's opinion for the Court in *United States* v. *Philadelphia National Bank, supra,* at 350 n. 28. The traditional aversion to implied repeal of the antitrust laws should have particular force in the context of the Federal Aviation Act, which explicitly states that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U. S. C. § 1506; and see *Pan American World Airways, supra,* at 321 (BRENNAN, J., dissenting).

Nor does the Court's result seem justifiable for practical reasons of regulatory accommodation. Indeed, I find the Court's expansive reading of the Board's antitrust responsibilities inconsistent with our duty "to make the [regulatory scheme] work." *Silver* v. *New York Stock Exchange,* 373 U. S., at 357. Section 408 of the Act has now been amended to require Board approval when any person, whether or not engaged in any aspect of aeronautics, acquires a controlling interest in an air carrier. In this age of conglomerate mergers, the time may soon arrive when another industrial corporation seeks to acquire control of an air carrier. It may well be that some similar future acquisition may be in the best interests of American air transportation. It may

likewise pose serious anticompetitive dangers. The Court's decision today will, I think, provide a serious obstacle to proper consideration of any such transaction that may be proposed in future years, since the Board will be faced with a difficult dilemma. If it approves the control acquisition, under the terms of the Court's decision the Board engages itself to exercise continuing supervision over all aspects of the control relationship, including the anticompetitive impact of the relationship in the computer market, the hotel market, the insurance market, the credit market, or whatever market happens to be affected by the control transaction. Quite understandably, the Board's response may be to play it safe, in keeping with its own advice to this Court that it cannot effectively function as the ombudsman of the American economy whenever that economy touches air transportation in any way. On the other hand, the Board may feel obliged to heed the Court's yawning interpretation of § 408. This course of action poses the threat that the Board will have extended itself so far beyond its competence and manpower that it is diverted from those central tasks of regulation imposed on it by § 408 of the Act. In either event, I cannot imagine that the Court's new reading of § 408 will contribute to the effective enforcement of the congressional scheme for promoting a sound national system of air transportation.

Returning to the 1964 efforts of Toolco to have the Court resolve the issue of the Board's authority with respect to the antitrust issue, it is elementary, of course, that a denial of a petition for certiorari decides nothing. It is also true that dismissal of a petition as improvidently granted, after full oral argument and briefing, is not a judgment on the merits in any sense. But when parties to litigation reach that stage and the Court fails to respond with a decision on the merits, lawyers read that as a signal that the case should proceed. These parties

did so—for nine years and more than 15 million dollars in legal expense—only to be told by the Court now that on the facts there is no legal liability—the very issue that could as well have been decided in 1964 as today. All of the litigation since 1964 has been confined to the massive task of determining damages and it will not do to say that the Court could not resolve the legal issues until damages were ascertained. Precisely the contrary is true.

For these reasons, I respectfully dissent from the Court's judgment. I would hold that actions permitted by the Board under § 408 of the Federal Aviation Act are "authorized, approved, or required" by the Board's action (and thereby immunized by § 414 from antitrust liability) only to the extent that the antitrust claim falls within the core of the Board's statutory responsibility to regulate air transportation while maintaining, in that market, the maximum degree of competition consistent with the public interest. In view of the Court's disposition, it would not be fruitful for me to express at length my views on the other issues presented to the Court, other than to note that, with modifications not relevant to the overriding issue, I would affirm the judgment of the Court of Appeals. At the very least, I would set the cases for reargument so the dispositive issue might be fully explored by the Court.

PHILPOTT ET AL. *v.* ESSEX COUNTY WELFARE BOARD

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 71–5656. Argued December 4, 1972—Decided January 10, 1973

A Social Security Act provision, 42 U. S. C. § 407, which prohibits subjecting federal disability insurance benefits and other benefits to any legal process, bars a State from recovering such benefits retroactively paid to a beneficiary, and in this case no exception can be implied on the ground that if the federal payments had been made monthly there would have been a corresponding reduction in the state payments. Pp. 415–417.

59 N. J. 75, 279 A. 2d 806, reversed.

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

George Charles Bruno argued the cause and filed a brief for petitioners.

Ronald Reichstein argued the cause for respondent. With him on the brief was *Joseph E. Cohen.*

Solicitor General Griswold, Deputy Solicitor General Friedman, Keith A. Jones, Wilmot R. Hastings, Edwin Yourman, and *Arthur Abraham* filed a brief for the United States as *amicus curiae* urging reversal.

George F. Kugler, Jr., Attorney General, *Stephen Skillman,* Assistant Attorney General, and *Joan W. Murphy,* Deputy Attorney General, filed a brief for the State of New Jersey as *amicus curiae* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Wilkes,[1] one of the petitioners, applied to respondent, one of New Jersey's welfare agencies, for financial as-

[1] The payment in controversy is in a bank account under the name of petitioner Philpott in trust for Wilkes.

sistance based upon need by reason of permanent and total disability. As a condition of receiving assistance, a recipient is required by New Jersey law to execute an agreement to reimburse the county welfare board for all payments received thereunder.[2] The purpose apparently is to enable the board to obtain reimbursement out of subsequently discovered or acquired real and personal property of the recipient.

Wilkes applied to respondent for such assistance in 1966 and he executed the required agreement. Respondent determined Wilkes' monthly maintenance needs to be $108; and, finding that he had no other income, respondent fixed the monthly benefits at that amount and began making assistance payments, no later than January 1, 1967. The payments would have been less if Wilkes had been receiving federal disability insurance benefits under the Social Security Act, and respondent advised him to apply for those federal benefits.

In 1968 Wilkes was awarded retroactive disability insurance benefits under § 223 of the Social Security Act, 70 Stat. 815, as amended, 42 U. S. C. § 423, covering the period from May 1966 into the summer of 1968. Those benefits, calculated on the basis of $69.60 per month for 20 months and $78.20 per month for six months,

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[2] N. J. Stat. Ann. § 44:7–14 (a) (Supp. 1972–1973) provides: "Every county welfare board shall require, as a condition to granting assistance in any case, that all or any part of the property, either real or personal, of a person applying for old age assistance, be pledged to said county welfare board as a guaranty for the reimbursement of the funds so granted as old age assistance pursuant to the provisions of this chapter. The county welfare board shall take from each applicant a properly acknowledged agreement to reimburse for all advances granted, and pursuant to such agreement, said applicant shall assign to the welfare board, as collateral security for such advances, all or any part of his personal property as the board shall specify."

amounted to $1,864.20. A check in that amount was deposited in the account which Philpott holds as trustee for Wilkes. Under New Jersey law, we are told, the filing of a notice of such a reimbursement agreement has the same force and effect as a judgment. 59 N. J. 75, 80, 279 A. 2d 806, 809.

Respondent sued to reach the bank account under the agreement to reimburse. The trial court held that respondent was barred by the Social Security Act, 49 Stat. 624, as amended, 42 U. S. C. § 407, from recovering any amount from the account.[3] 104 N. J. Super. 280, 249 A. 2d 639. The Appellate Division affirmed. 109 N. J. Super. 48, 262 A. 2d 227. The Supreme Court reversed.[4] 59 N. J. 75, 279 A. 2d 806. The case is here on a petition for a writ of certiorari which we granted. 406 U. S. 917.

On its face, the Social Security Act in § 407 bars the State of New Jersey from reaching the federal disability payments paid to Wilkes. The language is all-inclusive: [5] "[N]one of the moneys paid or payable . . . under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process . . . ." The

[3] Title 42 U. S. C. § 407 provides:

"The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

[4] Since respondent did not claim a right to the entire federal payment but only to the amount by which its own payments would have been reduced had the federal benefits been received currently rather than retroactively and because the stipulated facts were ambiguous as to when respondent actually began making assistance payments, the court remanded for a determination of the precise amount of respondent's claim.

[5] *Supra,* n. 3.

moneys paid as retroactive benefits were "moneys paid . . . under this subchapter"; and the suit brought was an attempt to subject the money to "levy, attachment . . . or other legal process."

New Jersey argues that if the amount of social security benefits received from the Federal Government had been made monthly, the amount of state welfare benefits could have been reduced by the amount of the federal grant. We see no reason to base an implied exemption from § 407 on that ground. We see no reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditor. Indeed, since the Federal Government provides one-half of the funds for assistance under the New Jersey program of disability relief, the State, concededly, on recovery of any sums by way of reimbursement, would have to account to the Federal Government for the latter's share.

The protection afforded by § 407 is to "moneys paid" and we think the analogy to veterans' benefits exemptions which we reviewed in *Porter* v. *Aetna Casualty Co.*, 370 U. S. 159, is relevant here. We held in that case that veterans' benefits deposited in a savings and loan association on behalf of a veteran retained the "quality of moneys" and had not become a permanent investment. *Id.*, at 161–162.

In the present case, as in *Porter,* the funds on deposit were readily withdrawable and retained the quality of "moneys" within the purview of § 407. The Supreme Court of New Jersey referred to cases[6] where a State which has provided care and maintenance to an incompetent veteran at times is a "creditor" for purposes of

[6] See *Savoid* v. *District of Columbia,* 110 U. S. App. D. C. 39, 288 F. 2d 851; *District of Columbia* v. *Reilly,* 102 U. S. App. D. C. 9, 249 F. 2d 524. See decision below, 59 N. J. 75, 85, 279 A. 2d 806, 812.

38 U. S. C. § 3101, and at other times is not. But § 407 does not refer to any "claim of creditors"; it imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a State.

The New Jersey court also relied on 42 U. S. C. § 404, a provision of the Social Security Act which permits the Secretary to recover overpayments of old age, survivors, or disability insurance benefits. But there has been no overpayment of federal disability benefits here and the Secretary is not seeking any recovery here. And the Solicitor General, speaking for the Secretary, concedes that the pecuniary interest of the United States in the outcome of this case, which would be its aliquot share of any recovery, is not within the ambit of § 404.

By reason of the Supremacy Clause the judgment below is

Reversed.

DISTRICT OF COLUMBIA *v.* CARTER

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

No. 71–564. Argued November 6, 1972—Decided January 10, 1973

The District of Columbia is not a "State or Territory" within the meaning of 42 U. S. C. § 1983, and the Court of Appeals therefore erred insofar as that court sustained respondent's claims for deprivation of civil rights pursuant to that statute. Pp. 420–433.

144 U. S. App. D. C. 388, 447 F. 2d 358, reversed.

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

Richard W. Barton argued the cause for petitioner. With him on the brief were *C. Francis Murphy* and *David P. Sutton.*

Warren K. Kaplan argued the cause for respondent. With him on the brief were *Melvin L. Wulf, Ralph J. Temple,* and *Robert W. Boraks.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

On February 12, 1969, respondent filed this civil action in the United States District Court for the District of Columbia alleging that in 1968 Police Officer John R. Carlson of the Metropolitan Police Department of the District of Columbia arrested him without probable cause and, while he was being held by two other officers, beat him with brass knuckles. The complaint alleged further that Carlson's precinct captain, the chief of police, and the District of Columbia each had negligently failed to train, instruct, supervise, and control Carlson with regard to the circumstances in which an arrest may be made and the extent to which various degrees of force may be used to effect an arrest. Respondent sought damages against each defendant upon several theories, in-

cluding a common-law theory of tort liability and an action for deprivation of civil rights pursuant to 42 U. S. C. § 1983, which provides: [1]

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

The District Court dismissed the complaint against all defendants without opinion.[2] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the allegations of the complaint were sufficient to state causes of action under both the common-law and federal statutory theories of liability. *Carter* v. *Carlson,* 144 U. S. App. D. C. 388, 447 F. 2d 358 (1971). In sustaining respondent's claims under § 1983, the court held that "[a]cts under color of the law of the District of Columbia are under color of the law of a 'State or Territory' for the purpose of § 1983." *Id.,* at 391 n. 3, 447 F. 2d, at 361 n. 3. We granted certiorari. 404 U. S. 1014. For the reasons stated below, we hold that the District of Columbia is not a "State or Territory" within the meaning of § 1983. We

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[1] Ku Klux Klan Act of 1871, Act of Apr. 20, 1871, § 1, 17 Stat. 13, Rev. Stat. § 1979, 42 U. S. C. § 1983.

[2] Officer Carlson was never found for service of process. The precinct captain and police chief moved to dismiss the complaint on the ground that it failed to state a claim for which relief could be granted. Their supporting memorandum argued that no tort on their part had been committed, and that in any event they were protected by the doctrine of official immunity. The District of Columbia moved to dismiss the complaint for failure to state a claim, and also on the ground of sovereign immunity.

therefore reverse the judgment of the Court of Appeals insofar as that judgment sustained respondent's claims under § 1983.[3]

I

Whether the District of Columbia constitutes a "State or Territory" within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.[4] Indeed, such "[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." *Puerto Rico* v. *The Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 258 (1937); see *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 86, 87–88 (1934); *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433 (1932).

The Court of Appeals' conclusion that the District of Columbia is a "State or Territory" for the purpose of § 1983 was premised almost exclusively upon this Court's earlier determination that "the District of Columbia is included within the phrase 'every State and Territory'" as employed in 42 U. S. C. § 1982. *Hurd* v. *Hodge*, 334

[3] We therefore have no occasion to determine whether, as urged by petitioner, the District is not a "person" for the purpose of 42 U. S. C. § 1983. In addition, we intimate no view on the merits of respondent's claims insofar as they are predicated on other theories of liability.

[4] Compare *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Talbott* v. *Silver Bow County*, 139 U. S. 438 (1891); *Geofroy* v. *Riggs*, 133 U. S. 258 (1890); *Callan* v. *Wilson*, 127 U. S. 540 (1888), with *Bolling* v. *Sharpe*, 347 U. S. 497 (1954); *Wight* v. *Davidson*, 181 U. S. 371 (1901); *Hepburn* v. *Ellzey*, 2 Cranch 445 (1805).

U. S. 24, 31 (1948).[5] At first glance, it might seem logical simply to assume, as did the Court of Appeals, that identical words used in two related statutes were intended to have the same effect. Nevertheless, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law . . . ." *Atlantic Cleaners & Dyers* v. *United States, supra,* at 433. And the logic underlying the Court of Appeals' assumption breaks down completely where, as here, "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed . . . with different intent." *Ibid.*

Section 1982, which first entered our jurisprudence as § 1 of the Civil Rights Act of 1866, Act of Apr. 9, 1866, 14 Stat. 27, provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This provision was enacted as a means to enforce the Thirteenth Amendment's proclamation that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." See *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 437–438 (1968). "As its text reveals, the Thirteenth

[5] The Court of Appeals also cited *Sewell* v. *Pegelow,* 291 F. 2d 196 (CA4 1961), which, relying upon *Hurd,* also held that the District of Columbia is a "State or Territory" within the meaning of § 1983. That decision is likewise disapproved.

Amendment 'is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.'" *Civil Rights Cases,* 109 U. S. 3, 20 (1883); see *Griffin* v. *Breckenridge,* 403 U. S. 88, 105 (1971); *Jones* v. *Alfred H. Mayer Co., supra,* at 437–440; *Clyatt* v. *United States,* 197 U. S. 207, 216, 218 (1905). Thus, it cannot be doubted that the power vested in Congress to enforce this Amendment includes the power to enact laws of nationwide application.

Moreover, like the Amendment upon which it is based, § 1982 is not a "mere prohibition of State laws establishing or upholding" racial discrimination in the sale or rental of property but, rather, an "absolute" bar to *all* such discrimination, private as well as public, federal as well as state. Cf. *Jones* v. *Alfred H. Mayer Co., supra,* at 413, 437. With this in mind, it would be anomalous indeed if Congress chose to carve out the District of Columbia as the sole exception to an act of otherwise universal application. And this is all the more true where, as here, the legislative purposes underlying § 1982 support its applicability in the District. The dangers of private discrimination, for example, that provided a focal point of Congress' concern in enacting the legislation,[6] were, and are, as present in the District of Columbia as in the States, and the same considerations that led Congress to extend the prohibitions of § 1982 to the Federal Government apply with equal force to the District, which is a mere instrumentality of that Government. Thus, in the absence of some express indication of legislative intent to the contrary,[7] there was

[6] See *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 422–436 (1968).

[7] Although the legislative debate over the 1866 Act did not focus specifically on the District, there are numerous indications that the

ample justification for the holding in *Hurd* that § 1982 was intended to outlaw racial discrimination in the sale or rental of property in the District of Columbia as well as elsewhere in the United States.

The situation is wholly different, however, with respect to § 1983. Unlike § 1982, which derives from the Civil Rights Act of 1866, § 1983 has its roots in § 1 of the Ku Klux Klan Act of 1871, Act of Apr. 20, 1871, § 1, 17 Stat. 13. This distinction has great significance, for unlike the 1866 Act, which was passed as a means to enforce the Thirteenth Amendment, the primary purpose of the 1871 Act was "to enforce the Provisions of the Fourteenth Amendment." 17 Stat. 13; see, *e. g., Lynch* v. *Household Finance Corp.,* 405 U. S. 538, 545 (1972); *Monroe* v. *Pape,* 365 U. S. 167, 171 (1961); see also Cong. Globe, 42 Cong., 1st Sess., App. 68, 80, 83–85. And it has long been recognized that "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources. See the *Civil Rights Cases,* 109 U. S. 3. Compare *United States* v. *Williams,* [341 U. S. 70], with *Screws* v. *United States,* 325 U. S. 91." *Monroe* v. *Pape, supra,* at 205–206 (opinion of Frankfurter, J.).

In contrast to the reach of the Thirteenth Amendment, the Fourteenth Amendment has only limited applicability; the commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority. See, *e. g., Civil Rights Cases, supra; United States* v. *Harris,* 106 U. S. 629 (1883); *United States* v. *Cruikshank,* 92 U. S. 542 (1876). The Fourteenth Amendment itself "erects no shield against merely private conduct, however discriminatory or wrong-

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Act was designed to "extend to all parts of the country." Cong. Globe, 39th Cong., 1st Sess., 322 (Sen. Trumbull); see, *e. g., id.,* at 426, 474.

ful." [8] *Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948); see also *United States* v. *Price,* 383 U. S. 787 (1966); *Evans* v. *Newton,* 382 U. S. 296 (1966); *Hodges* v. *United States,* 203 U. S. 1 (1906). Similarly, actions of the Federal Government and its officers are beyond the purview of the Amendment. And since the District of Columbia is not a "State" within the meaning of the Fourteenth Amendment, see *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954); *Shelley* v. *Kraemer, supra,* at 8; *Wight* v. *Davidson,* 181 U. S. 371, 384 (1901), neither the District nor its officers are subject to its restrictions.[9]

Like the Amendment upon which it based, § 1983 is of only limited scope. The statute deals only with those deprivations of rights that are accomplished under the color of the law of "any State or Territory." [10] It does not reach purely private conduct and, with the exception of the Territories,[11] actions of the Federal Govern-

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[8] This is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment. See *United States* v. *Guest,* 383 U. S. 745, 762 (1966) (Clark, J., concurring); *id.,* at 782–784 (BRENNAN, J., concurring and dissenting). Cf. *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966).

[9] Thus, unlike the situation with respect to § 1982 and the Thirteenth Amendment, inclusion of the District of Columbia in § 1983 cannot be subsumed under Congress' power to enforce the Fourteenth Amendment but, rather, would necessitate a wholly separate exercise of Congress' power to legislate for the District under Art. I, § 8, cl. 17.

[10] It should be observed that, unlike § 1982, which uses the phrase "every State and Territory" as a mere geographical description, the expression "any State or Territory" in § 1983 constitutes a substantive limitation upon the types of conduct that are prohibited.

[11] As initially enacted, § 1 of the 1871 Act applied only to action under color of the law of any "State." 17 Stat. 13. The phrase "or Territory" was added, without explanation, in the 1874 codification and revision of the United States Statutes at Large. Rev. Stat. § 1979 (1874). Since the Territories are not "States" within the meaning of the Fourteenth Amendment, see *South Porto Rico Sugar*

ment and its officers are at least facially exempt from its proscriptions. Thus, unlike the situation presented in *Hurd,* the instant case does not involve a constitutional provision and related statute of universal applicability. This being so, the considerations that led to an expansive reading of § 1982 so as to include the District of Columbia simply do not apply with respect to § 1983. We must therefore examine the legislative history of § 1983 to determine whether the purposes for which the Act was adopted support a similarly broad construction.

II

Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted.[12] After the Civil War ended in 1865, race relations in the South became increasingly turbulent. The Ku Klux Klan was organized by southern whites in 1866, and a wave of murders and assaults was launched against both blacks and Union sympathizers.[13] Thus, at the opening of the 42d Congress, considerable apprehension was expressed by Republicans about the insecurity of life and property in the South,[14]

Co. v. *Buscaglia,* 154 F. 2d 96, 101 (CA1 1946); *Anderson* v. *Scholes,* 83 F. Supp. 681, 687 (Alaska 1949), this addition presumably was an exercise of Congress' power to regulate the Territories under Art. IV, § 3, cl. 2.

[12] See generally K. Stampp, The Era of Reconstruction, 1865–1877 (1965); A. Nevins, The Emergence of Modern America, 1865–1878 (1927).

[13] See Nevins, *supra,* n. 12, at 351. For an appreciation of the nature and character of the Ku Klux Klan as it appeared to Congress in 1871, see S. Rep. No. 1, 42d Cong., 1st Sess. (1871), and the voluminous report of the Joint Select Committee to inquire into the Condition of Affairs in the late Insurrectionary States, published as S. Rep. No. 41, pts. 1–13 and H. R. Rep. No. 22, pts. 1–13, 42d Cong., 2d Sess. (1872).

[14] See Cong. Globe, 42d Cong., 1st Sess., 116–117.

and on March 23, 1871, President Grant sent a message to Congress requesting additional federal legislation to curb this rising tide of violence. Such legislation was deemed essential in light of the inability of the state governments to control the situation.[15] Five days later, Congressman Shellabarger of Ohio introduced the bill that eventually was to become the Ku Klux Klan Act of 1871.[16]

Although there are threads of many thoughts running through the debates on the 1871 Act, it seems clear that § 1 of the Act, with which we are here concerned, was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others.[17] Thus, while the Klan itself provided the principal catalyst for the legislation, the remedy created in § 1 "was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape,* 365 U. S., at 175–176 (emphasis in original). Senator Pratt of Indiana summarized this concern when he said: [18]

> "[O]f the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union senti-

[15] See *id.,* at App. 226.

[16] See Cong. Globe, 42d Cong., 1st Sess., 317.

[17] See, *e. g., id.,* at 154–159 (Sen. Sherman), 322 (Cong. Stoughton), 374 (Cong. Lowe), 428 (Cong. Beatty), 516–519 (Cong. Shellabarger), 653 (Sen. Osborn); *id.,* at App. 72 (Cong. Blair), 78 (Cong. Perry), 100–110 (Sen. Pool).

[18] Cong. Globe, 42d Cong., 1st Sess., 505.

> ments, white or black, invokes their aid. Then Justice closes the door of her temples."

Similarly, Congressman Hoar of Massachusetts stated: [19]

> "Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection."

To the Reconstruction Congress, the need for some form of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary. At the time this Act was adopted, it must be remembered, there existed no general federal-question jurisdiction in the lower federal courts.[20] Rather, "Congress relied on the

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[19] *Id.*, at 334.

[20] Original "arising under" jurisdiction, pursuant to Art. III, § 2, cl. 1, was vested in the federal courts by § 11 of the Act of Feb. 13, 1801, 2 Stat. 92, but was repealed only a year later by § 1 of the Act of Mar. 8, 1802, c. 8, § 1, 2 Stat. 132. It was not until 1875 that Congress granted the federal courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of

state courts to vindicate essential rights arising under the Constitution and federal laws." [21] *Zwickler* v. *Koota*, 389 U. S. 241, 245 (1967). With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials.[22] Congressman Coburn explained: [23]

> "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . . We believe that we can trust our United States courts, and we propose to do so."

Thus, in the final analysis, § 1 of the 1871 Act may be viewed as an effort "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced

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the United States . . . ." Act of Mar. 3, 1875, § 1, 18 Stat. 470. The jurisdictional amount has since been raised from $500 to $2,000 by the Act of Mar. 3, 1887, § 1, 24 Stat. 552; to $3,000 by the Act of Mar. 3, 1911, § 24, 36 Stat. 1091; and to $10,000 by the Act of July 25, 1958, 72 Stat. 415. The provision is now codified as 28 U. S. C. § 1331 (a).

[21] The only exception was § 25 of the Judiciary Act of 1789, 1 Stat. 85, providing for Supreme Court review whenever a claim of federal right was denied by a state court.

[22] Thus, as originally enacted, § 1 of the 1871 Act provided that the proceedings authorized by the Act are "to be prosecuted in the several district or circuit courts of the United States. . . ." 17 Stat. 13. This aspect of § 1 is now codified as 28 U. S. C. § 1343 (3).

[23] Cong. Globe, 42d Cong., 1st Sess., 460.

and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape,* 365 U. S., at 180.

There was no need, however, to create federal court jurisdiction for the District of Columbia. Even prior to 1871, the courts of the District possessed general jurisdiction over both federal and local matters. Act of Mar. 3, 1863, c. 91, 12 Stat. 762. Thus, the jurisdictional aspects of § 1 of the 1871 Act were entirely superfluous with respect to the District. Moreover, while Congress was unable to exert any direct control over the actions of state officials, it was authorized under Art. I, § 8, cl. 17, of the Constitution to exercise plenary power over the District of Columbia and its officers.[24] Indeed, "[t]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs." *Berman* v. *Parker,* 348 U. S. 26, 31 (1954); see *District of Columbia* v. *Thompson Co.,* 346 U. S. 100, 108 (1953); *National Insurance Co.* v. *Tidewater Co.,* 337 U. S. 582, 602 (1949); *Kendall* v. *United States,* 12 Pet. 524, 619 (1838). And since the District is itself the seat of the National Government, Congress was in a position to observe and, to a large extent, supervise the activities of local officials.[25] Thus, the rationale underlying Con-

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[24] In pertinent part, Art. I, § 8, cl. 17, of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of Government of the United States . . . ."

[25] The District of Columbia police system, for example, was operated under the direction of a board of five commissioners appointed by the President with the advice and consent of the Senate. The statutes creating the metropolitan police system established a network of regulations and reporting requirements that enabled the

gress' decision not to enact legislation similar to § 1983 with respect to federal officials—the assumption that the Federal Government could keep its own officers under control—is equally applicable to the situation then existing in the District of Columbia.

It is true, of course, that Congress also possessed plenary power over the Territories.[26] For practical reasons, however, effective federal control over the activities of territorial officials was virtually impossible. Indeed, "the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto. The scope of self-government exercised under these delegations was nearly

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Federal Government to keep a watchful eye over police conduct. See Act of Aug. 6, 1861, 12 Stat. 320; Act of July 16, 1862, 12 Stat. 578.

Respondent seeks to make much of the fact that, in 1871, Congress established a "territorial" form of government for the District of Columbia, with a governor and legislative assembly, to which the general administration of the affairs of the District was committed. Act of Feb. 21, 1871, 16 Stat. 419. In light of this development, respondent argues, Congress must have intended the word "Territory" in § 1 of the Ku Klux Klan Act to include the District of Columbia. What respondent apparently overlooks, however, is that on June 20, 1874, the very day that the phrase "or Territory" was formally enacted into the revised version of § 1 of the Ku Klux Klan Act, see n. 11, *supra,* Congress also abolished the "territorial" form of government in the District and, in its stead, authorized the President, with the advice and consent of the Senate, to appoint a commission of three members to exercise the power previously vested in the governor and assembly. Act of June 20, 1874, c. 337, 18 Stat. 116.

[26] Article IV, § 3, cl. 2, provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

as broad as that enjoyed by the States. . . ." *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 546 (1962); see also E. Pomeroy, The Territories and the United States 1861–1890, p. 92 (1947); H. R. Rep. No. 440, 48th Cong., 1st Sess. (1884); S. Rep. No. 1249, 49th Cong., 1st Sess. (1886). Thus, although the Constitution vested control over the Territories in the Congress, its practical control was both "confused and ineffective," [27] making the problem of enforcement of civil rights in the Territories more similar to the problem as it existed in the States than in the District of Columbia.[28]

Moreover, the effort to analogize the District of Columbia to the Territories in this context faces strong theoretical obstacles. The territorial state has aptly been described as "one of pupilage at best." *Nelson* v. *United States,* 30 F. 112, 115 (Ore. 1887). From the moment of their creation, the Territories were destined for admission as States into the Union, and "as a preliminary step toward that foreordained end—to tide over the period of ineligibility—Congress, from time to time, created territorial governments, the existence of

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[27] E. Pomeroy, The Territories and the United States 1861–1890, p. 4 (1947).

[28] Moreover, unlike the courts of general jurisdiction in the District of Columbia, which were created under the authority vested in Congress by Art. III, § 1, see *O'Donoghue* v. *United States,* 289 U. S. 516 (1933), the federal courts in the Territories were established under Art. IV, § 3, cl. 2, see *Glidden Co.* v. *Zdanok,* 370 U. S. 530 (1962); *American Insurance Co.* v. *Canter,* 1 Pet. 511 (1828). This distinction also has significance for our problem for, unlike judges in the District, territorial judges were appointed for terms of only four years. Rev. Stat. § 1864 (1874). As a result, the territorial judges were peculiarly susceptible to local pressures, since their reappointments were often dependent upon favorable recommendations of the territorial legislatures. See Pomeroy, *supra,* n. 27, at 98–102.

which was necessarily limited to the period of pupilage." *O'Donoghue* v. *United States,* 289 U. S. 516, 537 (1933); see *McAllister* v. *United States,* 141 U. S. 174, 188 (1891). Thus, in light of the transitory nature of the territorial condition, Congress could reasonably treat the Territories as inchoate States, quite similar in many respects to the States themselves, to whose status they would inevitably ascend.

The District of Columbia, on the other hand, "is an exceptional community . . . established under the Constitution as the seat of the National Government." *District of Columbia* v. *Murphy,* 314 U. S. 441, 452 (1941). As such, it "is as lasting as the States from which it was carved or the union whose permanent capital it became." *O'Donoghue* v. *United States, supra,* at 538. Indeed, it is "the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised . . . ." *Id.,* at 539. Unlike either the States or Territories, the District is truly *sui generis* in our governmental structure.

With this unique status of the District of Columbia in mind, and in the absence of any indication in the language, purposes, or history of § 1983 of a legislative intent to include the District within the scope of its coverage, the conclusion is compelled that the Court of Appeals erred in holding that the District of Columbia constitutes a "State or Territory" within the meaning of § 1983. Just as "[w]e are not at liberty to seek ingenious analytical instruments" to avoid giving a congressional enactment the broad scope its language and origins may require, *United States* v. *Price,* 383 U. S., at 801, so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it. This is not to say, of course, that a claim,

such as a possible claim against Officer Carlson, of alleged deprivation of constitutional rights is not litigable in the federal courts of the District. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U. S. 388 (1971); *Bell* v. *Hood,* 327 U. S. 678 (1946). But insofar as the judgment of the Court of Appeals sustaining respondent's claims rested on § 1983, that judgment must be, and is,

Reversed.

UNITED STATES *v.* KRAS

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

No. 71–749. Argued October 18, 1972—Decided January 10, 1973

Appellee, an indigent who filed a voluntary petition in bankruptcy, sought discharge without payment of the fees, aggregating no more than $50, that are a precondition to discharge in such a proceeding. The District Court, relying primarily on *Boddie* v. *Connecticut,* 401 U. S. 371 (where the Court held that a State could not consistently with due process and equal protection requirements, deny access to divorce courts to indigents unable to pay filing and other fees), held the bankruptcy fee provisions, as applied to appellee, an unconstitutional denial of Fifth Amendment rights of due process, including equal protection. *Held:* This case is not controlled by *Boddie, supra.* For here access to courts is not the only conceivable relief available to bankrupts; the filing-fee requirement does not deny an indigent the equal protection of the laws, since there is no constitutional right to obtain a discharge of one's debts in bankruptcy; the right to a discharge in bankruptcy is not a "fundamental" right demanding a compelling governmental interest as a precondition to regulation; and there is a rational basis for the fee requirement. Pp. 443–450.

331 F. Supp. 1207, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post,* p. 450. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post,* p. 451. DOUGLAS and BRENNAN, JJ., filed a dissenting opinion, *post,* p. 457. MARSHALL, J., filed a dissenting opinion, *post,* p. 458.

Edward R. Korman argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Acting Assistant Attorney General Wood,* and *Alan S. Rosenthal.*

Kalman Finkel argued the cause for appellee. With him on the brief was *Leon B. Polsky.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Bankruptcy Act and one of this Court's complementary Orders in Bankruptcy impose fees and make the payment of those fees a condition to a discharge in voluntary bankruptcy.

Appellee Kras, an indigent petitioner in bankruptcy, challenged the fees on Fifth Amendment grounds. Upon receiving notice of the constitutional issue in the District Court, the Government moved to intervene as of right under 28 U. S. C. § 2403 and Rule 24 (a) of the Federal Rules of Civil Procedure. Leave to intervene was granted. The District Court held the fee provisions to be unconstitutional as applied to Kras. 331 F. Supp. 1207 (EDNY 1971). It reached this conclusion in the face of an earlier contrary holding by a unanimous First Circuit. *In re Garland,* 428 F. 2d 1185 (1970), cert. denied, 402 U. S. 966 (1971). Pursuant to 28 U. S. C. § 1252, the Government appealed. We noted probable jurisdiction. 405 U. S. 915 (1972).

I

Section 14 (b)(2) of the Bankruptcy Act, 11 U. S. C. § 32 (b)(2), provides that, upon the expiration of the time fixed by the court for filing of objections, "the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this title have been paid in full." Section 14 (c), 11 U. S. C. § 32 (c), similarly provides that the court "shall grant the discharge unless satisfied that the bankrupt . . . (8) has failed to pay the filing fees required to be paid by this title in full." Section 59 (g), 11 U. S. C. § 95 (g), relates to the dismissal of a petition in bankruptcy and states that "in the case of a dismissal for failure to pay the costs," notice to creditors shall not be required. Three separate sections of the

Act thus contemplate the imposition of fees and condition a discharge upon payment of those fees.

Three charges are imposed: $37 for the referee's salary and expense fund, $10 for compensation of the trustee,[1] and $3 for the clerk's services. §§ 40 (c)(1), 48 (c), and 52 (a), 11 U. S. C. §§ 68 (c)(1), 76 (c), and 80 (a). These total $50.[2] The fees are payable upon the filing of the petition. Section 40 (c)(1), however, contains a proviso that in cases of voluntary bankruptcy, all the fees "may be paid in installments, if so authorized by General Order of the Supreme Court of the United States."

The Court's General Order in Bankruptcy No. 35 (4), as amended June 23, 1947, 331 U. S. 873, 876–877, 11 U. S. C. App., p. 2210, complements § 40 (c)(1) and provides that, upon a proper showing by the bankrupt, the fees may be paid in installments within a six-month period, which may be extended not to exceed three months.[3]

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[1] Additional compensation to the trustee in an appropriate case is allowable under § 48 (c), 11 U. S. C. § 76 (c), but these provisions have no application for a no-asset or fully exempt estate.

[2] General Order in Bankruptcy No. 15, 305 U. S. 687 (1939), 11 U. S. C. App., p. 2203, provides that a trustee need not be appointed in a no-asset case. When a trustee is not appointed, the aggregate fees are $40.

[3] "(4) The petition in a voluntary proceeding under Chapters I to VII . . . of the Act may be accepted for filing by the clerk if accompanied by a verified petition of the bankrupt . . . stating that the petitioner is without and cannot obtain the money with which to pay the filing fees in full at the time of filing. Such petition shall state the facts showing the necessity for the payment of the filing fees in installments and shall set forth the terms upon which the petitioner proposes to pay the filing fees.

"a. At the first meeting of creditors or any adjournment thereof, the court . . . shall enter an order fixing the amount and date of payment of such installments. The final installment shall be payable not more than six months after the date of filing of the original

II

Robert William Kras presented his voluntary petition in bankruptcy to the United States District Court for the Eastern District of New York on May 28, 1971. The petition was accompanied by Kras' motion for leave to file and proceed in bankruptcy without payment of any of the filing fees as a condition precedent to discharge. The motion was supported by Kras' affidavit containing the following allegations that have not been controverted by the Government:

1. Kras resides in a 2½-room apartment with his wife, two children, ages 5 years and 8 months, his mother, and his mother's 6-year-old daughter. His younger child suffers from cystic fibrosis and is undergoing treatment in a medical center.

2. Kras has been unemployed since May 1969 except for odd jobs producing about $300 in 1969 and a like amount in 1970. His last steady job was as an insurance agent with Metropolitan Life Insurance Company. He was discharged by Metropolitan in 1969 when premiums he had collected were stolen from his home and he was unable to make up the amount to his employer. Metropolitan's claim against him has increased to over $1,000 and is one of the debts listed in his bankruptcy petition. He has diligently sought steady employment in New York City, but, because of unfavorable references from Metropolitan, he has been unsuccessful. Mrs. Kras was employed until March 1970, when she was

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petition; provided, however, that for cause shown the court may extend the time of payment of any installment for a period not to exceed three months.

"b. Upon the failure of a bankrupt . . . to pay any installment as ordered, the court may dismiss the proceeding for failure to pay costs as provided in Section 59, sub. g. of the Act. . . .

"c. No proceedings upon the discharge of a bankrupt . . . shall be instituted until the filing fees are paid in full."

forced to stop because of pregnancy. All her attention now will be devoted to caring for the younger child who is coming out of the hospital soon.

3. The Kras household subsists entirely on $210 per month public assistance received for Kras' own family and $156 per month public assistance received for his mother and her daughter. These benefits are all expended for rent and day-to-day necessities. The rent is $102 per month. Kras owns no automobile and no asset that is non-exempt under the bankruptcy law. He receives no unemployment or disability benefit. His sole assets are wearing apparel and $50 worth of essential household goods that are exempt under § 6 of the Act, 11 U. S. C. § 24, and under New York Civil Practice Laws and Rules § 5205 (1963). He has a couch of negligible value in storage on which a $6 payment is due monthly.

4. Because of his poverty, Kras is wholly unable to pay or promise to pay the bankruptcy fees, even in small installments. He has been unable to borrow money. The New York City Department of Social Services refuses to allot money for payment of the fees. He has no prospect of immediate employment.

5. Kras seeks a discharge in bankruptcy of $6,428.69 in total indebtedness in order to relieve himself and his family of the distress of financial insolvency and creditor harassment and in order to make a new start in life. It is especially important that he obtain a discharge of his debt to Metropolitan soon "because until that is cleared up Metropolitan will continue to falsely charge me with fraud and give me bad references which prevent my getting employment."

The District Court's opinion contains an order, 331 F. Supp., at 1215, granting Kras' motion for leave to file his petition in bankruptcy without prepayment of fees. He was adjudged a bankrupt on September 13,

1971. Later, the referee, upon consent of the parties, entered an order allowing Kras to conduct all necessary proceedings in bankruptcy up to but not including discharge. The referee stayed the discharge pending disposition of this appeal.

III

In the District Court Kras first presented a statutory argument—and, alternatively, one based in common law—that he was entitled to relief from payment of the bankruptcy charges because of the provisions of 28 U. S. C. § 1915 (a).[4] This is the *in forma pauperis* statute that has its origin in the Act of July 20, 1892, c. 209, 27 Stat. 252. See also 28 U. S. C. §§ 832–836 (1940 ed.).

The District Court rejected the argument despite the seeming facial application of § 1915 (a) to a bankruptcy proceeding as well as to any other. It reached this result by noting that § 51 (2) of the Bankruptcy Act, as originally adopted in 1898, 30 Stat. 558, had provided for a waiver of fees upon the filing of an affidavit of inability to pay; that by the passage of the Referees' Salary Bill in 1946, 60 Stat. 326, bankruptcy petitions *in forma pauperis* were abolished, H. R. Rep. No. 1037, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 959, 79th Cong., 2d Sess., 7 (1946); and that the 1946 statute, being later and having a positive and specific provision for postponement of fees in cases of indigency, overrode the earlier general provisions of § 1915 (a). 331 F. Supp., at 1209–1210. To the same effect are

[4] "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress."

In re Garland, 428 F. 2d, at 1186–1187, and *In re Smith,* 323 F. Supp. 1082, 1084–1085 (Colo. 1971), the reasoning of which the District Court adopted. So also is *In re Smith,* 341 F. Supp. 1297, 1298 (ND Ill. 1972).

The appellee may well have abandoned the argument on this appeal. Tr. of Oral Arg. 44–45. In any event, we agree, for the reasons stated by the District Court and by the courts in *Garland* and in the two *Smith* cases, *supra,* that § 1915 (a) is not now available in bankruptcy. See 2 W. Collier, Bankruptcy ¶ 51.01, pp. 1873–1874 (14th ed. 1971). Neither do we perceive any common-law right to proceed without payment of fees. Congress, of course, sometime might conclude that § 1915 (a) should be made applicable to bankruptcy and legislate accordingly.

The District Court went on to hold, however, 331 F. Supp., at 1210–1215, that the prescribed fees, payment of which was required as a condition precedent to discharge, served to deny Kras "his Fifth Amendment right of due process, including equal protection." *Id.,* at 1212. It held that a discharge in bankruptcy was a "fundamental interest" that could be denied only when a "compelling government interest" was demonstrated. It noted, *id.,* at 1213, that provision should be made by the referee for the survival, beyond bankruptcy, of the bankrupt's obligation to pay the fees. The court rested its decision primarily upon *Boddie* v. *Connecticut,* 401 U. S. 371 (1971), which came down after the First Circuit's decision in *Garland, supra.* A number of other district courts and bankruptcy referees have reached the same result.[5]

[5] *In re Smith,* 323 F. Supp. 1082 (Colo. 1971) (decided before *Boddie*); *In re Naron,* 334 F. Supp. 1150 (Ore. 1971); *In re Ottman,* 336 F. Supp. 746 (ED Wis. 1972); *In re Smith,* 341 F. Supp. 1297 (ND Ill. 1972); *In re Haddock and Beeman,* Nos. 14810 and 14811 (Conn. 1972); *In re Passwater,* Nos. IP70–B–3697 and

Kras contends that his case falls squarely within *Boddie*. The Government, on the other hand, stresses the differences between divorce (with which *Boddie* was concerned) and bankruptcy, and claims that *Boddie* is not controlling and that the fee requirements constitute a reasonable exercise of Congress' plenary power over bankruptcy.

IV

Boddie was a challenge by welfare recipients to certain Connecticut procedures, including the payment of court fees and costs, that allegedly restricted their access to the courts for divorce. The plaintiffs, simply by reason of their indigency, were unable to bring their actions. The Court reversed a district court judgment that a State could limit access to its courts by fees "which effectively bar persons on relief from commencing actions therein." 286 F. Supp. 968, 972. Mr. Justice Harlan, writing for the Court, stressed state monopolization of the means for legally dissolving marriage and identified the would-be indigent divorce plaintiff with any other action's impoverished defendant forced into court by the institution of a lawsuit against him. He declared that "a meaningful opportunity to be heard" was firmly imbedded in our due process jurisprudence, 401 U. S., at 377, and that this was to be protected against denial by laws that operate to jeopardize it for particular individuals, *id.*, at 379–380. The Court then concluded that Connecticut's refusal to admit these good-faith divorce plaintiffs to its courts equated with the denial of an opportunity to be heard and, in the absence of a suffi-

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IP70–B–3698 (SD Ind. 1971); *In re Ripley,* No. Bk 71–0–1003 (Neb. 1972); *In re Read,* No. Bk 71–826 (WDNY 1971). See *O'Brien* v. *Trevethan,* 336 F. Supp. 1029 (Conn. 1972). But see *In re Partilla,* No. 71–B–380 (SDNY 1971); *In re Malevich,* No. Bk 29–71 (NJ 1971).

cient countervailing justification for the State's action, a denial of due process, *id.*, at 380–381.

But the Court emphasized that "we go no further than necessary to dispose of the case before us." *Id.*, at 382.

> "We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." *Id.*, at 382–383.

Mr. Justice Douglas, concurring in the result, rested his conclusion on equal protection rather than due process. "I do not see the length of the road we must follow if we accept my Brother Harlan's invitation." *Id.*, at 383, 385. Mr. Justice Brennan concurred in part, for he discerned no distinction between divorce and "any other right arising under federal or state law" and he, also, found a denial of equal protection. *Id.*, at 386, 387. Mr. Justice Black dissented, *id.*, at 389, feeling that the Connecticut court costs were barred by neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment.

Just two months after *Boddie* was decided, the Court denied certiorari in *Garland*. 402 U. S. 966. Mr. Jus-

TICE BRENNAN was of the opinion that certiorari should have been granted. Mr. Justice Black, in an opinion applicable to *Garland* and to seven other then-pending cases, 402 U. S. 954, dissented and would have heard argument in all eight cases "or reverse them outright on the basis of the decision in *Boddie*." *Id.*, at 955. For him "the need . . . to file for a discharge in bankruptcy seem[ed] . . . more 'fundamental' than a person's right to seek a divorce." *Id.*, at 958. And MR. JUSTICE DOUGLAS similarly dissented from the denial of certiorari in *Garland* and in four other cases because "obtaining a fresh start in life through bankruptcy proceedings . . . seemingly come[s] within the Equal Protection Clause." 402 U. S. 960, 961.

Thus, although a denial of certiorari normally carries no implication or inference, *Chessman* v. *Teets*, 354 U. S. 156, 164 n. 13 (1957); *Brown* v. *Allen*, 344 U. S. 443 (1953), the pointed dissents of Mr. Justice Black and MR. JUSTICE DOUGLAS to the denial in *Garland* so soon after *Boddie*, and Mr. Justice Harlan's failure to join the dissenters, surely are not without some significance as to their and the Court's attitude about the application of the *Boddie* principle to bankruptcy fees.

V

We agree with the Government that our decision in *Boddie* does not control the disposition of this case and that the District Court's reliance upon *Boddie* is misplaced.

A. *Boddie* was based on the notion that a State cannot deny access, simply because of one's poverty, to a "judicial proceeding [that is] the only effective means of resolving the dispute at hand." 401 U. S., at 376. Throughout the opinion there is constant and recurring reference to Connecticut's exclusive control over the establishment, enforcement, and dissolution of the mari-

tal relationship. The Court emphasized that "marriage involves interests of basic importance in our society," *ibid.*, and spoke of "state monopolization of the means for legally dissolving this relationship," *id.*, at 374. "[R]esort to the state courts [was] the only avenue to dissolution of . . . marriages," *id.*, at 376, which was "not only the paramount dispute-settlement technique, but, in fact, the only available one," *id.*, at 377. The Court acknowledged that it knew "of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery," *id.*, at 376. In the light of all this, we concluded that resort to the judicial process was "no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court" and we resolved the case "in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum," *id.*, at 376–377.

B. The appellants in *Boddie,* on the one hand, and Robert Kras, on the other, stand in materially different postures. The denial of access to the judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. See, for example, *Loving* v. *Virginia,* 388 U. S. 1 (1967); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). The *Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associa-

tional activities. Kras' alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level. See *Dandridge* v. *Williams,* 397 U. S. 471 (1970); *Richardson* v. *Belcher,* 404 U. S. 78 (1971). If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining or not gaining a discharge will effect no change with respect to basic necessities.[6] We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy.

C. Nor is the Government's control over the establishment, enforcement, or dissolution of debts nearly so exclusive as Connecticut's control over the marriage relationship in *Boddie.* In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors. The utter exclusiveness of court access and court remedy, as has been noted, was a potent factor in *Boddie.* But "[w]ithout a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts . . . ." 401 U. S., at 376.

However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors. At times the happy passage of the applicable limitation period, or other acceptable creditor arrangement, will provide the answer. Government's role with respect to the private commercial relationship is qualitatively and quantitatively different from its

[6] See N. Y. Civ. Prac. Law § 5205 (1963); N. Y. Labor Law § 595 (1965); N. Y. Soc. Welfare Law § 137 (1966), and § 137–a (Supp. 1972–1973).

role in the establishment, enforcement, and dissolution of marriage.

Resort to the court, therefore, is not Kras' sole path to relief. *Boddie*'s emphasis on exclusivity finds no counterpart in the bankrupt's situation. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 547–555 (1949).

D. We are also of the opinion that the filing fee requirement does not deny Kras the equal protection of the laws. Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. See *Shapiro* v. *Thompson*, 394 U. S. 618, 638 (1969). Neither does it touch upon what have been said to be the suspect criteria of race, nationality, or alienage. *Graham* v. *Richardson*, 403 U. S. 365, 375 (1971). Instead, bankruptcy legislation is in the area of economics and social welfare. See *Dandridge* v. *Williams*, 397 U. S., at 484–485; *Richardson* v. *Belcher*, 404 U. S., at 81; *Lindsey* v. *Normet*, 405 U. S. 56, 74 (1972); *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972). This being so, the applicable standard, in measuring the propriety of Congress' classification, is that of rational justification. *Flemming* v. *Nestor*, 363 U. S. 603, 611–612 (1960); *Dandridge* v. *Williams*, 397 U. S., at 485–486; *Richardson* v. *Belcher*, 404 U. S., at 81.

E. There is no constitutional right to obtain a discharge of one's debts in bankruptcy. The Constitution, Art. I, § 8, cl. 4, merely authorizes the Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Although the first bankruptcy law in England was enacted in 1542, 34 & 35 Hen. 8, c. 4, and a discharge provision first appeared

in 1705, 4 Anne, c. 17, primarily as a reward for cooperating debtors, J. MacLachlan, Bankruptcy 20–21 (1956), voluntary bankruptcy was not known in this country at the adoption of the Constitution. Indeed, for the entire period prior to the present Act of 1898, the Nation was without a federal bankruptcy law except for three short periods aggregating about 15½ years. The first statute was the Act of April 4, 1800, c. 19, 2 Stat. 19, and it was repealed by the Act of December 19, 1803, c. 6, 2 Stat. 248. The second was the Act of August 19, 1841, c. 9, 5 Stat. 440, repealed less than two years later by the Act of March 3, 1843, c. 82, 5 Stat. 614. The third was the Act of March 2, 1867, c. 176, 14 Stat. 517; it was repealed by the Act of June 7, 1878, c. 160, 20 Stat. 99. Voluntary petitions were permitted under the 1841 and 1867 Acts. See 1 W. Collier, Bankruptcy ¶¶ 0.03–0.05, pp. 6–9 (14th ed. 1971). Professor MacLachlan has said that the development of the discharge "represents an independent . . . public policy in favor of extricating an insolvent debtor from what would otherwise be a financial impasse." J. MacLachlan, Bankruptcy 88 (footnote omitted). But this obviously is a legislatively created benefit, not a constitutional one, and, as noted, it was a benefit withheld, save for three short periods, during the first 110 years of the Nation's life. The mere fact that Congress has delegated to the District Court supervision over the proceedings by which a petition for discharge is processed does not convert a statutory benefit into a constitutional right of access to a court. Then, too, Congress might have delegated the responsibility to an administrative agency.

F. The rational basis for the fee requirement is readily apparent. Congressional power over bankruptcy, of course, is plenary and exclusive. *Kalb* v. *Feuerstein,* 308 U. S. 433, 438–439 (1940). By the 1946 Amendment, 60 Stat. 326, Congress, as has been noted, abolished the

theretofore existing practices of the pauper petition and of compensating the referee from the fees he collected. It replaced that system with one for salaried referees and for fixed fees for every petition filed and a specified percentage of distributable assets. It sought to make the system self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large. H. R. Rep. No. 1037, 79th Cong., 1st Sess., 4–6 (1945); S. Rep. No. 959, 79th Cong., 2d Sess. 2, 5–6 (1946).[7] The propriety of the requirement that the fees be paid ultimately has been recognized even by those district courts that have held the payment of the fee as a precondition to a discharge to be unconstitutional, for those courts would make the payments survive the bankruptcy as a continuing obligation of the bankrupt. *In re Smith,* 323 F. Supp., at 1093; *In re Ottman,* 336 F. Supp. 746, 748 (ED Wis. 1972). See *O'Brien* v. *Trevethan,* 336 F. Supp. 1029, 1034 (Conn. 1972).

Further, the reasonableness of the structure Congress produced, and congressional concern for the debtor, are apparent from the provisions permitting the debtor to file his petition without payment of any fee, with consequent freedom of subsequent earnings and of after-acquired assets (with the rare exception specified in § 70 (a) of the Act, 11 U. S. C. § 110 (a)) from the claims of then-existing obligations. These provisions, coupled with the bankrupt's ability to obtain a stay of all debt enforcement actions pending at the filing of the petition or there-

[7] For the decade ended June 30, 1959, the Referee's Salary and Expense Fund showed surpluses for the first five fiscal years and deficits for the last five. For fiscal 1969, 107,481 no-asset cases were terminated (as compared with 169,500 nonbusiness cases filed). Administrative Office of the United States Courts, Tables of Bankruptcy Statistics for Fiscal Year Ending June 30, 1969, pp. 5, 10 (1971). This means, of course, that the fees were paid in those terminated no-asset cases. Undue hardship and denial of access to the courts are not apparent from this record of achievement.

after commenced, §§ 11 (a) and 2 (a)(15), 11 U. S. C. §§ 29 (a) and 11 (a)(15); 1A W. Collier, Bankruptcy ¶ 11.03 (14th ed. 1972); 1 *id.*, ¶ 2.62 [4] (14th ed. 1971), enable a bankrupt to terminate his harassment by creditors, to protect his future earnings and property, and to have his new start with a minimum of effort and financial obligation. They serve also, as an incidental effect, to promote and not to defeat the purpose of making the bankruptcy system financially self-sufficient. Cf. *Lindsey* v. *Normet,* 405 U. S., at 74–79.

G. If the $50 filing fees are paid in installments over six months as General Order No. 35 (4) permits on a proper showing, the required average weekly payment is $1.92. If the payment period is extended for the additional three months as the Order permits, the average weekly payment is lowered to $1.28.[8] This is a sum less than the payments Kras makes on his couch of negligible value in storage, and less than the price of a movie and little more than the cost of a pack or two of cigarettes. If, as Kras alleges in his affidavit, a discharge in bankruptcy will afford him that new start he so desires, and the Metropolitan then no longer will charge him with fraud and give him bad references,[9] and if he really needs and desires that discharge, this much available revenue should be within his able-bodied reach when the adjudication in bankruptcy has stayed collection and has brought to a halt whatever harassment, if any, he may have sustained from creditors.

VI

Mr. Justice Harlan, in his opinion for the Court in *Boddie,* meticulously pointed out, as we have noted

[8] If the fees total $40, as they may under General Order No. 15, 305 U. S. 687 (1939), 11 U. S. C. App., p. 2203, these average weekly figures are reduced to $1.54 and $1.03 respectively.

[9] We fail to see how a discharge in bankruptcy in itself will prevent the Metropolitan from issuing an unfavorable reference letter about Kras.

above, that the Court went "no further than necessary to dispose of the case before us" and did "not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual." 401 U. S., at 382–383. The Court obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees.

We decline to extend the principle of *Boddie* to the no-asset bankruptcy proceeding. That relief, if it is to be forthcoming, should originate with Congress. See Shaeffer, Proceedings in Bankruptcy In Forma Pauperis, 69 Col. L. Rev. 1203 (1969).

Reversed.

MR. CHIEF JUSTICE BURGER, concurring.

I concur fully in the Court's opinion. The painstaking and precise delineation by Mr. Justice Harlan of the interests involved in *Boddie* v. *Connecticut,* 401 U. S. 371 (1971), ought not to be ignored as the dissenting opinions would do. Moreover, the exclusivity of a State's control of marriage and divorce is a far cry from the degree of government control over relations between debtor and creditor, as MR. JUSTICE BLACKMUN has pointed out. In a bankruptcy proceeding the government, through the court, is no more than the overseer and the administrator of the process; it is not the absolute and exclusive controller as with the dissolution of marriage. Like the descent and distribution of property for which all States have provided statutes and probate courts, the bankruptcy court is but one mode of orderly adjustment with creditors; it is not the only one since many debtors work out binding private adjustments with creditors.

Surely there are strong arguments, as a matter of policy, for the result the dissenting view asserts. But Congress has not yet seen fit to declare the policy that the dissenters now find in the Constitution. In 1970 Congress authorized a tripartite commission to review the bankruptcy laws.[1] The commission has been engaged in its task for more than two years and it is hardly likely that this problem will escape its consideration.[2] The Constitution is not the exclusive source of law reform, even needed reform, in our system.

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

On May 28, 1971, Robert Kras, the appellee, sought to file a voluntary petition in bankruptcy. In an accompanying affidavit, he described his economic plight. He resided in a 2½-room apartment with his wife, his two young children, his mother, and her child. His eight-month-old son had cystic fibrosis and at the time of the

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[1] Pub. L. 91–354, 84 Stat. 468.

[2] The commission's mandate requires it to "study, analyze, evaluate, and recommend changes" in the Bankruptcy Act "in order for such Act to reflect and adequately meet the demands of present technical, financial, and commercial activities. The commission's study . . . shall include a consideration of the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system of bankruptcy administration, the applicability of advanced management techniques to achieve economies in the administration of the Act, and all other matters which the Commission shall deem relevant." Of particular relevance is the preamble to the Act creating the commission, which recites in part that "the technical aspects of the Bankruptcy Act are interwoven with the rapid expansion of credit which has reached proportions far beyond anything previously experienced by the citizens of the United States."

The report of the commission is to be submitted prior to June 30, 1973. Pub. L. 92–251, 86 Stat. 63.

affidavit was undergoing hospital treatment. Unemployed since May 1969, except for odd jobs, he supported his household on a total public assistance allotment of $366 per month—all of which was consumed on rent and the most basic necessities of life. His sole assets consisted of $50 worth of clothing and essential household goods.[1]

He sought a discharge from over $6,000 in debts, particularly his indebtedness to a former employer that he contended hampered his present efforts to find a permanent job: "I earnestly seek a discharge in bankruptcy . . . in order to relieve myself and my family of the distress of financial insolvency and creditor harassment and in order to make a new start in life. . . . When I do get a job I want to be able to spend my wages for the support of myself and my family and for the medical care of my son, instead of paying them to my creditors and forcing my family to remain dependent on welfare."

He indicated that he was unable to pay the $50 bankruptcy filing fee in a lump sum,[2] and could not promise to pay it in installments, as required before the petition could be filed.[3] He contended that the fee requirement

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[1] These items are exempt from distribution in bankruptcy pursuant to 11 U. S. C. § 24 and N. Y. Civ. Prac. Law § 5205 (1963).

[2] The fee consists of $37 for the referees' salary and expense fund, $10 compensation for the trustees, and $3 to the clerk as a filing fee. 11 U. S. C. §§ 68 (c)(1), 76 (c), 80 (a).

[3] This Court's General Order in Bankruptcy No. 35 (4), authorized by 11 U. S. C. § 68 (c)(1), permits fees to be paid in installments over a six-month period, amounting to $1.92 a week; and, for cause, this period may be extended for an additional three months, so that the debtor would only be required to pay $1.28 per week. But before the bankruptcy petition can be filed, the petitioner must both indicate that he is without, and cannot obtain, money with which to pay the fee in advance, and set forth the terms upon which he proposes to make installment payments.

was unconstitutional as applied to him,[4] and moved for leave to proceed without paying the fee.

The District Court held that under the doctrine of *Boddie* v. *Connecticut,* 401 U. S. 371, the statutory requirement of a prepaid bankruptcy filing fee would violate Kras' Fifth Amendment right to due process of law. 331 F. Supp. 1207, 1212.[5] The court ordered the petition filed and directed the referee in bankruptcy to make provision for the survival of the appellee's obligation to pay the filing fee. We noted probable jurisdiction of the Government's appeal. 405 U. S. 915. I agree with the District Court and would, therefore, affirm its judgment.

Boddie held that a Connecticut statute requiring the payment of an average $60 fee as a prerequisite to a divorce action was unconstitutional under the Due Proc-

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[4] The appellee also contended that the filing fee should be waived under the general federal *in forma pauperis* statute, 28 U. S. C. § 1915 (a). That contention was rejected by the District Court on the grounds that, in 1946, Congress expressly eliminated bankruptcy petitions *in forma pauperis,* and substituted installment payments. 11 U. S. C. § 68 (c). In light of the clear congressional intent to eliminate pauper petitions, the court concluded, Congress did not intend to allow bankrupts to proceed under the general *in forma pauperis* statute. See also *In re Garland,* 428 F. 2d 1185, 1186–1187; *In re Smith,* 323 F. Supp. 1082, 1084–1085. The appellee does not question that conclusion here.

[5] Other federal courts have reached the same conclusion. See *In re Haddock,* No. 14810 (Conn., May 22, 1972); *In re Smith,* 341 F. Supp. 1297; *In re Ripley,* No. Bk 71–0–1003 (Neb., Apr. 28, 1972); *In re Ottman,* 336 F. Supp. 746; *In re Naron,* 334 F. Supp. 1150; *In re Read,* No. Bk 71–826 (WDNY, Oct. 19, 1971). See also *In re Shropshire* (ND Ia., Mar. 28, 1972); *In re Passwater,* Nos. IP70–B–3697 and IP70–B–3698 (SD Ind. 1971). But see *In re Partilla,* No. 71–B–380 (SDNY Oct. 15, 1971); *In re Malevich,* No. Bk 29–71 (NJ 1971). *In re Garland, supra,* upon which the Government relies, was decided before our decision in *Boddie.*

ess Clause of the Fourteenth Amendment, as applied to indigents unable to pay the fee. The Court reasoned that due process protections are traditionally viewed as safeguards for a defendant, because at the point when a plaintiff invokes the governmental power of a court, the judicial proceeding is "the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." 401 U. S., at 376. But a party to a marriage remains under serious and continuing obligation imposed by the State, which cannot be removed except by judicial dissolution of the marital bond. Thus, we concluded that:

> "[A]lthough they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one." *Id.*, at 376–377.

The violation of due process seems to me equally clear in the present case. It is undisputed that Kras is making a good-faith attempt to obtain a discharge in bankruptcy, and that he is in fact indigent. As was true in *Boddie,* the "welfare income . . barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts . . . ." *Id.*, at 372–373.[6]

[6] The appellee indicated in the affidavit submitted with his petition:

"Because of my poverty, I am wholly unable to pay or promise

Similarly, the debtor, like the married plaintiffs in *Boddie,* originally entered into his contract freely and voluntarily. But it is the Government nevertheless that continues to enforce that obligation, and under our "legal system" that debt is effective only because the judicial machinery is there to collect it. The bankrupt is bankrupt precisely for the reason that the State stands ready to exact all of his debts through garnishment, attachment, and the panoply of other creditor remedies. The appellee can be pursued and harassed by his creditors since they hold his legally enforceable debts.

And in the unique situation of the indigent bankrupt, the Government provides the only effective means of his ever being free of these Government-imposed obligations. As in *Boddie,* there are no "recognized, effective alternatives," *id.,* at 376. While the creditors of a bankrupt with assets might well desire to reach a compromise settlement, that possibility is foreclosed to the truly indigent bankrupt. With no funds and not even a sufficient prospect of income to be able to promise the payment of a $50 fee in weekly installments of $1.28, the assetless bankrupt has absolutely nothing to offer his creditors. And his creditors have nothing to gain by allowing him to escape or reduce his debts; their only hope is that eventually he might make enough income for them to attach. Unless the Government provides him access to the bankruptcy court, Kras will remain in the totally hopeless situation he now finds himself. The Government has thus truly pre-empted the only means for the

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to pay the filing fees, even in small installments, as a condition precedent to discharge and also provide myself and my dependents with day-to-day necessities. I have been unable to borrow money from my family, relatives, or friends. One of the debts of which I seek a discharge in bankruptcy is a loan from my wife's grandmother. The New York City Department of Social Services refuses to allot money for payment of the bankruptcy filing fees. I have no prospect of immediate employment."

indigent bankrupt to get out from under a lifetime burden of debt.[7]

The Government contends that the filing fee is justified by the congressional decision to make the bankruptcy system self-supporting.[8] But in *Boddie* we rejected this same "pay as you go" argument, finding it an insufficient justification for excluding the poor from the only available process to dissolve a marriage. 401 U. S., at 382. The argument is no more persuasive here. The Constitution cannot tolerate achievement of the goal of self-support for a bankruptcy system, any more than for a domestic relations court, at the price of denying due process of law to the poor. *In re Naron,* 334 F. Supp. 1150, 1151; *In re Smith,* 323 F. Supp. 1082, 1088.[9]

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[7] In *Boddie,* the Court recognized that marriage was a "fundamental human relationship," 401 U. S., at 383, which involved interests "of basic importance in our society." *Id.,* at 376. But it was not any subjective conception of the "fundamentality" of marriage, or divorce for that matter, that led the Court to find a due process violation in *Boddie;* rather, the significant factor about marriage was that "[w]ithout a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval." *Id.,* at 376. It is the existence of judicially enforced obligations coupled with monopolization of the means of dissolution that similarly besets the indigent bankrupt.

[8] Prior to 1946, while pauper petitioners were accepted without payment of fees, the referees whose compensation depended on fees, often demanded payment before granting a discharge. S. Rep. No. 959, 79th Cong., 2d Sess., 6–7 (1946); H. R. Rep. No. 1037, 79th Cong., 1st Sess., 6 (1945). The 1946 Amendments to the Bankruptcy Act eliminated pauper petitions and provided for the payment of fixed fees for every petition filed, and the payment of a fixed percentage of all distributable assets. See H. R. Rep. No. 1037, *supra,* at 4, 5–6.

[9] See *Fuentes* v. *Shevin,* 407 U. S. 67, 90 n. 22; *Bell* v. *Burson,* 402 U. S. 535, 540–541; *Goldberg* v. *Kelly,* 397 U. S. 254, 261; Cf. *Griffin* v. *Illinois,* 351 U. S. 12.

Moreover, there is no evidence that a substantial amount of

In my view, this case, like *Boddie,* does not require us to decide "that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause . . . so that its exercise may not be placed beyond the reach of any individual . . . ." 401 U. S., at 382–383. It is sufficient to hold, as *Boddie* did, that "a State may not, consistent with the obligations imposed on it by the Due Process Clause . . . , pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." *Id.,* at 383.

The Bankruptcy Act relieves "the honest debtor from the weight of oppressive indebtedness and [permits] him to start afresh free from the obligations and responsibilities consequent upon business misfortunes," *Williams* v. *United States Fidelity & Guaranty Co.,* 236 U. S. 549, 554–555. It holds out a promise to the debtor of "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt." *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 244. Yet the Court today denies that promise to those who need it most, to those who every day must live face-to-face with abject poverty—who cannot spare even $1.28 a week.

The Court today holds that Congress may say that some of the poor are too poor even to go bankrupt. I cannot agree.

MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN, dissenting.

While we join MR. JUSTICE STEWART's dissenting opinion we do so with this explicit statement of reasons. We said in *Bolling* v. *Sharpe,* 347 U. S. 497, 499, when holding

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revenue would be lost by allowing assetless indigents with no present prospects of paying the fee to file without prepayment. Any loss in fees that did result could be partly recouped by allowing the filing-fee debt to survive bankruptcy.

that segregation of students in the District of Columbia violated the Due Process Clause of the Fifth Amendment:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

The invidious discrimination in the present case is a denial of due process because it denies equal protection within our decisions which make particularly "invidious" discrimination based on wealth or race.

MR. JUSTICE MARSHALL, dissenting.

The dissent of MR. JUSTICE STEWART, in which I have joined, makes clear the majority's failure to distinguish this case from *Boddie* v. *Connecticut,* 401 U. S. 371 (1971). I add only some comments on the extraordinary route by which the majority reaches its conclusion.

A. The majority notes that the minimum amount that appellee Kras must pay each week if he is permitted to pay the filing fees in installments is only $1.28. It says that "this much available revenue should be within his able-bodied reach." *Ante,* at 449.

Appellee submitted an affidavit in which he claimed that he was "unable to pay or promise to pay the filing fees, even in small installments." App. 5. This claim was supported by detailed statements of his financial con-

dition. The affidavit was unchallenged below, but the majority does challenge it. The District Judge properly accepted the factual allegations as true. See, *e. g., Poller* v. *Columbia Broadcasting System,* 368 U. S. 464 (1962); *First National Bank of Arizona* v. *Cities Service Co.,* 391 U. S. 253 (1968); 35B C. J. S., Federal Civil Procedure § 1197 n. 4 (1960). The majority seems to believe that it is not restrained by the traditional notion that judges must accept unchallenged, credible affidavits as true, for it disregards the factual allegations and the inferences that necessarily follow from them. I cannot treat that notion so cavalierly.[1]

Even if Kras' statement that he was unable to pay the fees was an honest mistake, surely he cannot have been mistaken in saying that he could not promise to pay the fees. The majority does not directly impugn his good faith in making that statement. Yet if he cannot promise to pay the fees, he cannot get the interim relief from creditor harassment that, the majority says, may enable him to pay the fees.

But beyond all this, I cannot agree with the majority that it is so easy for the desperately poor to save $1.92 *each week* over the course of six months. The 1970 Census found that over 800,000 families in the Nation had annual incomes of less than $1,000 or $19.23 a week. U. S. Bureau of Census, Current Population Reports, series P–60, No. 80; U. S. Bureau of Census, Statistical

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[1] The majority also misrepresents appellee's financial condition. It says that $1.28 "is a sum less than the payments Kras makes on his couch of negligible value in storage." *Ante,* at 449. Nowhere in the slender record of this case can I find any statement that appellee is actually paying anything for the storage of the couch. He said only that he "*owed* payments of $6 per month" for storage. App. 5 (emphasis added). He also stated that he owed $6,428.69, but I would hardly read that to mean that he was paying that much to anyone.

Abstract of the United States 1972, p. 323. I see no reason to require that families in such straits sacrifice over 5% of their annual income as a prerequisite to getting a discharge in bankruptcy.[2]

It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.

B. The majority derives some solace from the denial of certiorari in *In re Garland,* 402 U. S. 966 (1971). Re-

[2] The majority, in citing the "record of achievement" of the bankruptcy system in terminating 107,481 no-asset cases in the fiscal year 1969, *ante,* at 448 n. 7, relies on spectral evidence. Because the filing fees bar relief through the bankruptcy system, statistics showing how many people got relief through that system are unenlightening on the question of how many people could not use the system because they were too poor. I do not know how many people cannot afford to pay a $50 fee in installments. But I find nothing in the majority's opinion to convince me that due process is afforded a person who cannot receive a discharge in bankruptcy because he is too poor. Even if only one person is affected by the filing fees, *he* is denied due process.

liance on denial of certiorari for *any* proposition impairs the vitality of the discretion we exercise in controlling the cases we hear. See *Brown* v. *Allen,* 344 U. S. 443, 491–492 (1953) (opinion of Frankfurter, J.). For all that the legal community knows, Mr. Justice Harlan did not join the dissent from denial of certiorari in that case for reasons different from those that the majority uses to distinguish this case from *Boddie.* Perhaps he believed that lower courts should have some time to consider the implications of *Boddie.* Most of the lower courts have refused to follow the First Circuit's decision in *Garland,* 428 F. 2d 1185. See *ante,* at 453 n. 5 (STEWART, J., dissenting). Perhaps he thought that the record in that case made inappropriate any attempt to determine the scope of *Boddie* in that particular case. Or perhaps he had some other reason.

The point of our use of a discretionary writ is precisely to prohibit that kind of speculation. When we deny certiorari, no one, not even ourselves, should think that the denial indicates a view on the merits of the case. It ill serves judges of the courts throughout the country to tell them, as the majority does today, that in attempting to determine what the law is, they must read, not only the opinions of this Court, but also the thousands of cases in which we annually deny certiorari.[3]

C. The majority says that "[t]he denial of access to the judicial forum in *Boddie* touched directly . . . on the marital relationship." It sees "no fundamental interest

[3] That one of us undertook to write a dissent, even a "pointed dissent," from the denial of certiorari should suggest, again, nothing at all about the views of any other Members of the Court on the merits of the petition. Surely each of us has seen many cases in which a colleague's dissent from the denial of certiorari pointed to an issue of great concern that we thought should be decided by this Court, but in which we did not join because we did not consider the case to be an appropriate vehicle for determination of that issue.

that is gained or lost depending on the availability of a discharge in bankruptcy." *Ante,* at 444, 445. If the case is to turn on distinctions between the role of courts in divorce cases and their role in bankruptcy cases,[4] I agree with MR. JUSTICE STEWART that this case and *Boddie* cannot be distinguished; the role of the Government in standing ready to enforce an otherwise continuing obligation is the same.

However, I would go further than MR. JUSTICE STEWART. I view the case as involving the right of access to the courts, the opportunity to be heard when one claims a legal right, and not just the right to a discharge in bankruptcy.[5] When a person raises a claim of right or entitlement under the laws, the only forum in our legal system empowered to determine that claim is a court.

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[4] I am intrigued by the majority's suggestion that, because the granting of a divorce impinges on "associational interests," the right to a divorce is constitutionally protected. Are we to require that state divorce laws serve compelling state interests? For example, if a State chooses to allow divorces only when one party is shown to have committed adultery, must its refusal to allow them when the parties claim irreconcilable differences be justified by some compelling state interest? I raise these questions only to suggest that the majority's focus on the relative importance in the constitutional scheme of divorce and bankruptcy is misplaced. What is involved is the importance of access to the courts, either to remove an obligation that other branches of the government stand ready to enforce, as MR. JUSTICE STEWART sees it, or to determine claims of right, as I see it.

[5] The majority suggests that no such right is involved, because Congress could have committed the administration of the Bankruptcy Act to a nonjudicial agency. *Ante,* at 447. I have some doubt about the proposition that a statutorily created right can be finally determined by an agency, with no method for a disappointed claimant to secure judicial review. But I have no doubt that Congress could not provide that only the well-off had the right to present their claims to the agency. As should be clear, the question is one of access to the forum empowered to determine the claim of right; it is only shorthand to call this a question of access to the courts.

Kras, for example, claims that he has a right under the Bankruptcy Act to be free of any duty to pay his creditors. There is no way to determine whether he has such a right except by adjudicating his claim.[6] Failure to do so denies him access to the courts.

The legal system is, of course, not so pervasive as to preclude private resolution of disputes. But private settlements do not determine the validity of claims of right. Such questions can be authoritatively resolved only in courts. It is in that sense, I believe, that we should consider the emphasis in *Boddie* on the exclusiveness of the judicial forum—and give Kras his day in court.

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[6] It might be said that the right he claims does not come into play until he has fulfilled a condition precedent by paying the filing fees. But the distinction between procedure and substance is not unknown in the law and can be drawn on to counter that argument.

RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MORRIS ET AL.

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

No. 72–603. Decided January 15, 1973

District Court, which granted appellees an injunction against enforcement of § 203 (a) of the Social Security Act, erred in assuming jurisdiction under Tucker Act, which does not authorize suits for equitable relief.

346 F. Supp. 494, vacated and remanded.

PER CURIAM.

Appellees are illegitimate children on whose behalf a class action was commenced seeking to enjoin enforcement of § 203 (a) of the Social Security Act, 49 Stat. 623, as amended, 42 U. S. C. § 403 (a), on the ground that the provision was unconstitutional under this Court's decisions in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), and *Levy* v. *Louisiana*, 391 U. S. 68 (1968). The District Court granted appellees' request for declaratory and injunctive relief.

On the merits, this appeal involves the same issues that were raised in *Davis* v. *Richardson*, 342 F. Supp. 588 (Conn.), aff'd, *post*, p. 1069, and *Griffin* v. *Richardson*, 346 F. Supp. 1226 (Md.), aff'd, *post*, p. 1069. Unlike those cases, however, the District Court here purported to predicate its jurisdiction on the Tucker Act, 28 U. S. C. § 1346 (a)(2). Assuming, *arguendo*, that exhaustion of the administrative remedies provided by the Social Security Act was not a prerequisite to appellees' attack on the facial constitutionality of § 203 (a), see *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534 (1958), we nonetheless conclude that it was error for

the District Court to assume jurisdiction under the Tucker Act.

The Tucker Act plainly gives district courts jurisdiction over claims against the United States for money damages of less than $10,000 that are "founded . . . upon the Constitution."* But the Act has long been contrued as authorizing only actions for money judgments and not suits for equitable relief against the United States. See *United States* v. *Jones,* 131 U. S. 1 (1889). The reason for the distinction flows from the fact that the Court of Claims has no power to grant equitable relief, see *Glidden Co.* v. *Zdanok,* 370 U. S. 530, 557 (1962) (Harlan, J., announcing the judgment of the Court), and the jurisdiction of the district courts under the Act was expressly made "concurrent with the Court

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*The Act, in pertinent part, reads as follows:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

. . . . . .

"(2) Any other [excepting certain tax cases] civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The Act was passed in 1887. 24 Stat. 505. As enacted, the Act read in terms of "[a]ll claims" rather than "[a]ny other *civil action or* claim." Appellees suggest that the added phrase was intended to broaden the scope of district court jurisdiction to include "actions" for injunctions as well as "claims" for monetary damages. The phrase, however, did not appear in the 1940 edition of the Judicial Code, 28 U. S. C. § 41 (20), and appears to have been inserted during the revision in 1948, without any suggestion that the change was to affect the section's substance. In any event, the corresponding section dealing with the concurrent jurisdiction of the Court of Claims contains no such addition. See 28 U. S. C. § 1491.

of Claims." See *United States* v. *Sherwood,* 312 U. S. 584, 589–591 (1941); *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, 570 (1938). What was said in *Sherwood, supra,* at 591, applies here:

> "[T]he Tucker Act did no more than authorize the District Court to sit as a court of claims and . . . the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims."

Although appellees contend that jurisdiction was properly asserted under various alternative provisions of the Judicial Code, the District Court did not pass upon the applicability of those other provisions. Accordingly, appellees' motion for leave to proceed *in forma pauperis* is granted, the judgment is vacated, and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Per Curiam

AMERICAN TRIAL LAWYERS ASSN., NEW JERSEY BRANCH, ET AL. *v.* NEW JERSEY SUPREME COURT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 72–691. Decided January 15, 1973

In abstaining so as to permit a state court to pass on an issue of state law, a district court should retain jurisdiction pending the state proceeding so that appellants may preserve their right to litigate their federal claims in federal courts at the conclusion of the state proceeding.

Vacated and remanded.

PER CURIAM.

On December 21, 1971, the Supreme Court of New Jersey announced the adoption of Rule 1:21–7, effective January 31, 1972, establishing a graduated schedule of maximum contingent fees applicable to tort litigation conducted by New Jersey attorneys.[1] Appellants, representing members of the New Jersey bar, brought this action to enjoin the enforcement of the rules on the grounds that they violate several provisions of the Constitution, including the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial

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[1] Rule 1:21–7 provides in part:

"(c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

"(1) 50% on the first $1000 recovered;

"(2) 40% on the next $2000 recovered;

"(3) 33⅓% on the next $47,000 recovered;

"(4) 20% on the next $50,000 recovered;

"(5) 10% on any amount recovered over $100,000 . . . ."

judge convened a three-judge court. 28 U. S. C. § 2281.[2]

After hearing argument on the merits, the District Court pointed out that:

> "[E]ssentially the case poses a dispute between a state's highest court and those persons authorized by that court to practice law in the state. The relationship between the parties thus is an extremely delicate one. Under such circumstances federal courts generally have considered it appropriate, before attempting any direct federal intervention at the outset, first to permit the state courts to process the dispute. Cf. Reetz v. Bozanich, 397 U. S. 82, 85–87 (1970)."

The court added that "[a]s was true in *Reetz* the initial issue is whether the state constitution authorized the enactment challenged." The court therefore granted defendant-appellee's motion to dismiss.

By timely motion under Fed. Rule Civ. Proc. 59 (e), appellants sought an order amending the judgment by either

> "(A) Retaining jurisdiction, but staying proceedings in this Court pending determination of the issues of state law in the courts of New Jersey, or until efforts to obtain such a determination have been exhausted; or
>
> "(B) Ordering that the dismissal be without prejudice, so that the suits for determination of the

[2] Appellee maintained below, as it maintains before this Court, that a three-judge court need not have been convened because the constitutional question presented is insubstantial. *Bailey* v. *Patterson*, 369 U. S. 31 (1962). It insists, however, that if the claim is substantial then it must be heard by a court of three judges. 28 U. S. C. § 2281. In view of the posture of the case on this appeal, we do not, of course, express any view on the merits of the question presented.

federal constitutional issues may be reinstituted after exhausting state recourse with respect to state law issues." Jurisdictional Statement 10.

The motion was denied and appellants brought this appeal.[3]

"[A]bstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.'" *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 416 (1964), quoting from *Harrison* v. *NAACP,* 360 U. S. 167, 177 (1959). For that reason, we have held that a dismissal on grounds of abstention so as to permit a state court to pass on an issue of state law must not be with prejudice. *Doud* v. *Hodge,* 350 U. S. 485 (1956); *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498 (1972). The proper course is for the District Court to retain jurisdiction pending the proceedings in the state courts. *Lake Carriers' Assn.* v. *MacMullan, supra,* at 512–513; *Zwickler* v. *Koota,* 389 U. S. 241, 244–245, n. 4 (1967).[4] Although the District Court may have intended its judgment of dismissal to be without prejudice to the right of appellants to litigate their federal claims in federal court at the conclusion of the state proceeding, the court did deny appellants' motion for an amendment to the judgment making clear that no prejudice would attach. The motion should have been granted. Accordingly, we vacate the judgment of the District Court and remand the case for proceedings consistent with this opinion.

So ordered.

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[3] The validity of the District Court's decision to abstain is not at issue on this appeal.

[4] "It is better practice, in a case raising a federal constitutional or statutory claim [where the doctrine of abstention is applied], to retain jurisdiction, rather than to dismiss . . . ." *Zwickler, supra,* at 244 n. 4.

ALMOTA FARMERS ELEVATOR & WAREHOUSE CO. *v.* UNITED STATES

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

No. 71–951. Argued October 18, 1972—Decided January 16, 1973

Before and during the last of several successive leases, petitioner made substantial and permanent improvements that had a useful life in excess of the remaining lease term. With 7½ years to run on the then-current lease term, the United States contracted to acquire the underlying fee and began condemnation proceedings for the leasehold. The Court of Appeals reversed the District Court's ruling that just compensation required that the improvements be valued in place over their useful life without limitation to the remainder of the lease term. *Held:* In a condemnation proceeding, the concept of "just compensation" is measured by what a willing buyer would have paid for the improvements, taking into account the possibility that the lease might be renewed as well as that it might not. Pp. 473–478.

450 F. 2d 125, reversed and District Court judgment reinstated.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which DOUGLAS, J., joined, *post,* p. 479. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and BLACKMUN, JJ., joined, *post,* p. 480.

Lawrence Earl Hickman argued the cause for petitioner. With him on the briefs was *Philip H. Faris.*

Assistant Attorney General Frizzell argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Wm. Terry Bray, Edmund B. Clark,* and *Jacques B. Gelin.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Since 1919 the petitioner, Almota Farmers Elevator & Warehouse Co., has conducted grain elevator operations on land adjacent to the tracks of the Oregon-

Washington Railroad & Navigation Co. in the State of Washington. It has occupied the land under a series of successive leases from the railroad. In 1967, the Government instituted this eminent domain proceeding to acquire the petitioner's property interest by condemnation. At that time there were extensive buildings and other improvements that had been erected on the land by the petitioner, and the then-current lease had 7½ years to run.

In the District Court the Government contended that just compensation for the leasehold interest, including the structures, should be "the fair market value of the legal rights possessed by the defendant by virtue of the lease as of the date of taking," and that no consideration should be given to any additional value based on the expectation that the lease might be renewed. The petitioner urged that, rather than this technical "legal rights theory," just compensation should be measured by what a willing buyer would pay in an open market for the petitioner's leasehold.

As a practical matter, the controversy centered upon the valuation to be placed upon the structures and their appurtenances. The parties stipulated that the Government had no need for these improvements and that the petitioner had a right to remove them. But that stipulation afforded the petitioner only what scant salvage value the buildings might bring. The Government offered compensation for the loss of the use and occupancy of the buildings only over the remaining term of the lease. The petitioner contended that this limitation upon compensation for the use of the structures would fail to award what a willing buyer would have paid for the lease with the improvements, since such a buyer would expect to have the lease renewed and to continue to use the improvements in place. The value of the buildings, machinery, and equipment in place would be substantially greater than their salvage value at the end

of the lease term, and a purchaser in an open market would pay for the anticipated use of the buildings and for the savings he would realize from not having to construct new improvements himself. In sum, the dispute concerned whether Almota would have to be satisfied with its right to remove the structures with their consequent salvage value or whether it was entitled to an award reflecting the value of the improvements in place beyond the lease term.

In a pretrial ruling, the District Court accepted the petitioner's theory and held that Almota was to be compensated for the full market value of its leasehold "and building improvements thereon as of the date of taking . . . , the total value of said leasehold and improvements . . . to be what the interests of said company therein could have been then sold for upon the open market considering all elements and possibilities whatsoever found to then affect the market value of those interests including, but not exclusive of, the possibilities of renewal of the lease and of the landlord requiring the removal of the improvements in the event of there being no lease renewal." The court accordingly ruled that the petitioner was entitled to the full fair market value of the use of the land and of the buildings in place as they stood at the time of the taking, without limitation of such use to the remainder of the term of the existing lease.

On appeal, the Court of Appeals for the Ninth Circuit reversed, 450 F. 2d 125; it accepted the Government's theory that a tenant's expectancy in a lease renewal was not a compensable legal interest and could not be included in the valuation of structures that the tenant had built on the property. It rejected any award for the use of improvements beyond the lease term as "compensation for expectations disappointed by the exercise of the sovereign power of eminent domain, expectations

not based upon any legally protected right, but based only . . . upon 'a speculation on a chance.'" 450 F. 2d, at 129. The court explicitly refused to follow an *en banc* decision of the Court of Appeals for the Second Circuit, relied upon by the District Court, which had held that for condemnation purposes improvements made by a lessee are to be assessed at their value in place over their useful life without regard to the term of the lease. *United States* v. *Certain Property, Borough of Manhattan,* 388 F. 2d 596, 601.

In view of this conflict in the circuits, we granted certiorari, 405 U. S. 1039, to decide an important question of eminent domain law: "Whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed."[1] We find that the view of the Court of Appeals for the Second Circuit is in accord with established principles of just-compensation law under the Fifth Amendment, and therefore reverse the judgment before us and reinstate the judgment of the District Court.

The Fifth Amendment provides that private property shall not be taken for public use without "just compensation." "And 'just compensation' means the full monetary equivalent of the property taken. The owner is

[1] This was the statement of the question presented by the Government in opposing the grant of the petition for certiorari. As the petitioner phrased the question, the Court was asked to decide: "In awarding just compensation to a tenant in the condemnation of a leasehold interest in real property, including tenant owned building improvements and fixtures situated thereon, *may an element of great inherent value in the improvements be excluded* merely because it does not, by itself, rise to the status of a legal property right." (Emphasis added.)

to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States* v. *Reynolds,* 397 U. S. 14, 16 (footnotes omitted). See also *United States* v. *Miller,* 317 U. S. 369, 373. To determine such monetary equivalence, the Court early established the concept of "market value": the owner is entitled to the fair market value of his property at the time of the taking. *New York* v. *Sage,* 239 U. S. 57, 61. See also *United States* v. *Reynolds, supra,* at 16; *United States* v. *Miller, supra,* at 374. And this value is normally to be ascertained from "what a willing buyer would pay in cash to a willing seller." *Ibid.* See *United States* v. *Virginia Electric & Power Co.,* 365 U. S. 624, 633.

By failing to value the improvements in place over their useful life—taking into account the possibility that the lease might be renewed as well as the possibility that it might not—the Court of Appeals in this case failed to recognize what a willing buyer would have paid for the improvements. If there had been no condemnation, Almota would have continued to use the improvements during a renewed lease term, or if it sold the improvements to the fee owner or to a new lessee at the end of the lease term, it would have been compensated for the buyer's ability to use the improvements in place over their useful life. As Judge Friendly wrote for the Court of Appeals for the Second Circuit:

> "Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons—avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords. Thus, even when the lease has expired, the condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him

> of the opportunity to deal with the landlord or a new tenant—the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term." *United States* v. *Certain Property, Borough of Manhattan,* 388 F. 2d, at 601–602 (footnote omitted).

It seems particularly likely in this case that Almota could have sold the leasehold at a price that would have reflected the continued ability of the buyer to use the improvements over their useful life. Almota had an unbroken succession of leases since 1919, and it was in the interest of the railroad, as fee owner, to continue leasing the property, with its grain elevator facilities, in order to promote grain shipments over its lines. In a free market, Almota would hardly have sold the leasehold to a purchaser who paid only for the use of the facilities over the remainder of the lease term, with Almota retaining the right thereafter to remove the facilities—in effect, the right of salvage. "Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value for use in place would constitute a substantial taking without just compensation. '[I]t is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty.'" *United States* v. *1,132.50 Acres of Land,* 441 F. 2d 356, 358.[2]

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[2] The compensation to which Almota is entitled is hardly "totally set free from [its] property interest," as the dissent suggests. *Post,* at 484. The improvements are assuredly "private property" that the Government has "taken" and for which it acknowledges it must pay compensation. The only dispute in this case is over how those

United States v. *Petty Motor Co.*, 327 U. S. 372, upon which the Government primarily relies, does not lead to a contrary result. The Court did indicate that the measure of damages for the condemnation of a leasehold is to be measured in terms of the value of its use and occupancy for the remainder of the lease term, and the Court refused to elevate an expectation of renewal into a compensable legal interest. But the Court was not dealing there with the fair market value of improvements. Unlike *Petty Motor*, there is no question here of creating a legally cognizable value where none existed, or of compensating a mere incorporeal expectation.[3] The petitioner here has constructed the improvements and seeks only their fair market value. *Petty Motor* should not be

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improvements are to be valued, not over whether Almota is to receive additional compensation for business losses. Almota may well be unable to operate a grain elevator business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that. *Mitchell* v. *United States*, 267 U. S. 341, did hold that the Government was not obliged to pay for business losses caused by condemnation. But it assuredly did not hold that the Government could fail to provide fair compensation for business improvements that are taken—dismiss them as worth no more than scrap value—simply because it did not intend to use them. Indeed, in *Mitchell* the Government paid compensation both for the land, including its "adaptability for use in a particular business," *id.*, at 344, and for the improvements thereon.

[3] Hence, this is not a case where the petitioner is seeking compensation for lost opportunities, see *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 281–282; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502. The petitioner seeks only the fair value of the property taken by the Government.

Nor is this a case where compensation is to be paid for "the value added to fee lands by their potential use in connection with [Government] permit lands," *United States* v. *Fuller*, *post*, p. 488, at 494, for neither action by the Government nor location adjacent to public property contributed any element of value to Almota's leasehold interest.

read to allow the Government to escape paying what a willing buyer would pay for the same property.

The Government argues that it would be unreasonable to compensate Almota for the value of the improvements measured over their useful life, since the Government could purchase the fee and wait until the expiration of the lease term to take possession of the land.[4] Once it has purchased the fee, the argument goes, there is no further expectancy that the improvements will be used during their useful life since the Government will assuredly require their removal at the end of the term. But the taking for the dam was one act requiring proceedings against owners of two interests.[5] At the time of that "taking" Almota had an expectancy of continued occupancy of its grain elevator facilities. The Government must pay just compensation for those interests "probably within the scope of the project from the time the

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[4] It was established at oral argument that while the Government had contracted to acquire the railroad's interest, it had not acquired the fee at the time of the taking of the leasehold, nor did it have possession at the time of the trial or appeal.

[5] "It frequently happens in the case of a lease for a long term of years that the tenant erects buildings or puts fixtures into the buildings for his own use. Even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property. In the absence of a special agreement to the contrary, such buildings or fixtures may be removed by the tenant at any time during the continuation of the lease, provided such removal may be made without injury to the freehold. This rule, however, exists entirely for the protection of the tenant, and cannot be invoked by the condemnor. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award. But in apportioning the award, they are treated as personal property and credited to the tenant." 4 P. Nichols, Eminent Domain § 13.121 [2] (3d rev. ed. 1971) (footnotes omitted).

Government was committed to it." *United States* v. *Miller,* 317 U. S., at 377. Cf. *United States* v. *Reynolds,* 397 U. S., at 16–18. It may not take advantage of any depreciation in the property taken that is attributable to the project itself. *Id.,* at 16; *United States* v. *Virginia Electric & Power Co.,* 365 U. S., at 635–636. At the time of the taking in this case, there was an expectancy that the improvements would be used beyond the lease term. But the Government has sought to pay compensation on the theory that at that time there was no possibility that the lease would be renewed and the improvements used beyond the lease term. It has asked that the improvements be valued as though there were no possibility of continued use.[6] That is not how the market would have valued such improvements; it is not what a private buyer would have paid Almota.

"The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, *United States* v. *Commodities Trading Corp.,* 339 U. S. 121, 124 (1950), as it does from technical concepts of property law." *United States* v. *Fuller, post,* at 490. It is, of course, true that Almota should be in no better position than if it had sold its leasehold to a private buyer. But its position should surely be no worse.

The judgment before us is reversed and the judgment of the District Court reinstated.

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[6] Similarly, the dissent today would value the petitioner's interest after the Government has condemned the underlying fee, and thus after the value of the petitioner's interest has been diminished because the risk of nonrenewal of the lease has materialized. But there was only one "taking," and at the time of that "taking" there was not only a risk that the lease would not be renewed, but a possibility that it would be and that the improvements would be used over their useful life.

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS joins, concurring.

I join the opinion of the Court, but add a few words to indicate what I find implicit in its rejection of the Government's claim to act as if it were Almota's landlord.

It is clear, first of all, that the market value of improvements placed on a leasehold interest will vary depending in major part upon the probable future conduct of the landlord. In this case, based on the experience of nearly half a century and the evident self-interest of the landlord railroad, this conduct could be predicted with considerable confidence. There was every expectation that the improvements would continue to have significant value beyond the term of the present lease. In a transaction between a willing buyer and a willing seller, there can be no doubt that this value would have been accorded appropriate weight.

On different facts, the market value of Almota's interest might have been significantly lower. If, for example, the railroad had relocated its tracks before the Government entered the picture, the leasehold improvements would have been nearly valueless in the market. A risk which Almota took in erecting those improvements, the risk that the railroad would relocate its tracks, would have proved a poor one. The risk would have been substantially the same if, independently of the present navigation project, the Government had purchased the railroad with the intention of operating it, and thereafter had decided to relocate it or to discontinue operation. Under those circumstances, the Government could properly have acted as an ordinary landlord, and its lessees could have been expected to bear the risk that it would put its land to a new use.

Here, however, the Government held no interest in the land until its navigation project required the acquisition of both the fee and the leasehold interests. If, at that

point, the Government had condemned both interests in a single proceeding, or in separate proceedings, Almota would have been entitled to compensation for the value of the improvements beyond the present lease term. Almota bore the risk that the railroad would change its plans, but should not be forced to bear the risk that the Government would condemn the fee and change its use. Where multiple properties or property interests are condemned for a particular public project, the Government must pay *pre-existing market value for each.* Neither the Government nor the condemnee may take advantage of "an alteration in market value attributable to the project itself." *United States* v. *Reynolds,* 397 U. S. 14, 16 (1970); cf. *United States* v. *Virginia Electric & Power Co.,* 365 U. S. 624, 635–636 (1961); *United States* v. *Miller,* 317 U. S. 369, 377 (1943).

The result should not be different merely because the Government arranged to acquire the fee interest by negotiation rather than by condemnation. Apart from cases where, as in *United States* v. *Rands,* 389 U. S. 121 (1967), the Government has a property interest antedating but within the bounds of its present project, it would be unjust to allow the Government to use "salami tactics" to reduce the amount of one property owner's compensation by first acquiring an adjoining piece of property or another interest in the same property from another property owner. While *United States* v. *Petty Motor Co.,* 327 U. S. 372 (1946), arguably establishes an exception to this principle, I subscribe to the Court's narrow construction of that case.

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

Petitioner is entitled to compensation for so much of its private "property" as was taken for public use.

The parties concede that petitioner's property interest here taken was the unexpired portion of a 20-year lease on land owned by the Oregon-Washington Railroad & Navigation Co. near Colfax, Washington. The Court recognizes the limited nature of petitioner's interest in the real property taken, but concludes that it was entitled to have its leasehold and improvements valued in such a way as to include the probability that petitioner's 20-year lease would have been renewed by the railroad at its expiration.

There is a plausibility about the Court's resounding endorsement of the concept of "fair market value" as the touchstone for valuation, but the result reached by the Court seems to me to be quite at odds with our prior cases. Even in its sharply limited reading of *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946), the Court concedes that the petitioner's expectation of having its lease renewed upon expiration is not itself an interest in property for which it may be compensated. But the Court permits the same practical result to be reached by saying that, at least in the case of improvements, the fair market value may be computed in terms of a willing buyer's expectation that the lease would be renewed.

In *United States* v. *Petty Motor Co., supra,* the Government acquired by condemnation the use of a structure occupied by tenants in possession under leases for various unexpired terms. The Court held that the measure of damages for condemnation of a leasehold is the value of the tenant's use of the leasehold for the remainder of the agreed term, less the agreed rent. The Court considered the argument, essentially the same raised by petitioner here, that a history of past renewal of the leases to existing tenants creates a compensable expectancy, but held that the right to compensation should be measured solely on the basis of the remainder

of the tenant's term under the lease itself. *Id.*, at 380. In so deciding, the Court stated:

> "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights. *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 185, 59 N. E. 763 [per Holmes, C. J.]:
>
> " 'It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time . . . . Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right.' " *Id.*, at 380 n. 9.

The holding in *Petty* was consistent with a long line of cases to the effect that the Fifth Amendment does not require, on a taking of a property interest, compensation for mere expectancies of profit, or for the frustration of licenses or contractual rights that pertain to the land, but that are not specifically taken and that are not vested property interests. *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 510 (1923); *Sinclair Pipe Line Co.* v. *United States*, 152 Ct. Cl. 723, 728, 287 F. 2d 175, 178 (1961); *Chicago, M., St. P. & P. R. Co.* v. *Chicago, R. I. & P. R. Co.*, 138 F. 2d 268, 270–271 (CA8 1943), cert. denied, 320 U. S. 804 (1944).

While the inquiry as to what property interest is taken by the condemnor and the inquiry as to how that property interest shall be valued are not identical ones, they

cannot be divorced without seriously undermining a number of rules dealing with the law of eminent domain that this Court has evolved in a series of decisions through the years. The landowner, after all, is interested, not in the legal terminology used to describe the property taken from him by the condemnor, but in the amount of money he is to be paid for that property. It will cause him little remorse to learn that his hope for a renewal of a lease for a term of years is not a property interest for which the Government must pay, if in the same breath he is told that the lesser legal interest that he owns may be valued to include the hoped-for renewal.

The notion of "fair market value" is not a universal formula for determining just compensation under the Fifth Amendment. In *United States* v. *Miller,* 317 U. S. 369, 374 (1943), the Court said of market value:

> "Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated."

It is quite apparent that the property on which the owner operates a prosperous retail establishment would command more in an open market sale than the fair value of so much of the enterprise as was "private property" within the meaning of the Fifth Amendment. Yet *Mitchell* v. *United States,* 267 U. S. 341 (1925), stands squarely for the proposition that the value added to the property taken by the existence of a going business is no part of the just compensation for which the Government must pay for taking the property:

> "No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the

> business was destroyed, the destruction was an unintended incident of the taking of land." *Id.*, at 345.

More recently, in *United States ex rel. TVA* v. *Powelson,* 319 U. S. 266, 283 (1943), the Court generalized further:

> "That which is not 'private property' within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not 'taken' in the *Mitchell* case it need not be reflected in the award due the landowner unless Congress so provides."

In either *Mitchell* or *Powelson,* the result would in all probability have been different had the Court applied the reasoning that it applies in this case. Here, too, the improvements on the property are not desired by the Government for the project in question, but the taking of petitioner's leasehold interest prevents its continuing to have their use for the indefinite future as it had anticipated. The Court says that although its "property" interest would have expired in 7½ years, the market value of that interest may be computed on the basis of expectancies that do not rise to the level of a property interest under the Fifth Amendment.

If permissible methods of valuation are to be thus totally set free from the property interest that they purport to value, it is difficult to see why the same standards should not be applied to a going business. Although the Government does not take the going business, and although the business is not itself a "property" interest within the Fifth Amendment, since purchasers on the open market would have paid an added increment of value for the property because a business was located on it, it may well be that such increment of value is

properly included in a condemnation award under the Court's holding today. And it will assuredly make no difference to the property owner to learn that destruction of a going business is not compensable, if he be assured that the property concededly taken upon which the business was located may be valued in such a way as to include the amount a purchaser would have paid for the business.

The extent to which the Court's decision in this case will unsettle condemnation law is obscured by the fact that the parties, motivated no doubt by condemnation lawyers' well-known propensity to enter into factual stipulations that present abstract questions of valuation theory for decision, have stipulated as to amounts to be awarded depending on which party prevails. But the underlying difficulty with petitioner's theory was lucidly demonstrated by the late Judge Madden in his opinion for the Court of Appeals in this case, referring to the similar holding of the Court of Appeals for the Tenth Circuit in *Scully* v. *United States,* 409 F. 2d 1061 (1969):

> "If the law were to go into the business of awarding compensation for an expectancy which never materialized, because the sovereign 'took' the subject of the expectancy, should, in *Scully, supra,* e. g., the one year lessees be compensated for the loss of a five year occupancy, a 50 year occupancy, a perpetual occupancy? In our instant case, was the stipulation based upon some actuarial computation such as the prospective life of the buildings and machinery, or the life of the railroad, or upon free-ranging guesswork?" *United States* v. *22.95 Acres of Land,* 450 F. 2d 125, 129 (CA9 1971).

The Court's conclusion gains no support from its citation of the recognized principle that the Government

may not take advantage of any depreciation in the property taken that is attributable to the project itself, *United States* v. *Reynolds,* 397 U. S. 14 (1970); *United States* v. *Miller,* 317 U. S. 369 (1943). The value of petitioner's property taken could not be diminished by the fact that the river improvement and navigation for which the Government took its property might have had a depressing effect on pre-existing market value. But the Government makes no such contention here. While, under existing principles of constitutional eminent domain law, the value of petitioner's property was not subject to diminution resulting from the effect on market value of the improvement that the Government proposed to construct, it *was* subject to the hazard of nonrenewal of petitioner's leasehold interest. The fact that the Government has condemned the underlying fee for the same project, and has therefore made the risk of nonrenewal a certainty, undoubtedly diminishes the market value of petitioner's leasehold interest. But the diminution results, not from any depressing effect of the improvement that the Government will construct after having taken the leasehold, but from a materialization of the risk of transfer of ownership of the underlying fee to which its value was always subject.

In at least partially cutting loose the notion of "just compensation" from the notion of "private property" that has developed under the Fifth Amendment, the Court departs from the settled doctrine of numerous prior cases that have quite rigorously adhered to the principle that destruction of value by itself affords no occasion for compensation. *United States* v. *Fuller, post,* p. 488; *United States* v. *Rands,* 389 U. S. 121 (1967). "[D]amage alone gives courts no power to require compensation where there is not an actual taking of property." *United States* v. *Willow River Power Co.,* 324 U. S. 499, 510 (1945). "[T]he existence of value alone

does not generate interests protected by the Constitution against diminution by the government . . . ." *Reichelderfer* v. *Quinn,* 287 U. S. 315, 319 (1932). While the Court purports to follow this well-established principle by requiring the compensation paid to be determined on the basis of private property actually taken, its endorsement of valuation computed in part on an expectancy that is no part of the property taken represents a departure from this settled doctrine. I therefore dissent.

UNITED STATES *v.* FULLER ET UX.

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

No. 71–559. Argued October 18, 1972—Decided January 16, 1973

In a condemnation proceeding brought by the United States, respondents made a claim, which the District Court and Court of Appeals upheld, to compensation for enhanced value on the open market because of use of the condemned fee lands in conjunction with adjoining federal lands for which respondents held permits under the Taylor Grazing Act. *Held:* The Fifth Amendment requires no compensation for any value added to the fee lands by the permits, which are revocable and, by the Act's terms, create no property rights. Pp. 490–494.

442 F. 2d 504, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 494.

Harry R. Sachse argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Frizzell, Raymond N. Zagone,* and *Jacques B. Gelin.*

Frank Haze Burch argued the cause for respondents. With him on the brief was *Daniel Cracchiolo.*

Francis Gallagher filed a brief for the Montana Public Lands Council as *amicus curiae* urging affirmance.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents operated a large-scale "cow-calf" ranch near the confluence of the Big Sandy and Bill Williams Rivers in western Arizona. Their activities were conducted on lands consisting of 1,280 acres that they

owned in fee simple (fee lands), 12,027 acres leased from the State of Arizona, and 31,461 acres of federal domain held under Taylor Grazing Act permits issued in accordance with § 3 of the Act, 48 Stat. 1270, as amended, 43 U. S. C. § 315b. The Taylor Grazing Act authorizes the Secretary of the Interior to issue permits to livestock owners for grazing their stock on Federal Government lands. These permits are revocable by the Government. The Act provides, moreover, that its provisions "shall not create any right, title, interest, or estate in or to the lands." *Ibid.*

The United States, petitioner here, condemned 920 acres of respondents' fee lands. At the trial in the District Court for the purpose of fixing just compensation for the lands taken, the parties disagreed as to whether the jury might consider value accruing to the fee lands as a result of their actual or potential use in combination with the Taylor Grazing Act "permit" lands. The Government contended that such element of incremental value to the fee lands could neither be taken into consideration by the appraisers who testified for the parties nor considered by the jury. Respondents conceded that their permit lands could not themselves be assigned any value in view of the quoted provisions of the Taylor Grazing Act. They contended, however, that if on the open market the value of their fee lands was enhanced because of their actual or potential use in conjunction with permit lands, that element of value of the fee lands could be testified to by appraisers and considered by the jury. The District Court substantially adopted respondents' position, first in a pretrial order and then in its charge to the jury over appropriate objection by the Government.

On the Government's appeal, the Court of Appeals for the Ninth Circuit affirmed the judgment and approved the charge of the District Court. 442 F. 2d 504.

That court followed the earlier case of *United States* v. *Jaramillo,* 190 F. 2d 300 (CA10 1951), and distinguished our holding in *United States* v. *Rands,* 389 U. S. 121 (1967). The dissenting judge in the Ninth Circuit thought the issue controlled by *Rands, supra.* We granted certiorari. 404 U. S. 1037 (1972).

Our prior decisions have variously defined the "just compensation" that the Fifth Amendment requires to be made when the Government exercises its power of eminent domain. The owner is entitled to fair market value, *United States* v. *Miller,* 317 U. S. 369, 374 (1943), but that term is "not an absolute standard nor an exclusive method of valuation." *United States* v. *Virginia Electric & Power Co.,* 365 U. S. 624, 633 (1961). The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, *United States* v. *Commodities Trading Corp.,* 339 U. S. 121, 124 (1950), as its does from technical concepts of property law.

The record shows that several appraiser witnesses for respondents testified that they included as an element of the value that they ascribed to respondents' fee lands the availability of respondents' Taylor Grazing Act permit lands to be used in conjunction with the fee lands. Under the District Court's charge to the jury, the jury was entitled to consider this element of value testified to by the appraisers. This Court has held that generally the highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may be taken into consideration in valuing the parcel taken. *Olson* v. *United States,* 292 U. S. 246, 256 (1934). The question presented by this case is whether there is an exception to that general rule where the parcels to be aggregated with the land taken are themselves owned

by the condemnor and used by the condemnee only under revocable permit from the condemnor.

To say that this element of value would be considered by a potential buyer on the open market, and is therefore a component of "fair market value," is not the end of the inquiry. In *United States* v. *Miller, supra,* this Court held that the increment of fair market value represented by knowledge of the Government's plan to construct the project for which the land was taken was not included within the constitutional definition of "just compensation." The Court there said:

> "But [respondents]insist that no element which goes to make up value . . . is to be discarded or eliminated. We think the proposition is too broadly stated. . . ." 317 U. S., at 374.

United States v. *Cors,* 337 U. S. 325 (1949), held that the just compensation required to be paid to the owner of a tug requisitioned by the Government in October 1942, during the Second World War, could not include the appreciation in market value for tugs created by the Government's own increased wartime need for such vessels. The Court said: "That is a value which the government itself created and hence in fairness should not be required to pay." *Id.,* at 334. A long line of cases decided by this Court dealing with the Government's navigational servitude with respect to navigable waters evidences a continuing refusal to include, as an element of value in compensating for fast lands that are taken, any benefits conferred by access to such benefits as a potential portsite or a potential hydro-electric site. *United States* v. *Rands, supra; United States* v. *Twin City Power Co.,* 350 U. S. 222 (1956); *United States* v. *Commodore Park,* 324 U. S. 386 (1945).

These cases go far toward establishing the general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain. If, as in *Rands,* the Government need not pay for value that it could have acquired by exercise of a servitude arising under the commerce power, it would seem *a fortiori* that it need not compensate for value that it could remove by revocation of a permit for the use of lands that it owned outright.

We do not suggest that such a general principle can be pushed to its ultimate logical conclusion. In *United States* v. *Miller, supra,* the Court held that "just compensation" did include the increment of value resulting from the completed project to neighboring lands originally outside the project limits, but later brought within them. Nor may the United States "be excused from paying just compensation measured by the value of the property at the time of the taking" because the State in which the property is located might, through the exercise of its lease power, have diminished that value without paying compensation. *United States ex rel. TVA* v. *Powelson,* 319 U. S. 266, 284 (1943).

"Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings." *United States* v. *Miller, supra,* at 375. Seeking as best we may to extrapolate from these prior decisions such a "working rule," we believe that there is a significant difference between the value added to property by a completed public works project, for which the Government must pay, and the value added to fee lands by a revocable permit authorizing the use of neighboring lands that the Government owns. The Government

may not demand that a jury be arbitrarily precluded from considering as an element of value the proximity of a parcel to a post office building, simply because the Government at one time built the post office. But here respondents rely on no mere proximity to a public building or to public lands dedicated to, and open to, the public at large. Their theory of valuation aggregates their parcel with land owned by the Government to form a privately controlled unit from which the public would be excluded. If, as we held in *Rands,* a person may not do this with respect to property interests subject to the Government's navigational servitude, he surely may not do it with respect to property owned outright by the Government. The Court's statement in *Rands* respecting portsite value is precisely applicable to respondents' contention here that they may aggregate their fee lands with permit lands owned by the Government for valuation purposes:

> "[I]f the owner of the fast lands can demand port site value as part of his compensation, 'he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. . . . To require the United States to pay for this . . . value would be to create private claims in the public domain.' " 389 U. S., at 125, quoting *United States* v. *Twin City Power Co.,* 350 U. S., at 228.

We hold that the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with the Government's permit lands.

The Court of Appeals based its holding in part on its conclusion that although the Fifth Amendment might not have required the Government to pay compensation

of the sort permitted by the trial court's charge to the jury, the history of the Taylor Grazing Act indicated that Congress had intended that such compensation be paid. Congress may, of course, provide in connection with condemnation proceedings that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950). But we do think the factors relied upon by the Court of Appeals fall far short of the direction contained in the Reclamation Act of 1902, 32 Stat. 388, as amended, that payment be made for rights recognized under state law, which was determinative of the outcome in *Gerlach*. The provisions of the Taylor Grazing Act quoted *supra* make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of the permit. Given that intent, it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands by their potential use in connection with permit lands. We find no such authorization in the applicable congressional enactments.

Reversed.

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

I dissent from a decision which, in my view, dilutes the meaning of the just compensation required by the Fifth Amendment when property is condemned by the Government. As a full understanding of the facts is necessary, I will begin by restating them.

This is a condemnation proceeding brought by the United States to acquire title to 920 of 1,280 acres of land, owned in fee by respondents, which is within the area to

be flooded by a dam and reservoir project in Arizona. At the time of the taking respondents used this fee land as a base for a cattle operation known as a "cow-calf" ranch. A dependable source of water allowed intense cultivation of the fee land to provide the basic source of feed for the cattle. In connection with their fee land, respondents used 31,461 acres of adjacent public land on which they held revocable grazing permits issued under the Taylor Grazing Act. 43 U. S. C. § 315 *et seq.*[1] The public land was used for grazing during favorable seasons, and roads running across the public land connected respondents' three parcels of fee land.

The permits held by respondents on the public land accorded exclusive but revocable grazing rights to respondents. By the terms of the Act, the issuance of a permit does not "create any right, title, interest, or estate in or to the lands." 43 U. S. C. § 315b. Nonetheless, grazing permits are of considerable value to ranchers and serve a corresponding public interest in assuring the "most beneficial use" of range lands. *Hatahley* v. *United States,* 351 U. S. 173, 177 (1956). Respondents' permits had not been revoked at the time of the taking, nor, so far as the record reveals, have they yet been revoked. The record also shows that only a small fraction of the public grazing land will be flooded in the dam and reservoir project. Thus, the public land which respondents assert gave added value to their fee land remains substantially intact and available for Taylor Grazing Act purposes.

The District Court allowed respondents to introduce testimony as to the market value of the fee land which took into consideration its proximity to this public

[1] In addition, respondents grazed their cattle on 12,027 acres of land leased from the State, but this land is not relevant to the controversy now before us.

land. In relevant part, the District Court instructed the jury as follows:

> "During the course of this trial, reference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, should you determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or canceled at any time without a constitutional obligation to pay the compensation therefor.
>
> "Evidence has been introduced of defendants' use of their deeded land which is being taken, in conjunction with surrounding land owned by the United States, for which defendants have grazing permits, and land belonging to the State of Arizona, which defendants leased. In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or the State of Arizona. However, in determining the value of the fee land and in awarding compensation to the owners, you should consider the availability and accessibility of the permit and leased land and its use in conjunction with the fee land taken and give to the fee land such value as, in your judgment, according to the evidence, should be given on account of such availability and accessibility of the permit and leased land, if any. You should also consider the possibility that the permits on the United States land could be withdrawn at any time without constitutional obligation to pay compensation therefor and determine the effect you

> feel such possibility, according to the evidence, would have upon the value of the fee land." App. 26–27.

I have reproduced this extensive excerpt to underline the careful manner in which the condemnation jury was instructed. Contrary to the implication in the Government's framing of the question in this case,[2] the jury was not allowed to include "the value of revocable grazing permits." The instruction expressly stated that "such permits are mere licenses which may be revoked and are not compensable as such." The emphasis of the instruction was on the location of the fee land, with the resulting "availability and accessibility" of the adjacent public grazing land. I find the instruction to be an appropriate statement of the applicable principles of just compensation.

The opinion of the Court recognizes that the just compensation required by the Fifth Amendment when the Government exercises its power of eminent domain is ordinarily the market value of the property taken. *United States* v. *Miller,* 317 U. S. 369, 374 (1943). It is commonplace, in determining market value—whether

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[2] As stated by the Government, the question presented by this case is:

"Whether the owner of land taken by the United States is entitled to have included in the measure of his compensation the value of revocable grazing permits on adjoining federal land issued under an Act of Congress which specifies that such grazing permits create no 'right, title, interest, or estate in or to the lands.'" Brief for United States 2.

More accurate, in light of the District Court's instruction, is respondents' statement of the question:

"Whether, in determining the compensation due an owner of land taken by the United States, the jury may consider the availability and accessibility of public lands, so long as consideration is also given the possibility that the grazing permits on the public land may be withdrawn." Brief for Respondents 1–2.

in condemnation or in private transactions—to consider such elements of value as derive from the *location* of the land. But today the Court enunciates an exception to these recognized principles where the value of the land to be condemned may be enhanced by its location in relation to Government-owned property. The Court relies on two lines of cases which, indeed, are said to go far toward establishing

> "the general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." *Ante,* at 492.

Applying this new principle to the present case, the Court now holds that since the Government "created" an element of value by owning grazing land and making it available under the Taylor Grazing Act, and since it has the power to "destroy" this element of value by barring respondents and others from the land, the condemnation jury must ignore the fact that respondents' land is adjacent to public land. Under this formulation, it is quite immaterial that the grazing land remains substantially intact, and that the Government has taken no action—and none is shown to be contemplated in the record—to convert such land to some other use. The test is not whether the Government has in fact put its property to some other use or removed it entirely; rather, it is quite simply whether the Government has the power to do this.

Neither of the lines of cases on which the Court relies seems apposite. The first includes *United States* v. *Miller, supra,* in which the Court held that the Government need not pay for an increase in value occa-

sioned by the very project for which the land was condemned, and *United States* v. *Cors,* 337 U. S. 325 (1949), in which the Court held that in condemning tugboats during wartime the Government need not offer compensation for an increase in value attributable to its own extraordinary wartime demand for such craft. These cases support only the modest generalization that compensation need not be afforded for an increase in market value stemming from the very Government undertaking which led to the condemnation.

The other cases on which the Court relies, *United States* v. *Rands,* 389 U. S. 121 (1967), and *United States* v. *Twin City Power Co.,* 350 U. S. 222 (1956), deal with the condemnation of lands adjacent to navigable waters. In *Rands,* the condemnee owned land on the Columbia River which the United States condemned "in connection with the John Day Lock and Dam Project, authorized by Congress as part of a comprehensive plan for the development of the Columbia River." 389 U. S., at 122. Relying on the "unique position" of the Government "in connection with navigable waters," *ibid.,* the Court held that no special element of value could be accorded the land by virtue of its possible use as a port. In *Twin City,* the condemnee was holding land on the Savannah River as a potential hydroelectric powersite. The Government condemned the land as part of a major flood control, navigation, and hydroelectric project. By a bare majority vote, the Court held that the condemnee was not entitled to the "special water-rights value" of the land as a potential powersite, distinguishing other cases with the comment:

> "We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river . . . ." 350 U. S., at 225.

The water rights cases may be subject to varying interpretations, but it is important to remember when interpreting them that they cut sharply against the grain of the fundamental notion of just compensation, that a person from whom the Government takes land is entitled to the market value, including location value, of the land. They could well be confined to cases involving the Government's "unique position" with respect to "navigable waters." [3] At most, these cases establish a principle no broader than that the Government need not compensate for location value attributable to the proximity of Government property utilized in the same project. In *Rands,* as in *Twin City,* the river adjacent to the property condemned was the focal point of the development project which led to the condemnation. The Government simply decided to put the river to a new use and in connection with that new use condemned adjacent land.

To understand why compensation is not required in such cases, it is important to distinguish the Government's role as condemnor from its role as property owner. While as condemnor the Government must pay market value, as property owner it may change the use of its property as if it were a private party, without paying compensation for the loss in value suffered by neighboring land.

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[3] Arguably, then, these are water rights cases and nothing more. Suitable sites for hydroelectric plants or port facilities are important natural resources, highly valuable but limited in number, over which the Government has peculiar historical and constitutional sway. On this view, while the Government has equal authority over Taylor Grazing Act land and other Government-owned property, proximity to such property may appropriately be treated differently from proximity to navigable water for the purpose of measuring just compensation. This was one of the bases on which the court below distinguished the water cases from the present case, 442 F. 2d 504, 507 (CA9 1971), and in my view is an alternative ground for affirming the judgment below.

When the Government condemns adjoining parcels of privately owned land for the same project, it may not take advantage of a drop in market value of one parcel resulting from the decision to condemn another. When, however, as in *Rands* and *Twin City*, a project encompasses not only parcels of private land, but also the public property which enhances the value of the private land, a more difficult question is presented. In each of those cases, the Government held a dominant servitude over the flow of a river, and it condemned adjacent private lands in connection with a decision to exercise its servitude. Arguably, the measure of compensation for the taking of the private lands should have included the value of the riparian location unaffected by the Government's decision to exercise its own rights in the river. But this result would have impinged on the Government's right to use the river by raising the cost of any new use which required the condemnation of private land.

Accordingly, in those cases the Court excluded evidence of riparian location value since the Government was exercising its lawful power to appropriate "the entire flow of the river."

> "The proper exercise of this power [over navigable waters] is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *United States* v. *Rands*, 389 U. S., at 123.

In any event, the present case is quite different. Respondents' lands were condemned not because the Government as property owner decided to put its grazing land to some other use and needed additional land, but

rather because the Government wanted respondents' land for a project which left the grazing land substantially intact and available.[4]

The Government's role here is not an ambiguous one—it is simply a condemnor of private land which happens to adjoin public land. If the Government need not pay location value in this case, what are the limits upon the principle today announced? Will the Government be relieved from paying location value whenever it condemns private property adjacent to or favorably located with respect to Government property?[5] Does the principle apply, for example, to the taking of a gasoline station at an interchange of a federal highway, or to the taking of a farm which in private hands could continue to be irrigated with water from a federal reservoir? The majority proposes to distinguish such cases with the "working rule" that

> "there is a significant difference between the value added to property by a completed public works project, for which the Government must pay, and the value added to fee lands by a revocable permit

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[4] In two cases decided together involving the condemnation of ranch land used in connection with Taylor Grazing Act land, a panel of the Court of Appeals for the Tenth Circuit followed a similar analysis in awarding location value in one case, *United States* v. *Jaramillo,* 190 F. 2d 300 (1951), but not in the other, *United States* v. *Cox,* 190 F. 2d 293 (1951). In *Jaramillo,* the court stated:

"By appropriate condemnation proceedings . . . the Government took appellee's fee and leased land as a part of a total of 20,061 acres, to be used for war purposes. But, *unlike the Cox and Beasley cases, the project did not contemplate the acquisition of the forest land covered by appellee's permit.*" (Emphasis added.) *Id.,* at 301.

[5] If so, the contrast between condemnation proceedings and other transactions would be stark: the enhancement of value stemming from public highways, parks, buildings, and recreational facilities is commonly recognized for purposes of taxation, mortgaging, and private sales.

> authorizing the use of neighboring lands which the Government owns." *Ante,* at 492.

The Court can hardly be drawing a distinction between Government-owned "completed public works" and Government-owned parks and grazing lands in their natural state. The "working rule" as articulated can, therefore, only mean that the respondents' revocable permit to use the neighboring lands is regarded by the Court as the distinguishing element. This is an acceptance of the Government's argument that the added value derives from the permit and not from the favorable location with respect to the grazing land.[6] The answer to this, not addressed either by the Government or the Court, is that the favorable location is the central fact. Even if no permit had been issued to these respondents, their three tracts of land—largely surrounded by the grazing land—were strategically located and logical beneficiaries of the Taylor Grazing Act. In determining the market value of respondents' land, surely this location—whether or not a permit had been issued [7]—would enter into any rational estimate of value. This is precisely the rationale of the District Court's jury instruction, which carefully distinguished between the revocable permits "not compensable as such" and the "availability and accessibility" of the grazing land. It is this distinction which the Court's opinion simply ignores.

Finally, I do not think the Court's deviation from the market-value rule can be justified by invocation of long-

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[6] See n. 2, *supra.*

[7] Even if, as the Government's argument suggests is possible, the permits held by respondents had been withdrawn as a prelude to this condemnation, the Taylor Grazing Act contemplates their issuance in the public interest and the record discloses no other private landowners as favorably located to qualify for permits as these respondents.

established "basic equitable principles of fairness." *Ante,* at 490. It hardly serves the principles of fairness as they have been understood in the law of just compensation to disregard what respondents could have obtained for their land on the open market in favor of its value artificially denuded of its surroundings.[8]

I would affirm the judgment of the Court of Appeals.

[8] Respondents' witnesses valued the land at figures up to nearly a million dollars, while the Government's expert witness assigned it a value of $136,500. In what was manifestly a compromise, the jury awarded $350,000.

ROBINSON *v.* NEIL, WARDEN

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

No. 71–6272. Argued December 6, 1972—Decided January 16, 1973

Waller v. *Florida,* 397 U. S. 387, which bars on the ground of double jeopardy two prosecutions, state and municipal, based on the same act or offense, is fully retroactive. Pp. 506–511.

452 F. 2d 370, vacated and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a separate opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post,* p. 511.

James D. Robinson argued the cause for petitioner. With him on the brief was *Jerry H. Summers.*

Bart C. Durham III, Assistant Attorney General of Tennessee, argued the cause for respondent. With him on the brief were *David M. Pack,* Attorney General, and *William C. Koch, Jr.,* Assistant Attorney General.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1962 petitioner was tried and convicted in the Chattanooga municipal court of three counts of assault and battery in violation of a city ordinance. He was fined $50 and costs on each count. He was later indicted by the grand jury of Hamilton County, Tennessee, which, out of the same circumstances giving rise to the municipal trial, charged him with three offenses of assault with intent to commit murder in violation of state law. The petitioner pleaded guilty to the state charges and received consecutive sentences of three to 10 years for two offenses and three to five years for the third offense. He is presently in the custody of the respondent warden of the Tennessee State Penitentiary.

In 1966 the petitioner unsuccessfully sought habeas corpus relief in state courts on the ground that the second convictions for state offenses violated his federal constitutional guarantee against twice being placed in jeopardy for the same offense. In 1967 federal courts denied a similar request for habeas corpus relief. *Robinson* v. *Henderson,* 268 F. Supp. 349 (ED Tenn. 1967), aff'd, 391 F. 2d 933 (CA6 1968). In 1970 the petitioner renewed his claims for habeas relief, basing his arguments on this Court's intervening decisions in *Benton* v. *Maryland,* 395 U. S. 784 (1969), and *Waller* v. *Florida,* 397 U. S. 387 (1970). Holding that *Waller* was to be accorded retrospective effect, the District Court granted the petitioner habeas corpus relief. 320 F. Supp. 894 (ED Tenn. 1971). The Sixth Circuit reversed (452 F. 2d 370 (1971)) and we granted certiorari to decide the retroactivity of *Waller* v. *Florida.* 406 U. S. 916 (1972).

The Fifth Amendment's guarantee that no person be twice put in jeopardy for the same offense was first held binding on the States in *Benton* v. *Maryland, supra.* Our subsequent decision in *Waller* v. *Florida, supra,* held that the scope of this guarantee precluded the recognition of the "dual sovereignty" doctrine with respect to separate state and municipal prosecutions. *Waller* involved the theft of a mural from the City Hall of St. Petersburg, Florida. The petitioner there was first tried and convicted of violating city ordinances with respect to the destruction of city property and breach of the peace. Subsequently, he was convicted of grand larceny in violation of state law involving the same theft. The Court stated:

> "the Florida courts were in error to the extent of holding that—
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> " 'even if a person has been tried in a municipal court for the identical offense with which he is charged

> in a state court, this would not be a bar to the prosecution of such person in the proper state court.'" 397 U. S., at 395.

Prior to this Court's 1965 decision in *Linkletter* v. *Walker,* 381 U. S. 618, there would have been less doubt concerning the retroactivity of the *Waller* holding. For, until that time, both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court, *e. g., Norton* v. *Shelby County,* 118 U. S. 425, 442 (1886), subject to limited exceptions of a nature such as those stated in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371 (1940). In *Linkletter,* the Court, declaring that it was charting new ground (381 U. S., at 628 and n. 13), held that with respect to new constitutional interpretations involving criminal rights "the Constitution neither prohibits nor requires retrospective effect." *Id.,* at 629. *Linkletter* and succeeding cases established a set of factors for determining which constitutional rules were to be accorded retrospective and which prospective effect only.* The District Court and the Sixth Circuit in this case applied the factors enunciated by these cases to the *Waller* holding. The Sixth Circuit held, contrary to the conclusion of the District Court, that *Waller* is not to be applied retroactively.

We do not believe that this case readily lends itself to the analysis established in *Linkletter.* Certainly, there is nothing in *Linkletter* or those cases following it to indicate that all rules and constitutional interpretations arising under the first eight Amendments must be subjected to the analysis there enunciated. *Linkletter* itself announced an exception to the general rule of retro-

*See *Desist* v. *United States,* 394 U. S. 244 (1969), which carefully examined all of the cases decided since *Linkletter* and more fully enunciated the guiding criteria of those cases.

activity in a decision announcing that the exclusionary rule of *Mapp* v. *Ohio,* 367 U. S. 643 (1961), would be given prospective effect only. *Linkletter,* and the other cases relied upon by the Sixth Circuit, dealt with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial. Those procedural rights and methods of conducting trials, however, do not encompass all of the rights found in the first eight Amendments. Guarantees that do not relate to these procedural rules cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis. For the purpose and effect of the various constitutional guarantees vary sufficiently among themselves so as to affect the necessity for prospective rather than retrospective application.

Linkletter indicated, for instance, that only those procedural rules affecting "the very integrity of the factfinding process" would be given retrospective effect. 381 U. S., at 639. In terms of some nonprocedural guarantees, this test is simply not appropriate. In *Furman* v. *Georgia,* 408 U. S. 238 (1972), for example, this Court held that in the situation there presented imposition of the death penalty was not constitutionally permissible. Yet, while this holding does not affect the integrity of the factfinding process, we have not hesitated to apply it retrospectively without regard to whether the rule meets the *Linkletter* criteria. *E. g., Walker* v. *Georgia,* 408 U. S. 936.

The prohibition against being placed in double jeopardy is likewise not readily susceptible of analysis under the *Linkletter* line of cases. Although the Court has not handed down a fully reasoned opinion on the retroactivity of *Benton* v. *Maryland,* it has indicated that it is retroactive without examination of the *Linkletter* criteria. *North Carolina* v. *Pearce,* 395 U. S. 711 (1969); *Ashe* v. *Swenson,* 397 U. S. 436, 437 n. 1 (1970). These

decisions do not directly control the question of whether *Waller* should be given retrospective effect but they bear upon its disposition.

The guarantee against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial. A number of the constitutional rules applied prospectively only under the *Linkletter* cases were found not to affect the basic fairness of the earlier trial, but to have been directed instead to collateral purposes such as the deterrence of unlawful police conduct, *Mapp* v. *Ohio, supra.* In *Waller,* however, the Court's ruling was squarely directed to the prevention of the second trial's taking place at all, even though it might have been conducted with a scrupulous regard for all of the constitutional procedural rights of the defendant.

We would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other. The element of reliance embodied in the *Linkletter* analysis will not be wholly absent in the case of constitutional decisions not related to trial procedure, as indeed this case when contrasted with *Furman* illustrates.

In *Furman* v. *Georgia, supra,* our mandate was tailored so as to deny to the State only the authority to impose a punishment that we held unconstitutional, without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus, the prejudice to the State resulting from the necessity of an entirely new trial because of procedures newly found to be constitutionally defective, with the

attendant difficulties of again assembling witnesses whose memories would of necessity be dimmer for the second trial than for the first, was not present. That which was constitutionally invalid could be isolated and excised without requiring the State to begin the entire factfinding process anew.

The application of *Waller* retrospectively may, on the other hand, result in a form of prejudice to the State because, in reliance upon the "dual sovereignty" analogy, the municipal prosecution may have occurred first and the sentence already have been served prior to the commencement of the state prosecution. If the offense involved was a serious one under state law, as it apparently was in this case, the defendant may have been unintentionally accorded a relatively painless form of immunity from the state prosecution. But the Court's opinion in *Waller* makes clear that the analogy between state and municipal prosecutions, and federal and state prosecutions permitted in *Bartkus* v. *Illinois,* 359 U. S. 121 (1959), had never been sanctioned by this Court and was not analytically sound. Since the issue did not assume federal constitutional proportions until after *Benton* v. *Maryland* held the Double Jeopardy Clause applicable to the States, this Court had not earlier had occasion to squarely pass on the issue. But its decision in *Waller* cannot be said to have marked a departure from past decisions of this Court. Therefore, while *Waller*-type cases may involve a form of practical prejudice to the State over and above the refusal to permit the trial that the Constitution bars, the justifiability of the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter* line of cases. We intimate no view as to what weight should be accorded

to reliance by the State that was justifiable under the *Linkletter* test in determining retroactivity of a nonprocedural constitutional decision such as *Waller*.

We hold, therefore, that our decision in *Waller* v. *Florida* is to be accorded full retroactive effect. We refrain from an outright reversal of the judgment below, however, because statements of counsel at oral argument raised the issue of whether the state and municipal prosecutions were actually for the same offense. We therefore vacate the judgment of the Court of Appeals and remand the case so that respondent may have an opportunity to present this issue there or in the District Court.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur.

Although I otherwise join the opinion of the Court, I would reverse the judgment of the Court of Appeals outright. I adhere to my view that, regardless of the similarity of the offenses, the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the prosecution, except in most limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring); see *Grubb* v. *Oklahoma, post,* p. 1017 (1972) (BRENNAN, J., dissenting); *Miller* v. *Oregon,* 405 U. S. 1047 (1972) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (separate statement of DOUGLAS, BRENNAN, and MARSHALL, JJ.). Under this "same transaction" test, all charges against petitioner should have been brought in a single prosecution.

GOOSBY ET AL. *v.* OSSER ET AL.

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

No. 71–6316. Argued December 6–7, 1972—
Decided January 17, 1973

Philadelphia County prisoners unable to make bail or being held on nonbailable offenses brought this class action, asserting the unconstitutionality of Pennsylvania Election Code provisions denying them the right to vote. When the Commonwealth (but not the municipal) officials who were named as defendants conceded the Code provisions' unconstitutionality, the District Judge (deeming the Commonwealth officials the principal defendants) ruled the case nonjusticiable as not involving an Art. III case or controversy, and dismissed the complaint. The Court of Appeals, though differing as to justiciability, affirmed on the ground that petitioners' constitutional claims were wholly insubstantial under *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802, and ruled that a three-judge district court was therefore not required under 28 U. S. C. § 2281. *Held:*

1. The Commonwealth officials' concession did not foreclose the existence of an Art. III case or controversy since the municipal officials continue to assert the right to enforce the challenged Code provisions. Pp. 516–517.

2. *McDonald, supra,* unlike the situation alleged here, did not deal with an absolute prohibition against voting by the prisoners there involved, and that decision does not "foreclose the subject" of petitioners' challenge to the Pennsylvania statutory scheme. The case may, if appropriate, therefore be heard by a three-judge district court. Pp. 518–523.

452 F. 2d 39, reversed and remanded.

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

Ann S. Torregrossa argued the cause for petitioners *pro hac vice.* With her on the briefs was *Elliot B. Platt.*

Peter W. Brown, Deputy Attorney General, argued the cause for respondents Commonwealth of Pennsylvania

et al. With him on the brief were *J. Shane Creamer,* Attorney General, and *Thomas J. Oravetz* and *Edward J. Weintraub,* Deputy Attorneys General. *John Mattioni* argued the cause and filed a brief for municipal respondents.

Briefs of *amici curiae* urging reversal were filed by *Jack Greenberg* and *Stanley A. Bass* for the NAACP Legal Defense and Educational Fund, Inc., et al., and by *Samuel Rabinove, Michael von Moschzisker, Wilbur Bourne Ruthrauff, A. Harry Levitan,* and *Carolyn Temin* for the American Jewish Committee et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question is whether 28 U. S. C. § 2281 [1] required the convening of a three-judge court in the District Court for the Eastern District of Pennsylvania to hear this case. It is a class action brought by and on behalf of persons awaiting trial and confined in Philadelphia County prisons because either unable to afford bail or because charged with nonbailable offenses. The complaint alleges that provisions of the Pennsylvania Election Code, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, absolutely deny petitioners' class the right to vote in

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[1] Title 28 U. S. C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

that they neither permit members of the class to leave prison to register and vote, nor provide facilities for the purpose at the prisons, and in that they expressly prohibit persons "confined in penal institutions" from voting by absentee ballot.[2] The complaint names as defendants two Commonwealth officials, the Attorney General and Secretary of State of Pennsylvania, and certain municipal officials of the County and City of Philadelphia: the City Commissioners of Philadelphia who constitute the Board of Elections and Registration Commission of the City and County of Philadelphia, the Voting Registration Supervisor for the City and County, and the Superintendent of Prisons for the County.

On oral argument before a single judge on petitioners' motion for a temporary restraining order, the Commonwealth officials appeared by a Deputy Attorney General, who conceded that the challenged provisions of the Election Code, as applied to petitioners' class, were unconstitutional under the Fourteenth Amendment. The municipal officials, on the other hand, vigorously defended the constitutionality of the provisions as so applied. The single judge deemed the contrary view of the municipal officials to be irrelevant, as he regarded the Commonwealth officials to be the "principal defendants." See

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[2] Pa. Stat. Ann., Tit. 25, § 623–1 *et seq.* (1963 and Supp. 1972–1973); § 2602 (w)(12) (Supp. 1972–1973). Several elections, including the 1972 presidential election, have been held since this action was filed, but this does not render the case moot. See *Moore* v. *Ogilvie,* 394 U. S. 814 (1969). Similarly, the case is not rendered moot because some of the named petitioners have lost their status as class members by being released on bail, discharged, acquitted, or convicted. See *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802, 803 n. 1 (1969); *Lee* v. *Washington,* 390 U. S. 333 (1968), aff'g 263 F. Supp. 327 (MD Ala. 1966).

n. 3, *infra.* He therefore ruled that the concession on behalf of the Commonwealth officials meant there was no case or controversy before the court as required by Art. III of the Constitution, and dismissed the complaint.[3] On petitioners' appeal, the Court of Appeals for the Third Circuit affirmed. 452 F. 2d 39 (1971). We do not, however, read the *per curiam* opinion of the Court of Appeals as resting the affirmance on agreement with the single judge that the concession of the Commonwealth officials meant there was no case or controversy before the court. Rather, we read the *per curiam* opinion as either implying disagreement with the single judge on that question, or as at least assuming that a case or controversy existed, for the opinion states that, in the view of the Court of Appeals, petitioners' constitutional claims were wholly insubstantial under *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969), in which circumstance,

[3] The unpublished transcript of the oral opinion of the single judge reads in pertinent part as follows:

"It has been stated that no Federal Court has jurisdiction to pronounce any statute, either of the State or of the United States void because irreconcilable with the Constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies.

"Now, in the instant case the Attorney General, as the chief legal officer of the Commonwealth, obviously represents, as Counsel have stated in their arguments this morning, the 'principal' Defendant or Defendants. The position taken by the remaining Defendants seems to be the result of the fact that the Attorney General has not, in accordance with his past practice, rendered an opinion together with suggested procedures, plans, etc., covering the subject matter of the opinion.

"It is, therefore, our conclusion that in the posture of this case as it presently exists . . . there is no controversy in the sense in which that term is used by the Courts, and we find ourselves compelled to, therefore, dismiss the complaint. It is so ordered." App. 85.

the Court of Appeals held, *Bailey* v. *Patterson,* 369 U. S. 31 (1962), was authority that 28 U. S. C. § 2281 did not require the assembly of a three-judge court and that dismissal by the single judge was therefore proper, 452 F. 2d, at 40. A petition for rehearing *en banc* was denied, three judges dissenting. We granted certiorari, 408 U. S. 922 (1972). We reverse the judgment of the Court of Appeals and remand with direction to enter an appropriate order pursuant to 28 U. S. C. § 2281 for the convening of a three-judge court to hear this case.

I

The single judge clearly erred in holding that the concession of the Commonwealth officials foreclosed the existence of a case or controversy. All parties are in accord that Pennsylvania law did not oblige the municipal officials to defer to the concession of the Commonwealth officials, or otherwise give the Commonwealth officials a special status as "principal defendants." [4] Indeed, the brief filed in this Court by the Commonwealth officials forthrightly argues that "[t]he District Court made an egregious error. The Attorney General and the Secretary of the Commonwealth are not the only defendants in this case. The City Commissioners of Philadelphia, the Voting Registration Supervisor, the Registration Commission, and the Superintendent of Prisons for Philadelphia County are also parties. These parties have contested vigorously the issues raised by petitioners both in the District Court and on appeal.

[4] Thus, this is not a situation in which a State confesses error and represents that the error will be corrected without need for further court action. See, *e. g., Titmus* v. *Tinsley,* 370 U. S. 964 (1962); *McKissick* v. *Durham City Board of Education,* 176 F. Supp. 3 (MDNC 1959); *Jeffers* v. *Whitley,* 197 F. Supp. 84 (MDNC 1961); *Kelley* v. *Board of Education,* 139 F. Supp. 578 (MD Tenn. 1956).

They have provided adversity of interest, and will sharply define the issues, to the extent they are not already clear." Brief for Respondents Commonwealth of Pennsylvania et al. 4–5.[5]

Thus, there is satisfied the requisite of Art. III that "[t]he constitutional question . . . be presented in the context of a specific live grievance." *Golden* v. *Zwickler,* 394 U. S. 103, 110 (1969). As between petitioners and the municipal officials, the District Court was "called upon to adjudge the legal rights of litigants in actual controversies," *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39 (1885), and "the interests of [petitioners' class] require the use of . . . judicial authority for [petitioners'] protection against actual interference." *United Public Workers of America* v. *Mitchell,* 330 U. S. 75, 90 (1947). Since the municipal officials persist in their asserted right to enforce the challenged provisions of the Election Code, there is a "real and substantial controversy" "touching the legal relations of parties having adverse legal interests," *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937), in which circumstance the concession of the Commonwealth officials could not have the effect of dissipating the existence of a case or controversy. Cf. *In re Metropolitan Railway Receivership,* 208 U. S. 90, 107–108 (1908).

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[5] We also read respondents' brief as rejecting the view of the single judge that the municipal officials must defer to the commonwealth officials' concession pending the issuance of a formal opinion of the Attorney General on the question of the constitutionality of the statutes.

Insofar as the single judge may have rested his finding of the absence of a case or controversy on the alleged difficulty of formulating a remedy, he also erred. See *Louisiana* v. *United States,* 380 U. S. 145, 154 (1965); *Brown* v. *Board of Education,* 349 U. S. 294, 300 (1955).

II

The Court of Appeals also erred. We disagree with its holding that *McDonald* v. *Board of Election Comm'rs, supra,* rendered petitioners' constitutional claims wholly insubstantial.

Title 28 U. S. C. § 2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," *Bailey* v. *Patterson,* 369 U. S., at 33; "wholly insubstantial," *ibid.;* "obviously frivolous," *Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285, 288 (1910); and "obviously without merit," *Ex parte Poresky,* 290 U. S. 30, 32 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281. A claim is insubstantial only if " 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " *Ex parte Poresky, supra,* at 32, quoting from *Hannis Distilling Co.* v. *Baltimore, supra,* at 288; see also *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105–106 (1933); *McGilvra* v. *Ross,* 215 U. S. 70, 80 (1909). Under this test, it is clear that *McDonald* is not a prior decision of this Court that "foreclose[s] the subject" of petitioners' constitutional attack upon the Pennsylvania statutory scheme; it is demonstrably not a decision that

"leave[s] no room for the inference that the question sought to be raised [by petitioners] can be the subject of controversy."

In *McDonald,* appellants were a class of pretrial detainees in Cook County, Illinois, already registered to vote, who sought to vote only by absentee ballot. Their timely applications to the Cook County Board of Election Commissioners for absentee ballots were denied on the ground that pretrial detainees were not included among those persons specifically permitted by the Illinois Election Code to vote by absentee ballot. Appellants brought suit alleging that in that circumstance the Illinois Election Code denied them equal protection of the laws, particularly as the Code provided absentee ballots for those "medically incapacitated," and for pretrial detainees who were residents of Cook County but incarcerated outside of Cook County.[6]

The threshold question presented in *McDonald* was "how stringent a standard to use in evaluating the classifications made [by the Illinois absentee ballot provisions] and whether the distinctions must be justified by a compelling state interest . . . ." 394 U. S., at 806. In resolving this question, the Court analyzed the Illinois scheme in light of our decisions that required the application of the more stringent compelling state interest test when either a fundamental right, such as the right to vote, was allegedly infringed, *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Harper* v. *Virginia Board of Elec-*

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[6] The Illinois absentee voting statute, Ill. Rev. Stat., c. 46, §§ 19–1 to 19–3 (1971), made absentee voting available to four classes of persons: (1) those who were absent from their county of residence for any reason; (2) those who were "physically incapacitated"; (3) those whose observance of a religious holiday prevented attendance at the polls; and (4) those who served as poll watchers in precincts other than their own on election day. See *McDonald* v. *Board of Election Comm'rs, supra,* at 803–804.

tions, 383 U. S. 663 (1966); *Carrington* v. *Rash,* 380 U. S. 89 (1965), or when the statutory classifications were drawn on the basis of suspect criteria, such as wealth or race, *Harper* v. *Virginia Board of Elections, supra; McLaughlin* v. *Florida,* 379 U. S. 184, 192 (1964); *Douglas* v. *California,* 372 U. S. 353 (1963). 394 U. S., at 807. Our analysis led us to conclude that neither situation was presented by the Illinois absentee voting provisions. We held that "the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race," *ibid.,* and, with respect to the alleged infringement of appellants' right to vote, that:

> "[T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants. [Citation omitted.] *Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.*" *Id.,* at 807–808. (Emphasis supplied.)

For all that appeared, Illinois might make the franchise available by other means:

> "Appellants agree that the record is barren of any indication that the State might not, for instance,

> possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.*, at 808 n. 6.

Thus, "[s]ince there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State . . ." *id.*, at 808 n. 7, we concluded that the Illinois absentee ballot provisions were to be tested by the "more traditional standards for evaluating . . . equal protection claims," *id.*, at 808, and that under those standards the provisions could not be said to be arbitrary or unreasonable, particularly since "there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise." *Id.*, at 809.

Petitioners' constitutional challenges to the Pennsylvania scheme are in sharp contrast. Petitioners allege [7] that, unlike the appellants in *McDonald,* the Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes "persons confined in a penal institution" from voting by absentee ballot, Pa. Stat. Ann., Tit. 25, § 2602 (w)

[7] "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint." *Ex parte Poresky,* 290 U. S. 30, 32 (1933). In the present procedural posture of petitioners' case, the allegations of their complaint must be deemed to be true. *Boddie* v. *Connecticut,* 401 U. S. 371, 373 (1971); *Gomillion* v. *Lightfoot,* 364 U. S. 339, 341 (1960). In addition to the allegations that they are absolutely prohibited from voting, petitioners allege that the Pennsylvania statute creates classifications based on wealth and race, that the denial of the right to vote is an impermissible consequence of pretrial detention in violation of due process of law, and that the Pennsylvania statute's specific exclusion of pretrial detainees from the definition of a "qualified absentee voter" is unconstitutional even under the less stringent rational relationship test applied in *McDonald.*

(12) (Supp. 1972–1973), and because requests by members of petitioners' class to register and to vote either by absentee ballot, or by personal or proxy appearance at polling places outside the prison, or at polling booths and registration facilities set up at the prisons, or generally by any means satisfactory to the election officials, had been denied. Thus, petitioners' complaint alleges a situation that *McDonald* itself suggested might make a different case.

This is not to say, of course, that petitioners are as a matter of law entitled to the relief sought. We neither decide nor intimate any view upon the merits.[8] It suffices that we hold that *McDonald* does not "foreclose the subject" of petitioners' challenge to the Pennsylvania statutory scheme. The significant differences between that scheme and the Illinois scheme leave ample "room for the inference that the questions sought to be raised [by petitioners] can be the subject of controversy." See *supra,* at 518, 519.

We therefore conclude that this case must be "heard and determined by a district court of three judges . . . ." 28 U. S. C. § 2281. The judgment of the Court of Appeals is therefore reversed and the case is remanded with direction to enter an appropriate order pursuant to that section for the convening of a three-judge court to hear and determine the merits of petitioners' constitutional claims, see *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 153 (1963); *Idlewild Bon Voyage Liquor Corp.* v.

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[8] The *per curiam* opinion of the Court of Appeals states: "We have carefully considered each of the contentions raised by the [petitioners] and find them to be without merit." 452 F. 2d 39, 41. In view of the result we reach, the Court of Appeals was without jurisdiction to render this holding insofar as it implies an adjudication of the merits of petitioners' constitutional contentions. *Stratton* v. *St. Louis Southwestern R. Co.,* 282 U. S. 10 (1930). C. Wright, The Law of Federal Courts 193 (2d ed. 1970).

Epstein, 370 U. S. 713 (1962); *Borden Co.* v. *Liddy,* 309 F. 2d 871, 876 (CA8 1962), cert. denied, 372 U. S. 953 (1963); *Riss & Co.* v. *Hoch,* 99 F. 2d 553, 555 (CA10 1938); see also C. Wright, The Law of Federal Courts 190–191 (2d ed. 1970), or, if deemed appropriate, to abstain from such determination pending state court proceedings. See *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498, 509–513 (1972).

It is so ordered.

HAM *v.* SOUTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 71–5139. Argued November 6, 1972—Decided January 17, 1973

Petitioner, a civil rights worker, claims that the trial resulting in his drug conviction (which was affirmed by the South Carolina Supreme Court) was not fair because of the trial court's refusal to examine jurors on *voir dire* as to possible prejudice arising from the fact that petitioner is a Negro and that he wears a beard. *Held:* The trial court's refusal to make any inquiry of the jurors as to racial bias after petitioner's timely request therefor denied petitioner a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. Its refusal to inquire as to particular bias against beards, after it had make inquiries as to bias in general, was not constitutional error. Pp. 526–529.

256 S. C. 1, 180 S. E. 2d 628, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, *post,* p. 529, and MARSHALL, JJ., *post,* p. 530, filed opinions concurring in part and dissenting in part.

Jonathan Shapiro argued the cause for petitioner. With him on the brief were *Jack Greenberg, James M. Nabrit III,* and *Anthony G. Amsterdam.*

Timothy G. Quinn, Assistant Attorney General of South Carolina, argued the cause for respondent. With him on the brief was *Daniel R. McLeod,* Attorney General.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted in the South Carolina trial court of the possession of marihuana in violation of state law.[1] He was sentenced to 18 months' confinement, and on appeal his conviction was affirmed by a divided

[1] S. C. Code § 32–1506 (1962).

South Carolina Supreme Court. 256 S. C. 1, 180 S. E. 2d 628 (1971). We granted certiorari limited to the question of whether the trial judge's refusal to examine jurors on *voir dire* as to possible prejudice against petitioner violated the latter's federal constitutional rights. 404 U. S. 1057 (1972).

Petitioner is a young, bearded Negro who has lived most of his life in Florence County, South Carolina. He appears to have been well known locally for his work in such civil rights activities as the Southern Christian Leadership Conference and the Bi-Racial Committee of the City of Florence. He has never previously been convicted of a crime. His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.

Prior to the trial judge's *voir dire* examination of prospective jurors, petitioner's counsel requested the judge to ask jurors four questions relating to possible prejudice against petitioner.[2] The first two questions sought to elicit any possible racial prejudice against Negroes; the third question related to possible prejudice

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[2] The four questions sought to be asked are the following:

"1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?

"2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?

"3. Would you disregard the fact that this defendant wears a beard in deciding this case?

"4. Did you watch the television show about the local drug problem a few days ago when a local policeman appeared for a long time? Have you heard about that show? Have you read or heard about recent newspaper articles to the effect that the local drug problem is bad? Would you try this case solely on the basis of the evidence presented in this courtroom? Would you be influenced by the circumstances that the prosecution's witness, a police officer, has publicly spoken on TV about drugs?"

against beards; and the fourth dealt with pretrial publicity relating to the drug problem. The trial judge, while putting to the prospective jurors three general questions as to bias, prejudice, or partiality that are specified in the South Carolina statutes,[3] declined to ask any of the four questions posed by petitioner.

The dissenting justices in the Supreme Court of South Carolina thought that this Court's decision in *Aldridge* v. *United States,* 283 U. S. 308 (1931), was binding on the State. There a Negro who was being tried for the murder of a white policeman requested that prospective jurors be asked whether they entertained any racial prejudice. This Court reversed the judgment of conviction because of the trial judge's refusal to make such an inquiry. Mr. Chief Justice Hughes, writing for the Court, stated that the "essential demands of fairness" required the trial judge under the circumstances of that case to interrogate the veniremen with respect to racial prejudice upon the request of counsel for a Negro criminal defendant. *Id.,* at 310.

The Court's opinion relied upon a number of state court holdings throughout the country to the same effect, but it was not expressly grounded upon any constitutional requirement. Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these "essential demands of fairness," *e. g., Lisenba* v. *California,* 314 U. S. 219, 236 (1941), and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from

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[3] S. C. Code § 38–202 (1962). The three questions asked of all prospective jurors in this case were, in substance, the following:

"1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?

"2. Are you conscious of any bias or prejudice for or against him?

"3. Can you give the State and the defendant a fair and impartial trial?"

invidiously discriminating on the basis of race, *Slaughter-House Cases,* 16 Wall. 36, 81 (1873), we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias. Cf. *Groppi* v. *Wisconsin,* 400 U. S. 505, 508 (1971); *Bell* v. *Burson,* 402 U. S. 535, 541 (1971).

We agree with the dissenting justices of the Supreme Court of South Carolina that the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner. The Court in *Aldridge* was at pains to point out, in a context where its authority within the federal system of courts allows a good deal closer supervision than does the Fourteenth Amendment, that the trial court "had a broad discretion as to the questions to be asked," 283 U. S., at 310. The discretion as to form and number of questions permitted by the Due Process Clause of the Fourteenth Amendment is at least as broad. In this context, either of the brief, general questions urged by the petitioner would appear sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain.

The third of petitioner's proposed questions was addressed to the fact that he wore a beard. While we cannot say that prejudice against people with beards might not have been harbored by one or more of the potential jurors in this case, this is the beginning and

not the end of the inquiry as to whether the Fourteenth Amendment required the trial judge to interrogate the prospective jurors about such possible prejudice. Given the traditionally broad discretion accorded to the trial judge in conducting *voir dire, Aldridge* v. *United States, supra,* and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated when the trial judge refused to put this question. The inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied, and from a principal purpose as well as from the language of those who adopted the Fourteenth Amendment. The trial judge's refusal to inquire as to particular bias against beards, after his inquiries as to bias in general, does not reach the level of a constitutional violation.

Petitioner's final question related to allegedly prejudicial pretrial publicity. But the record before us contains neither the newspaper articles nor any description of the television program in question. Because of this lack of material in the record substantiating any pretrial publicity prejudical to this petitioner, we have no occasion to determine the merits of his request to have this question posed on *voir dire.*[4]

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[4] The record indicates that there was a brief colloquy between petitioner's counsel and the trial judge, in which the former apparently offered newspaper accounts and an editorial in support of his request that the question be propounded; the judge responded that he did not consider the items submitted prejudicial. The Supreme Court of South Carolina, discussing prejudicial publicity in the context of petitioner's claim that he was entitled to a change of venue, stated that "[t]he two newspaper clippings and one editorial concerning drug abuse did not name the defendant or refer in any way to his trial."

Because of the trial court's refusal to make any inquiry as to racial bias of the prospective jurors after petitioner's timely request therefor, the judgment of the Supreme Court of South Carolina is

Reversed.

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

I concur in that portion of the majority's opinion that holds that the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice on *voir dire*. I think, however, that it was an abuse of discretion for the trial judge to preclude the defendant from an inquiry by which prospective jurors' prejudice to hair growth could have been explored.

It is unquestioned that a defendant has the constitutional right to a trial by a neutral and impartial jury. Criminal convictions have been reversed when the limitations on *voir dire* have unreasonably infringed the exercise of this right. *Aldridge* v. *United States,* 283 U. S. 308. Such reversals have not been limited to incidents where the defendant was precluded from inquiring into possible racial prejudice. In both *Morford* v. *United States,* 339 U. S. 258, and *Dennis* v. *United States,* 339 U. S. 162, defendants were held to have the right to inquire into possible prejudices concerning the defendants' alleged ties with the Communist party. In *Aldridge* v. *United States, supra,* at 313, this Court made it clear that *voir dire* aimed at disclosing "prejudices of a serious character" must be allowed.

Prejudices involving hair growth are unquestionably of a "serious character." Nothing is more indicative of the importance currently being attached to hair growth by the general populace than the barrage of cases reaching the courts evidencing the attempt by one segment of society officially to control the plumage of another. On the

issue of a student's right to wear long hair alone there are well over 50 reported cases, *Olff* v. *East Side Union High School,* 404 U. S. 1042. In addition, the issue of plumage has surfaced in the employment-discrimination context, *Roberts* v. *General Mills, Inc.,* 337 F. Supp. 1055 (ND Ohio); *Conard* v. *Goolsby,* 350 F. Supp. 713 (ND Miss.), as well as the military area, *Friedman* v. *Froehlke,* 5 S. S. L. R. 3179 (Mass.).

The prejudices invoked by the mere sight of nonconventional hair growth are deeply felt. Hair growth is symbolic to many of rebellion against traditional society and disapproval of the way the current power structure handles social problems. Taken as an affirmative declaration of an individual's commitment to a change in social values, nonconventional hair growth may become a very real personal threat to those who support the *status quo.* For those people, nonconventional hair growth symbolizes an undesirable lifestyle characterized by unreliability, dishonesty, lack of moral values, communal ("communist") tendencies, and the assumption of drug use. If the defendant, especially one being prosecuted for the illegal use of drugs, is not allowed even to make the most minimal inquiry to expose such prejudices, can it be expected that he will receive a fair trial?

Since hair growth is an outward manifestation by which many people determine whether to apply deep-rooted prejudices to an individual, to deny a defendant the right to examine this aspect of a prospective juror's personality is to deny him his most effective means of *voir dire* examination.

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

I, too, concur in that portion of the majority's opinion which holds that the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice on

voir dire. I also agree that, on this record, we cannot say that the judge was required to ask questions about pretrial publicity. I cannot agree, however, that the judge acted properly in totally foreclosing other reasonable and relevant avenues of inquiry as to possible prejudice.

Long before the Sixth Amendment was made applicable to the States through the Due Process Clause of the Fourteenth Amendment, see *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), this Court held that the right to an "impartial" jury was basic to our system of justice.

> "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 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 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds* v. *United States,* 98 U. S. 145, 155." *Irvin* v. *Dowd,* 366 U. S. 717, 722 (1961) (footnote omitted).

See also *Turner* v. *Louisiana,* 379 U. S. 466, 471–473 (1965); *Glasser* v. *United States,* 315 U. S. 60, 84–86 (1942).

We have never suggested that this right to impartiality and fairness protects against only certain classes of prejudice or extends to only certain groups in the population. It makes little difference to a criminal defendant whether

the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict. It is unsurprising, then, that this Court has invalidated decisions reached by juries with a wide variety of different prejudices. See, *e. g., Witherspoon* v. *Illinois,* 391 U. S. 510 (1968); *Irvin* v. *Dowd, supra; Morford* v. *United States,* 339 U. S. 258 (1950).

Moreover, the Court has also held that the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial. A variety of techniques is available to serve this end, see *Groppi* v. *Wisconsin,* 400 U. S. 505, 509–511 (1971); *Sheppard* v. *Maxwell,* 384 U. S. 333, 357–363 (1966), but perhaps the most important of these is the jury challenge. See, *e. g., Johnson* v. *Louisiana,* 406 U. S. 356, 379 (1972) (opinion of POWELL, J.); *Swain* v. *Alabama,* 380 U. S. 202, 209–222 (1965). Indeed, the first Mr. Justice Harlan, speaking for a unanimous Court, thought that the right to challenge was "one of the most important of the rights secured to the accused" and that "[a]ny system for the empanelling of a jury that [prevents] or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer* v. *United States,* 151 U. S. 396, 408 (1894). See also *Lewis* v. *United States,* 146 U. S. 370, 376 (1892).

Of course, the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on *voir dire* upon which the challenge for cause can be predicated. See *Swain* v. *Alabama, supra,* at 221. It is for this reason that the Court has held that "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury," *Dennis* v. *United States,* 339 U. S. 162,

171–172 (1950), and that the Court has reversed criminal convictions when the right to query on *voir dire* has been unreasonably infringed. See, *e. g., Aldridge* v. *United States,* 283 U. S. 308 (1931). Contrary to the majority's suggestion, these reversals have not been confined to cases where the defendant was prevented from asking about racial prejudice. See, *e. g., Morford* v. *United States, supra.* Cf. *Dennis* v. *United States, supra.*[1]

I do not mean to suggest that a defendant must be permitted to propound any question or that limitless time must be devoted to preliminary *voir dire.* Although the defendant's interest in a jury free of prejudice is strong, there are countervailing state interests in the expeditious conduct of criminal trials and the avoidance of jury intimidation. These interests bulk larger as the possibility of uncovering prejudice becomes more attenuated. The trial judge has broad discretion to refuse to ask questions that are irrelevant or vexatious.[2] Thus, where the claimed prejudice is of a novel character, the judge might require a preliminary showing of relevance or of possible prejudice before allowing the questions.

But broad as the judge's discretion is in these matters, I think it clear that it was abused in this case. The defense attorney wished to ask no more than four questions, which would have required a scant 15 additional

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[1] Indeed, it was not so confined in *Aldridge* itself, upon which the majority heavily relies. *Aldridge* pointed out that "[t]he right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." 283 U. S. 308, 313 (1931).

[2] I also agree with the majority that the judge may properly decline to ask the question in any particular form or ask any particular number of questions on a subject.

minutes of the court's time. The inquiries, directed *inter alia* to possible prejudice against people with beards, were obviously relevant, since the defendant was in fact bearded. Moreover, the judge afforded petitioner no opportunity to show that there were a significant number of potential jurors who might be prejudiced against people with beards. At minimum, I think such an opportunity should have been provided. I cannot believe that in these circumstances an absolute ban on questions designed to uncover such prejudice represents a proper balance between the competing demands of fairness and expedition.

It may be that permitting slightly more extensive *voir dire* examination will put an additional burden on the administration of justice. But, as Mr. Chief Justice Hughes argued 40 years ago, "it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." *Aldridge* v. *United States*, 283 U. S., at 315.

I would therefore hold that the defendant in this case, and subject to the limitations set out above, had a constitutionally protected interest in having the judge propound the additional question, in some form, to the jury.

GOMEZ *v.* PEREZ

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, FOURTH SUPREME JUDICIAL DISTRICT

No. 71–575. Argued December 6, 1972—Decided January 17, 1973

Texas law denying right of paternal support to illegitimate children while granting it to legitimate children violates the Equal Protection Clause of the Fourteenth Amendment. Cf. *Levy* v. *Louisiana,* 391 U. S. 68; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164.

466 S. W. 2d 41, reversed and remanded.

Stanley Dalton Wright argued the cause for appellant. With him on the brief were *Melvin N. Eichelbaum* and *Harry B. Adams III.*

Joseph Jaworski, by invitation of the Court, 408 U. S. 942, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

Norman Dorsen, Melvin L. Wulf, and *Sanford Jay Rosen* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Crawford C. Martin, Attorney General, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *J. C. Davis* and *Pat Bailey,* Assistant Attorneys General, filed a brief for the State of Texas as *amicus curiae* urging affirmance.

PER CURIAM.

The issue presented by this appeal is whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children.

In 1969, appellant filed a petition in Texas District Court seeking support from appellee on behalf of her

minor child. After a hearing, the state trial judge found that appellee is "the biological father" of the child, and that the child "needs the support and maintenance of her father," but concluded that because the child was illegitimate "there is no legal obligation to support the child and the Plaintiff take nothing." The Court of Civil Appeals affirmed this ruling over the objection that this illegitimate child was being denied equal protection of law. 466 S. W. 2d 41. The Texas Supreme Court refused application for a writ of error, finding no "reversible error." We noted probable jurisdiction. 408 U. S. 920.

In Texas, both at common law and under the statutes of the State, the natural father has a continuing and primary duty to support his legitimate children. See *Lane* v. *Phillips,* 69 Tex. 240, 243, 6 S. W. 610, 611 (1887); Tex. Fam. Code § 4.02 (1970) (husband's duty).[1] That duty extends even beyond dissolution of the marriage, Tex. Rev. Civ. Stat., Art. 4639a (Supp. 1972–1973); *Hooten* v. *Hooten,* 15 S. W. 2d 141 (Tex. Ct. Civ. App. 1929), and is enforceable on the child's behalf in civil proceedings and, further, is the subject of criminal sanctions. Tex. Penal Code § 602. The duty to support exists despite the fact that the father may not have custody of the child. *Hooten* v. *Hooten, supra.* The Court of Civil Appeals has held in this case that nowhere in this elaborate statutory scheme does the State recognize any enforceable duty on the part of the biological father to support his illegitimate children and that, absent a statutory duty to support, the controlling law is the

[1] Section 4.02 became effective after the commencement of appellant's suit, but the provision is identical (except for punctuation) to its predecessor, Tex. Rev. Civ. Stat., Husband and Wife, Art. 4614, in 1 Tex. Laws, c. 309, p. 736 (60th Legislature, Reg. Sess. 1967). Section 4.02 was enacted as part of a codification of Texas family law.

Texas common-law rule that illegitimate children, unlike legitimate children, have no legal right to support from their fathers. See also *Home of the Holy Infancy* v. *Kaska,* 397 S. W. 2d 208 (Tex. 1965); *Lane* v. *Phillips, supra,* at 243, 6 S. W., at 611; *Bjorgo* v. *Bjorgo,* 391 S. W. 2d 528 (Tex. Ct. Civ. App. 1965). It is also true that fathers may set up illegitimacy as a defense to prosecutions for criminal nonsupport of their children. See *Curtin* v. *State,* 155 Tex. Cr. R. 625, 238 S. W. 2d 187 (1950); *Beaver* v. *State,* 96 Tex. Cr. R. 179, 256 S. W. 929 (1923).

In this context, appellant's claim on behalf of her daughter that the child has been denied equal protection of the law is unmistakably presented. Indeed, at argument here, the attorney for the State of Texas, appearing as *amicus curiae,* conceded that but for the fact that this child is illegitimate she would be entitled to support from appellee under the laws of Texas.[2]

We have held that under the Equal Protection Clause of the Fourteenth Amendment a State may not create a right of action in favor of children for the wrongful

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[2] Tr. of Oral Arg. 24. There was some question at argument whether the statutory scheme relating to paternal support of children was properly drawn into question in the state courts. In the circumstances of this case, we need not resolve the question. First, the State of Texas asserts no prejudice from appellant's apparent failure to explicitly draw attention to the individual statutes that make up the so-called Texas rule regarding support of legitimate and illegitimate children. On the contrary, the State asserted here that it was prepared to meet appellant's constitutional attack on its statutes on the merits. Tr. of Oral Arg. 28. Second, under our cases, "the unrestricted notation of probable jurisdiction of the appeal is to be understood as a grant of the writ" of certiorari on "nonappealable" issues presented in the case. *Mishkin* v. *New York,* 383 U. S. 502, 512 (1966). Appellant's federal claim, which was rejected in the state courts, that her child was being denied equal protection of laws is, therefore, properly before us in any event.

death of a parent and exclude illegitimate children from the benefit of such a right. *Levy* v. *Louisiana,* 391 U. S. 68 (1968). Similarly, we have held that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972).[3] Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." *Id.,* at 175. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley* v. *Illinois,* 405 U. S. 645, 656–657 (1972); *Carrington* v. *Rash,* 380 U. S. 89 (1965).

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

This case came here as an appeal, on the representation that the Texas courts had sustained the constitutionality of § 4.02 of the Texas Family Code and

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[3] See also *Davis* v. *Richardson,* 342 F. Supp. 588 (Conn.), aff'd, *post,* p. 1069 (1972); *Griffin* v. *Richardson,* 346 F. Supp. 1226 (Md.), aff'd, *post,* p. 1069 (1972).

Articles 602 and 602–A of the Texas Penal Code, over a challenge to those statutes under the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction, 408 U. S. 920, to consider whether the alleged discrimination between legitimate and illegitimate children, in terms of the support obligations of their biological fathers, denied equal protection to illegitimate children under the principles of *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164; *Glona* v. *American Guarantee & Liability Insurance Co.,* 391 U. S. 73; and *Levy* v. *Louisiana,* 391 U. S. 68.

Upon the submission of briefs and oral argument, it became clear that neither statute had been the actual subject of litigation in the courts of Texas. Hence, this is not properly an appeal under 28 U. S. C. § 1257 (2). I would, therefore, dismiss the appeal for want of jurisdiction, and treat "the papers whereon the appeal was taken" as a petition for writ of certiorari. 28 U. S. C. § 2103.

The parties were not prepared to submit this case as one challenging the common-law treatment of illegitimates in Texas, and failed to provide this Court with a sufficient understanding of Texas law with respect to such matters as custodial versus noncustodial support obligations, legitimation, common-law marriage, and the effect of a Texas statute, § 4.02 of the Family Code, which became law after this litigation had begun. With the issues so vaguely drawn and the alleged discriminations so imprecise, I would dismiss the writ of certiorari as improvidently granted.

INDIANA EMPLOYMENT SECURITY DIVISION ET AL. *v.* BURNEY

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

No. 71–1119. Argued December 7, 1972—Decided January 17, 1973

There being no named representative of the class except appellee, settlement of appellee's claim for benefits in this class action challenging Indiana's system of administering unemployment insurance raises a question as to whether this case has become moot.

347 F. Supp. 218, vacated and remanded.

Darrel K. Diamond, Deputy Attorney General of Indiana, argued the cause for appellants. With him on the briefs was *Theodore L. Sendak,* Attorney General.

Ivan E. Bodensteiner argued the cause for appellee. With him on the brief were *Stephen P. Berzon, Stefan M. Rosenzweig,* and *Fred H. Altshuler.*

Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger,* Attorney General, *Elizabeth Palmer,* Assistant Attorney General, and *Asher Rubin,* Deputy Attorney General, for the State of California, and by *Harry T. Ice* for College University Corp. et al.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, and by *Dennis R. Yeager, E. Richard Larson, Howard I. Rosenberg, James H. Seckinger, John M. Levy, Marttie Louis Thompson, Joseph A. Matera, C. Christopher Brown,* and *C. Lyonel Jones* for National Employment Law Project et al.

PER CURIAM.

We noted probable jurisdiction in this case, 406 U. S. 956, to review the judgment of a three-judge district court, holding that Indiana's system of administering unemployment insurance was in conflict with § 303 (a)(1) of the Social Security Act, 49 Stat. 626, as amended, 42 U. S. C. § 503 (a)(1).[1] Before the three-judge court entered its injunction, Indiana's practice was to discontinue unemployment benefits upon a determination of ineligibility, that determination taking place without the benefit of a full hearing for the erstwhile beneficiary.

After several months of effort, however, the class representative in this litigation, Mrs. Burney, succeeded in obtaining a reversal of the initial determination of ineligibility.[2] She has now received full retroactive compensation.

The full settlement of Mrs. Burney's financial claim raises the question whether there continues to be a case or controversy in this lawsuit. Though the appellee purports to represent a class of all present and future recip-

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[1] The three-judge court was convened pursuant to 28 U. S. C. §§ 2281, 2284, to consider the prayer for an injunction against enforcement of the Indiana statute, Ind. Ann. Stat. § 52–1542a (e) (Supp. 1970), on the grounds that it violated the appellee's right to due process under the Fourteenth Amendment. The District Court did not reach this issue.

[2] The District Court entered a temporary restraining order against the appellants on May 7, 1971. Presumably, the appellee's payments were then restored pending the outcome of her hearing before a referee, which took place on July 1, 1971. On July 13, 1971, the referee affirmed the determination of ineligibility. Mrs. Burney then appealed to the Division Review Board. After the judgment and injunction were entered by the District Court, the Review Board reversed the referee and awarded payments to Mrs. Burney. This latter determination was unrelated to the injunction.

ients of unemployment insurance, there are no named representatives of the class except Mrs. Burney, who has been paid. Cf. *Bailey* v. *Patterson,* 369 U. S. 31, 32–33. Accordingly, the judgment is vacated and the case is remanded to the District Court to consider whether it has become moot.

It is so ordered.

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

I consider the remand ordered by the Court to be pointless. The only issue in this case is the right of a recipient of unemployment insurance benefits to a full evidentiary hearing before those benefits are terminated as the result of an administrative determination of ineligibility. The Court evidently concludes that this action may be moot as to Mrs. Burney since she has now received a full evidentiary hearing and settlement of her claim, and as to the affected class since Mrs. Burney is its only named representative in this action. I think it clear on the record before us, however, that nothing has occurred at either the administrative or judicial level since Mrs. Burney entered this suit that would suffice to moot her claim or that of the class.

Mrs. Burney's benefits were suspended beginning the week of March 23, 1971. On April 2, 1971, some three weeks before Mrs. Burney sought leave to intervene in this action,[1] she invoked the existing Indiana appeal pro-

[1] This action was originally brought to declare invalid the Indiana statutory provision that an unemployed individual found initially to be eligible by the Division authorities would have his benefits suspended upon appeal by the employer of the eligibility determination. That issue was effectively resolved against the Division by this Court's decision in *California Dept. of Human Resources Development* v. *Java,* 402 U. S. 121 (1971), which was handed down while

cedure, see Ind. Stat. Ann. § 52–1542a (e) (Supp. 1970), now Ind. Stat. Ann. § 52–1542a (e) (Supp. 1972), and requested an administrative hearing. She received such a hearing on July 1, 1971, while this action was still pending in the District Court. Although the hearing referee affirmed the suspension order, on December 6, 1971, the Division Review Board reversed the referee and held that Mrs. Burney's benefits had been erroneously suspended. Meanwhile, on October 27, 1971, the District Court granted summary judgment in favor of Mrs. Burney and the affected class.

Certainly the full administrative hearing that Mrs. Burney received during the pendency of this case in the District Court cannot be considered to be an indication that Indiana has voluntarily chosen to provide henceforth the *pre*-termination hearing that Mrs. Burney claims is required under both § 303 (a)(1) of the Social Security Act, 42 U. S. C. § 503 (a)(1), and the Due Process Clause. So far as appears, the hearing afforded Mrs. Burney was nothing more than the *post*-termination hearing for which provision is already made in Indiana law.[2]

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this case was pending in the District Court, and it is not presented on this appeal. On May 7, 1971, the District Court allowed Mrs. Burney to intervene in this action in order to raise the further issue whether a pre-termination hearing is necessary where the Division seeks to suspend payment of benefits because it has determined that a person who was *initially eligible* to receive unemployment benefits has *since* become ineligible.

[2] At the same time Mrs. Burney sought to intervene, she requested a temporary restraining order reinstating her benefits. On May 7, 1971, the District Court issued such an order directing that Mrs. Burney's benefits be reinstated and not be again suspended "without a prior, due process hearing." In light of the chronology of events in this case it appears that Mrs. Burney received only the regular post-termination hearing for which Indiana law provides. But even if the July 1 hearing was the product of

Nor can I accept any suggestion that Mrs. Burney's attack upon appellants' failure to provide a pre-termination hearing may be moot merely because she has received a full post-termination hearing and settlement of her claim since entering this litigation.[3] A determination of mootness based on this line of reasoning would effectively bar the full and final litigation of whether a pre-termination hearing is legally required, while leaving Indiana free to continue to provide Mrs. Burney and other beneficiaries of unemployment insurance with only post-termination hearings.

It is, by now, clear that a claim is not moot if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911); see *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969). It is entirely possible that Mrs. Burney will, in the future, become employed and then once more become unemployed. If this action is deemed to be moot and the existing state procedure remains intact, she then may encounter the same problem of suspension of benefits without a prior hearing that she has encountered in this instance. And, inevitably, the post-termination administrative process will again be completed before final legal relief may be obtained as to the pre-termination hearing question. Indeed, this sequence of events might repeat itself any number of times for Mrs. Burney

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the temporary restraining order, such compliance with the court order would not moot this case. See, *e. g., Bakery Sales Drivers Local Union No. 33* v. *Wagshal,* 333 U. S. 437, 442 (1948); *Dakota County* v. *Glidden,* 113 U. S. 222, 224, (1885).

[3] It particularly bears noting that in *California Dept. of Human Human Resources Development* v. *Java, supra,* at 123–124, which involved a related pre-termination hearing claim, see n. 1, *supra,* the Court never even suggested that there was any problem of mootness, although both appellees had received full post-termination administrative hearings during the pendency of the litigation.

if the mere provision of the post-termination hearing and settlement of her particular claim were considered sufficient to moot the issue whether a pre-termination hearing is required. The principle that a federal court will not pass upon a moot controversy does not require us to set in motion such a litigious merry-go-round where, as here, there is a short-lived controversy of a potentially recurring character.

It is no answer that there are other beneficiaries of unemployment insurance whose benefits may be terminated in advance of a full hearing and who might therefore institute litigation concerning the timing issue. Such litigation can be expected to fare no better, or worse, in terms of problems of mootness, than this case. As with Mrs. Burney's claim, the post-termination administrative process will invariably be completed before a final adjudication is obtained. In fact, appellants indicate that the post-termination hearing procedure has been speeded up significantly since Mrs. Burney's administrative appeal was processed.[4]

It is true that the District Court entered an injunction ordering Indiana to provide pre-termination hearings, and that injunction is currently in effect since no stay has been entered. As a result, pre-termination hearings are presently being provided in Indiana.[5] But this certainly does not moot the case, for it is well established that compliance with a court order *pendente lite* does not moot the underlying controversy, see, *e. g., Bakery Sales Drivers Local Union No. 33* v. *Wagshal,* 333 U. S. 437, 442 (1948); *Dakota County* v. *Glidden,* 113 U. S. 222, 224 (1885). A determination of mootness would require that the decision below be vacated and the action dismissed. See, *e. g., SEC* v. *Medical Committee for*

[4] See Reply Brief for Appellants 8.

[5] See Brief for Appellee 6.

Human Rights, 404 U. S. 403, 407 (1972); *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 632 (1953). Under such circumstances, appellants would be "free to return to [their] old ways." *Ibid.* For a case to be moot it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn.,* 393 U. S. 199, 203 (1968). In this case, appellants have hardly provided such assurance—as is evident from the very fact that this appeal was taken from the adverse decision below.

In my view, then, this case remains viable as to both Mrs. Burney and the affected class. Accordingly, I see no need for the remand ordered by the Court.[6] On the merits, I would affirm the judgment of the District Court in light of our decision in *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). See *Torres* v. *New York Dept. of Labor,* 405 U. S. 949 (1972) (statement of DOUGLAS, BRENNAN, and MARSHALL, JJ.).

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[6] I can see the purpose of a remand to a district court for consideration of possible mootness where the Court identifies disputed factual issues the resolution of which affects the continuing viability of the particular claim. See, *e. g., Johnson* v. *New York State Education Dept., ante,* p. 75. But here the Court fails to identify any such factual issue. Indeed, there do not appear to be any factual issues in dispute as to the administrative developments subsequent to Mrs. Burney's intervention in this suit. Under such circumstances, this Court is as competent as a district court to resolve initially the issue of mootness, and in the past it has proceeded to do so, see, *e. g., SEC* v. *Medical Committee for Human Rights,* 404 U. S. 403 (1972); *United States* v. *Concentrated Phosphate Export Assn.,* 393 U. S. 199, 202–204 (1968).

Reporter's Note

The next page is purposely numbered 801. The numbers between 546 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

JULY 7, 1972*

Miscellaneous Order

No. A–1320. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* WICHITA BOARD OF TRADE ET AL. D. C. Kan.

On consideration of the appellants' application for stay, the appellees' reply to the application, and the affidavits and memoranda filed in support of the application and reply, IT IS ORDERED:

(1) That, subject to the condition set forth in paragraph 2 herein, the judgment of the United States District Court for the District of Kansas entered in this matter on June 8, 1972, be and hereby is stayed pending a final determination of the appeal by this Court.

(2) That, as a condition of the foregoing stay, each railroad collecting in-transit grain inspection charges under the challenged tariffs shall immediately take steps, including publication of appropriate provisions in applicable tariffs, to do the following:

(a) keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid; and

(b) in the event the order suspending the charges is affirmed by this Court, refund (with interest) of

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*[REPORTER'S NOTE: The Court had been convened in Special Term on this date to consider applications for stays in Nos. A–23 and A–24. See *ante*, p. 1.]

such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds. In the event this Court's action should be other than in affirmance of the results reached by the District Court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate.

Cases Dismissed In Vacation

No. 72–5139. Herrmann *v.* United States. C. A. 9th Cir. Petition for writ of certiorari dismissed August 28, 1972, under Rule 60 of the Rules of this Court.

No. 72–5051. Bethea et al. *v.* United States. C. A. 4th Cir. Petition for writ of certiorari dismissed as to petitioner Brunson, August 30, 1972, under Rule 60 of the Rules of this Court.

No. 71–771. Lazard Freres & Co. et al. *v.* Rosenfeld et al. C. A. 2d Cir. Petition for writ of certiorari dismissed September 1, 1972, under Rule 60 of the Rules of this Court. Reported below: 445 F. 2d 1337.

No. 71–6747. In re Knight. C. A. 1st Cir. Petition for writ of certiorari dismissed September 1, 1972, under Rule 60 of the Rules of this Court.

No. 71–553. Thornton et al. *v.* Prichard et al. Appeal from D. C. E. D. Va. dismissed September 18, 1972, under Rule 60 of the Rules of this Court. [Probable jurisdiction noted, 405 U. S. 1063.] Reported below: 330 F. Supp. 1138.

No. 72–5092. Harvell *v.* United States. C. A. 7th Cir. Petition for writ of certiorari dismissed September 18, 1972, under Rule 60 of the Rules of this Court.

October 3, 1972

Miscellaneous Order

No. A–362. Bridge *v.* New Jersey. Super. Ct. N. J. Application for stay presented to Mr. Justice Douglas, and by him referred to the Court, denied. Mr. Justice Douglas would grant stay.

October 5, 1972

Miscellaneous Orders

No. A–325. American Party of Texas et al. *v.* Bullock, Secretary of State of Texas. D. C. W. D. Tex. Application for temporary restraining order, presented to Mr. Justice Douglas and by him referred to the Court, denied. Reported below: 349 F. Supp. 1272.

Mr. Justice Douglas, dissenting.

The American Party, seeking to get on the Texas ballot for this year's election, brought an action which asked a three-judge federal court to hold provisions of the Texas election laws unconstitutional.

Texas has four methods of nominating candidates.

First, those whose party's gubernatorial candidate polled more than 200,000 votes in the last general election may be nominated through primaries. Election Code, Art. 13.02 (1967). Second, those whose party's candidates polled less than 200,000 votes but more than 2% of the total votes cast for governor may be nominated by primaries or by nominating conventions. Election Code, Art. 13.45 subd. 1 (Supp. 1972). Third, those whose party's candidates polled less than 2% of the total gubernatorial vote and those whose party did not have a nominee for governor in the last general election may be nominated by convention only or by fulfilling the requirements of Art. 13.45 subd. 2 of the Election Code (Supp. 1972). Fourth, nonpartisan and independent candidates

may appear on the ballot after meeting the requirements of Art. 13.50 of the Election Code.

The American Party falls in the third category. In order to get its nominees printed on the ballot it must meet the following requirements:

It must by the previous September declare its intention to nominate by convention. That entails a statewide party organization with an executive committee. It also requires the filing with the Secretary of State by February of the names of the candidates; it requires the filing of party rules by March. It requires the holding of precinct conventions on the day of the primary and the holding of county conventions the following week and a state convention on a day certain.

The American Party must in addition do the following:

(1) It must furnish a list of participants in each precinct convention with the names, addresses, and registration certificate numbers of qualified voters attending such conventions. The names on the list must total at least 1% of the total votes cast for governor at the last preceding general election.

(2) If the number of qualified voters attending the precinct conventions is less than 1%, there must be filed a petition requesting that the names of the nominees be printed on the election ballot, signed by a sufficient number of additional qualified voters to make a combined total of at least 1% of the total votes cast for governor in the last election.

(3) No person who during the voting year voted at any primary election or participated in any convention of any other party may attend the minority party convention or sign the petition. If he does, he is subject to criminal penalties.

(4) The petition may not be circulated until after the date set for the holding of the major parties' primaries. Signatures must be certified before 20 days after the date

of the party's convention, which in 1972 gave it approximately 53 days to gather signatures.

(5) Each person who signs a petition must be administered an oath before a notary public at the time he signs.

This election scheme is not as severe or oppressive as the one we condemned in *Williams* v. *Rhodes,* 393 U. S. 23; nor is it as benign as the one we approved in *Jenness* v. *Fortson,* 403 U. S. 431.

While Texas requires only 1% of the voters for governor to endorse the new party, that requirement must be met by obtaining signatures of those attending precinct conventions, supplemented, if need be, by signatures obtained after the primaries. But all cross-over signing is barred and it is supported by criminal sanctions. Moreover, the supplemental signatures can be obtained only after the major parties have held their primaries. And only a 55-day period is available for obtaining the necessary signatures.

While the requirement of 1% of the total vote for governor may be less than Georgia's requirement of 5% of those eligible to vote in the last election for the filling of the office the candidate is seeking, the Texas machinery for launching a minority party is almost as cumbersome and involved as the one we struck down in *Williams* v. *Rhodes.*

The minority party must be statewide even though its appeal may be essentially to urban voters or to rural voters, as the case may be. That requirement did not appear in Georgia's scheme.

In Georgia 180 days was allowed for circulating a nominating petition; in Texas, less than 60 days.

In Georgia the minority party had to meet the same deadline as did candidates running in the primaries of the regular parties. In Texas the regular parties first have their primaries; only then can a minority party

solicit signatures for its candidates. Moreover, no one who voted in a primary is eligible to sign the petition for the minority party.

The minority party therefore must draw its support from the ranks of those who were either unwilling or unable to vote in the primaries of the established parties.

The minority party therefore cannot compete with the regular parties; it must be content with the leftovers to get on the ballot.

We said in *Jenness* v. *Fortson, supra,* at 438, "Georgia's election laws, unlike Ohio's, do not operate to freeze the status quo." Texas, though not as severe as Ohio, works in that direction. It therefore seems to me, at least prima facie, to impose an invidious discrimination on the unorthodox political group.

Perhaps full argument would dispel these doubts. But they are so strong that I would grant the requested stay so that candidates for the American Party may get on the Texas ballot for next month's presidential election. To do so it must be certified by the Secretary of State no later than October 6. We cannot possibly decide the merits by that date. But if the American Party is on the ballot, the voting and associational rights which we have been alert to protect will be honored; and if meanwhile the merits are reached and we affirm the three-judge court, holding the Texas scheme constitutional, the ballots will not be counted. That was the way Justice Black avoided the dilemma in a Florida case;* and I would follow his course here.

No. A–370. WHITCOMB, GOVERNOR OF INDIANA, ET AL. *v.* COMMUNIST PARTY OF INDIANA ET AL. D. C. N. D. Ind. Motion of applicants for emergency stay presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied as moot. Cross motion of Communist

*See *Davis* v. *Adams,* 400 U. S. 1203.

Party of Indiana et al. to petition for mandate to enforce prior order of United States District Court also denied. MR. JUSTICE DOUGLAS would treat motion of Communist Party of Indiana et al. as jurisdictional statement and postpone question of jurisdiction to hearing of case on the merits.

OCTOBER 6, 1972

Miscellaneous Order

No. A–374. PATTANI ET AL. *v.* MEYERS ET AL. C. A. 3d Cir. Application for temporary restraining order presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

OCTOBER 10, 1972

Affirmed on Appeal

No. 71–1235. CRAIG, COMMISSIONER OF SOCIAL SERVICES, ET AL. *v.* GILLIARD ET AL. Appeal from D. C. W. D. N. C. Motion to dispense with printing motion to affirm granted. Judgment affirmed. Reported below: 331 F. Supp. 587.

No. 71–1363. DAVIS ET AL. *v.* CINEMA CLASSICS, LTD., INC., ET AL.; and

No. 71–1364. BUSCH, DISTRICT ATTORNEY OF LOS ANGELES COUNTY, ET AL. *v.* CINEMA CLASSICS, LTD., INC., ET AL. Affirmed on appeals from D. C. C. D. Cal. MR. JUSTICE STEWART would note probable jurisdiction and set cases for oral argument. Reported below: 339 F. Supp. 43.

No. 71–1416. HOLSHOUSER *v.* SCOTT, GOVERNOR OF NORTH CAROLINA, ET AL. Affirmed on appeal from D. C. M. D. N. C. Reported below: 335 F. Supp. 928.

No. 71–1560. TEXAS BOARD OF BARBER EXAMINERS ET AL. *v.* BOLTON ET AL. Affirmed on appeal from D. C. N. D. Tex.

No. 71–1399. INTERSTATE COMMERCE COMMISSION *v.* GOLD KIST, INC., ET AL.;

No. 71–1404. REFRIGERATED TRANSPORT CO., INC. *v.* GOLD KIST, INC., ET AL.; and

No. 71–1407. AMERICAN TRUCKING ASSNS., INC. *v.* GOLD KIST, INC., ET AL. Affirmed on appeals from D. C. N. D. Ga. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would note probable jurisdiction and set cases for oral argument. Reported below: 339 F. Supp. 1249.

No. 71–1676. ARCHER ET AL. *v.* SMITH, GOVERNOR OF TEXAS, ET AL. Affirmed on appeal from D. C. W. D. Tex. Reported below: 343 F. Supp. 704.

No. 71–1683. WASHINGTON STATE LABOR COUNCIL, AFL–CIO, ET AL. *v.* PRINCE ET AL. Affirmed on appeal from D. C. W. D. Wash.

No. 72–45. NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL. *v.* NATIONAL ALLIANCE OF POSTAL & FEDERAL EMPLOYEES ET AL. Affirmed on appeal from D. C. D. C. Reported below: 341 F. Supp. 370.

No. 71–1592. AUERBACH ET AL. *v.* MANDEL, GOVERNOR OF MARYLAND, ET AL. Appeal from D. C. Md. Renewed motion to expedite denied. Judgments affirmed.

No. 71–1664. ESSEX, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL. *v.* WOLMAN ET AL. Affirmed on appeal from D. C. S. D. Ohio. MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 342 F. Supp. 399.

No. 71–6791. BRISCOE *v.* KLEINDIENST, ATTORNEY GENERAL, ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 356 F. Supp. 1292.

No. 71–6902. MOORE ET AL. *v.* HAUGH, WARDEN, ET AL. Affirmed on appeal from D. C. N. D. Iowa. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 341 F. Supp. 1263.

No. 72–46. UTE MOUNTAIN TRIBE OF INDIANS *v.* NAVAJO TRIBE OF INDIANS. Affirmed on appeal from D. C. N. M. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 72–36. WILLIAMS *v.* DEMOCRATIC PARTY OF GEORGIA ET AL. Appeal from D. C. N. D. Ga. Motions to dispense with printing jurisdictional statement and motion to dismiss or affirm granted. Judgment affirmed. MR. JUSTICE DOUGLAS would dismiss appeal as moot. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument.

No. 72–83. STERRETT ET AL. *v.* MOTHERS' & CHILDREN'S RIGHTS ORGANIZATION ET AL. Appeal from D. C. N. D. Ind. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed.

No. 72–114. GAUNT ET AL. *v.* BROWN, SECRETARY OF STATE OF OHIO, ET AL. Appeal from D. C. S. D. Ohio. Motion to dispense with printing jurisdictional statement granted. Judgment affirmed. Reported below: 341 F. Supp. 1187.

Vacated and Remanded on Appeal

No. 70–5083. NEWMAN *v.* NEWMAN. Appeal from Sup. Ct. La. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Boddie* v. *Connecticut,* 401 U. S. 371 (1971).

Appeals Dismissed

No. 71–1027. BAKER ET AL. *v.* NELSON. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 291 Minn. 310, 191 N. W. 2d 185.

No. 71–1132. MAYOR OF BALTIMORE ET AL. *v.* SILVER ET UX. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 263 Md. 439, 283 A. 2d 788.

No. 71–1445. SPECTER, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY *v.* TUCKER, SECRETARY OF THE COMMONWEALTH, ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 448 Pa. 1, 293 A. 2d 15.

No. 71–1530. RETZA *v.* FORTUNE. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of substantial federal question.

No. 71–1681. SURETY SAVINGS & LOAN ASSN. *v.* WISCONSIN DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 54 Wis. 2d 438, 195 N. W. 2d 464.

No. 72–61. SNOHOMISH COUNTY BOARD OF EQUALIZATION ET AL. *v.* WASHINGTON STATE DEPARTMENT OF REVENUE ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 80 Wash. 2d 262, 493 P. 2d 1012.

No. 72–88. MESA VERDE CO. *v.* BOARD OF COUNTY COMMISSIONERS OF MONTEZUMA COUNTY ET AL. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: —— Colo. ——, 495 P. 2d 229.

No. 72–91. DAVIS *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question.

No. 72–5065. CRAWFORD *v.* MISSOURI. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 478 S. W. 2d 314.

No. 71–1109. NORRIS ET AL. *v.* JORDAN ET AL.; and

No. 71–1439. NORRIS ET AL. *v.* JORDAN ET AL. Appeals from D. C. N. D. Ohio. Motion to defer consideration denied. Appeals dismissed for want of jurisdiction.

No. 71–1186. FRY'S FOOD STORES, INC., ET AL. *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed.

No. 71–1233. BRIDGEFORTH *v.* ILLINOIS; and

No. 71–6422. DAVIS *v.* ILLINOIS. Appeals from Sup. Ct. Ill. Motions to dispense with printing jurisdictional statement and to dismiss in No. 71–1233 granted. Motion to supplement jurisdictional statement in No. 71–6422 granted. Appeals dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set cases for oral argument. Reported below: 51 Ill. 2d 52, 281 N. E. 2d 617.

No. 71–1402. COLEMAN *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 260 La. 897, 257 So. 2d 652.

No. 71–1616. RONWIN *v.* FAIR EMPLOYMENT PRACTICES COMMISSION (FRESNO STATE COLLEGE, REAL PARTY IN INTEREST). Appeal from Ct. App. Cal., 5th 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. 71–6423. HOUSE *v.* HOUSE. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–6568. CLARK *v.* DELAWARE. Appeal from Sup. Ct. Del. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Del. ——, 287 A. 2d 660.

No. 71–6624. TILLMAN *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 13 Md. App. 570, 284 A. 2d 259.

No. 71–6643. PICKING *v.* YATES ET AL. Appeal from Ct. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 265 Md. 1, 288 A. 2d 146.

No. 71–6668. NIEDER *v.* MERCURY FEDERAL SAVINGS & LOAN ASSN. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–133. BERNSTEIN ET AL. *v.* NATIONWIDE MUTUAL INSURANCE CO. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 458 F. 2d 506.

No. 71–6264. ANDERSON *v.* MUNICIPAL COURT, SAN DIEGO JUDICIAL DISTRICT, ET AL. Appeal from D. C. S. D. Cal. dismissed for want of jurisdiction.

No. 72–5107. DAWLEY *v.* COUNTY OF SACRAMENTO. Appeal from Ct. App. Cal., 3d 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. 71–1482. FLEMING ET AL. *v.* BOSTON SAFE DEPOSIT & TRUST CO. ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: —— Mass. ——, 279 N. E. 2d 342.

No. 71–1651. NEWBERN, EXECUTRIX, ET AL. *v.* ALABAMA. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: See 46 Ala. App. 210, 239 So. 2d 780.

No. 71–6520. JACK ET AL. *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Santa Clara, dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 72–5070. KELLEY *v.* IOWA DEPARTMENT OF SOCIAL SERVICES. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 197 N. W. 2d 192.

No. 72-20. MOTTELER, ADMINISTRATRIX *v.* J. A. JONES CONSTRUCTION CO. Appeal from C. A. 7th Cir. 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 would note probable jurisdiction and set case for oral argument. Reported below: 457 F. 2d 917.

No. 72–92. BUTCHER ET AL. *v.* TOWNSHIP OF GROSSE ILE ET AL. Appeal from Sup. Ct. Mich, dismissed for want of substantial federal question. MR. JUSTICE STEWART would dismiss appeal for want of a properly presented federal question. Reported below: 387 Mich. 42, 194 N. W. 2d 845.

No. 72–5080. BUNCH *v.* CITY OF CINCINNATI. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument.

No. 72–5133. BUCHANAN *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 480 S. W. 2d 207.

Certiorari Granted—Vacated and Remanded

No. 71–1302. SUPERINTENDENT OF FIELD UNIT No. 9 *v.* TERRY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Colten* v. *Kentucky,* 407 U. S. 104.

No. 71–1548. IN RE LEARY. Super. Ct. Div., Gen. Ct. of Justice, County of Wake, N. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jackson* v. *Indiana,* 406 U. S. 715. MR. JUSTICE DOUGLAS dissents from vacating and remanding this case.

No. 71–6773. DUNCAN *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Gelbard* v. *United States,* 408 U. S. 41. Reported below: 456 F. 2d 1401.

No. 71–6460. GAUSE *v.* ARIZONA. Sup. Ct. Ariz. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Stewart* v. *Massachusetts*, 408 U. S. 845. Reported below: 107 Ariz. 491, 489 P. 2d 830.

No. 71–6570. KETOLA *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representations of the Solicitor General, set forth in his Memorandum for the United States filed June 16, 1972, judgment vacated and case remanded for further consideration in light of position presently asserted by the Government. Application for bail denied without prejudice to renewal of application to the Court of Appeals. Reported below: 455 F. 2d 83.

No. 72–5009. WEBB *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Gelbard* v. *United States*, 408 U. S. 41.

No. 72–28. NORTHERN STATES POWER CO. *v.* IHRKE ET UX. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded with instructions to dismiss case as moot. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 459 F. 2d 566.

No. 72–5110. MARTINEZ-FRAUSTO *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon representations of the Solicitor General, set forth in his Memorandum for the United States filed September 6, 1972, judgment vacated and case remanded for further consideration in light of the position presently asserted by the Government. Reported below: 463 F. 2d 231.

No. 72–34. O'Brien et al. *v.* Brown et al. C. A. D. C. Cir. Motions to dispense with printing petition and respondents' brief granted. Certiorari granted, judgment vacated, and case remanded with directions to dismiss case as moot. Reported below: 152 U. S. App. D. C. 157, 469 F. 2d 563.

No. 72–35. Keane et al. *v.* National Democratic Party et al. C. A. D. C. Cir. Motions to dispense with printing petition and respondents' brief granted. Certiorari granted, judgment vacated, and case remanded to determine whether case has become moot. Reported below: 152 U. S. App. D. C. 157, 469 F. 2d 563.

Miscellaneous Orders

No. A–1165, October Term, 1971. In re Disbarment of Morton. It having been reported to this Court that William M. Morton, Jr., of St. Joseph, Missouri, has been disbarred from the practice of law in all of the courts of the State of Missouri, and this Court by order of May 15, 1972 [406 U. S. 914], having suspended the said William M. Morton, Jr., 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 has expired;

It is ordered that the said William M. Morton, Jr., 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. 36, Orig. Texas *v.* Louisiana. Exceptions to Report of Special Master set for oral argument in due course. [For earlier orders herein, see, *e. g.*, 406 U. S. 941.]

No. A–271. NON-RESIDENT TAXPAYERS ASSOCIATION OF PENNSYLVANIA AND NEW JERSEY ET AL. *v.* MURRAY, SHERIFF, ET AL. D. C. E. D. Pa. Application for injunction presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application. Reported below: 347 F. Supp. 399.

No. 56, Orig. VIRGINIA *v.* INTERNATIONAL AIR TRANSPORT ASSN. ET AL. Motion of Metropolitan Washington Board of Trade for leave to file a brief as *amicus curiae* granted. Motion for leave to file bill of complaint denied. *Washington* v. *General Motors Corp.*, 406 U. S. 109. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 70–18. ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY. Appeal from D. C. N. D. Tex.; and

No. 70–40. DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL. Appeal from D. C. N. D. Ga. [Restored to calendar, 408 U. S. 919.] Motion of California Committee to Legalize Abortion et al. for leave to file a brief as *amici curiae* granted.

No. 70–106. HEFFERNAN, GUARDIAN *v.* DOE ET AL. Appeal from D. C. N. D. Ill. Motion of appellant to consolidate with No. 70–18 [*Roe* v. *Wade*] and No. 70–40 [*Doe* v. *Bolton*] for oral argument denied.

No. 71–485. GOTTSCHALK, ACTING COMMISSIONER OF PATENTS *v.* BENSON ET AL. C. C. P. A. [Certiorari granted, 405 U. S. 915.] Motion of Association of Data Processing Service Organizations, Software Products and Service Section, for leave to participate in oral argument as *amicus curiae* denied. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71–36. CALIFORNIA ET AL. *v.* LARUE ET AL. Appeal from D. C. D. C. Cal. [Probable jurisdiction noted, 404 U. S. 999.] Motion to permit two counsel to argue on behalf of appellees granted.

No. 71–123. NATIONAL LABOR RELATIONS BOARD *v.* BURNS INTERNATIONAL SECURITY SERVICES, INC., ET AL.; and

No. 71–198. BURNS INTERNATIONAL SECURITY SERVICES, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 406 U. S. 272. Motion to recall judgment denied.

No. 71–366. TIDEWATER OIL CO. *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 405 U. S. 986.] Motion of the Solicitor General to permit A. Raymond Randolph, Jr., to argue orally *pro hac vice* on behalf of the United States granted.

No. 71–507. KEYES ET AL. *v.* SCHOOL DISTRICT No. 1, DENVER, COLORADO, ET AL. C. A. 10th Cir. [Certiorari granted, 404 U. S. 1036.] Joint motion for additional time for oral argument granted and 15 minutes allotted for that purpose to each side. MR. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 71–575. GOMEZ *v.* PEREZ. Appeal from Ct. Civ. App. Tex., 4th Sup. Jud. Dist. [Probable jurisdiction noted, 408 U. S. 920.] Motion of appellant to dispense with printing appendix and to proceed on original record granted. Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 71–666. UNITED STATES *v.* GLAXO GROUP LTD. ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 405 U. S. 914.] Motion of appellant for additional time for oral argument granted and 15 minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument.

No. 71–651. California *v.* Krivda et al. Sup. Ct. Cal. [Certiorari granted, 405 U. S. 1039.] Motion to permit showing of motion picture during oral argument, to permit two counsel to argue orally, and for additional time for oral argument denied. Motion of National Legal Aid & Defender Assn. for leave to dispense with printing *amicus curiae* brief granted.

No. 71–685. Lehnhausen, Director, Department of Local Government Affairs of Illinois *v.* Lake Shore Auto Parts Co. et al.; and

No. 71–691. Barrett, County Clerk of Cook County, Illinois, et al. *v.* Shapiro et al. Sup. Ct. Ill. [Certiorari granted, 405 U. S. 1039.] Motion of American National Bank & Trust Co. of Chicago et al., as members of Corporate Fiduciaries Assn. of Illinois, for leave to file a brief as *amici curiae* granted. Motion of Proviso Township High School District #209 et al. for leave to file a brief as *amici curiae* granted, but motion to participate in oral argument as *amici curiae* denied. Motion of Charles Marshall, State's Attorney, County of DeKalb, Illinois, for leave to intervene in No. 71–685 denied.

No. 71–829. Mourning *v.* Family Publications Service, Inc. C. A. 5th Cir. [Certiorari granted, 405 U. S. 987.] Motion of National Consumer Law Center, Inc., for leave to dispense with printing *amicus curiae* brief granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioner granted and 15 minutes allotted for that purpose. Respondent also allotted 15 additional minutes for oral argument.

No. 71–1182. Mattz *v.* Arnett, Director, Department of Fish and Game. Ct. App. Cal., 1st App. Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

No. 71–834. McClanahan *v.* Arizona Tax Commission. Appeal from Ct. App. Ariz. [Probable jurisdiction noted, 406 U. S. 916.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of appellants granted and 15 minutes allotted for that purpose. Appellee allotted 15 additional minutes for oral argument.

No. 71–863. Columbia Broadcasting System, Inc. *v.* Democratic National Committee;

No. 71–864. Federal Communications Commission et al. *v.* Business Executives' Move for Vietnam Peace et al.;

No. 71–865. Post-Newsweek Stations, Capital Area, Inc. *v.* Business Executives' Move for Vietnam Peace; and

No. 71–866. American Broadcasting Cos., Inc. *v.* Democratic National Committee. C. A. D. C. Cir. [Certiorari granted, 405 U. S. 953.] Motion of Columbia Broadcasting System, Inc., and Post-Newsweek Stations, Capital Area, Inc., for additional time for oral argument granted and 7½ minutes allotted to petitioners for that purpose. Respondents also alloted 7½ additional minutes for oral argument.

No. 71–991. Otter Tail Power Co. *v.* United States. Appeal from D. C. Minn. [Probable jurisdiction noted, 406 U. S. 944.] Motion of appellant for additional time for oral argument denied. Motion of Federal Power Commission for leave to participate in oral argument as *amicus curiae* denied. Mr. Justice Blackmun and Mr. Justice Powell took no part in the consideration or decision of these motions.

No. 71–1672. Guthrie et al. *v.* Alabama By-Products Co. et al. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 456 F. 2d 1294.

No. 71–1021. EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. *v.* DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. C. A. 8th Cir. [Certiorari granted, 405 U. S. 1016.] The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 71–1031. TONASKET *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash. [Probable jurisdiction noted, 407 U. S. 908.] Motion of appellant for additional time for oral argument denied.

No. 71–1119. INDIANA EMPLOYMENT SECURITY DIVISION ET AL. *v.* BURNEY. Appeal from D. C. N. D. Ind. [Probable jurisdiction noted, 406 U. S. 956.] Motion of College-University Corporation of Indianapolis, Indiana, et al. for leave to file a brief as *amici curiae* granted. Motion of California Department of Human Resources Development for leave to argue orally as *amicus curiae* denied.

No. 71–1136. TILLMAN ET AL. *v.* WHEATON-HAVEN RECREATION ASSN., INC., ET AL. C. A. 4th Cir. [Certiorari granted, 406 U. S. 916.] Motion of Montgomery County, Maryland, for leave to participate in oral argument as *amicus curiae* denied.

No. 71–1192. GOLDSTEIN ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. [Certiorari granted, 406 U. S. 956.] Motion of Custom Recording Co., Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 72–434. BYRN, GUARDIAN *v.* NEW YORK CITY HEALTH & HOSPITALS CORP. ET AL. Appeal from Ct. App. N. Y. Motion of appellant to expedite consideration denied. Reported below: 31 N. Y. 2d 194, 286 N. E. 2d 887.

No. 71–1332. San Antonio Independent School District et al. *v.* Rodriguez et al. Appeal from D. C. W. D. Tex. [Probable jurisdiction noted, 406 U. S. 966.] Motions of John Serrano, Jr., et al.; American Civil Liberties Union et al.; Wilson Riles, Superintendent of Public Instruction of California, et al.; NAACP Legal Defense Fund et al.; Mayor of Baltimore et al.; National Education Assn. et al.; Houston L. Flournoy, Controller of California; and Wendell Anderson, Governor of Minnesota, et al., for leave to file briefs as *amici curiae* granted. Motions of John Serrano, Jr., et al. and Wendell Anderson, Governor of Minnesota, et al. for leave to participate in oral argument as *amici curiae* denied.

No. 71–1586. Wood *v.* Goodson, Judge. Cir. Ct. Ark., Miller County. Motion to defer consideration of petition for writ of certiorari granted.

No. 71–6278. Almeida-Sanchez *v.* United States. C. A. 9th Cir. [Certiorari granted, 406 U. S. 944.] Motion of Luke McKissack for leave to file a brief as *amicus curiae* granted.

No. 71–6516. Braden *v.* 30th Judicial Circuit Court of Kentucky. C. A. 6th Cir. [Certiorari granted, 407 U. S. 909.] Motion of M. Curran Clem, Esquire, to permit John M. Famularo, Esquire, to argue *pro hac vice* on behalf of respondent granted. Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted. Reported below: 454 F. 2d 145.

No. 71–1531. Nolan *v.* Judicial Council of the Third Circuit of the United States et al. Motion for leave to file petition for writ of prohibition and/or mandamus denied. Mr. Justice Brennan took no part in the consideration or decision of this motion.

No. 72–190. SMITH ET AL. *v.* BOARD OF EDUCATION, INDEPENDENT SCHOOL DISTRICT NO. 1, TULSA COUNTY, OKLAHOMA, ET AL. C. A. 10th Cir. Motion to advance denied. Reported below: 459 F. 2d 720.

No. 72–482. MARCHETTI *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner to expedite consideration denied. Reported below: 466 F. 2d 1309.

No. A–320 (72–521). IRISH NORTHERN AID COMMITTEE *v.* ATTORNEY GENERAL OF THE UNITED STATES. C. A. 2d Cir. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted. Should petition for writ of certiorari be denied, stay is to terminate automatically. Should petition for writ of certiorari be granted, stay is to remain in effect pending the sending down of the judgment of this Court.

No. 71–6603. HOUSE *v.* SMITH, WARDEN; and

No. 72–5054. GIBSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–6564. NEWELL *v.* BOHANON, U. S. DISTRICT JUDGE;

No. 72–5034. DOYLE *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA ET AL.; and

No. 72–5035. BEY *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

No. 71–1655. FALKNER *v.* SUPREME COURT OF FLORIDA ET AL. Motion to dispense with printing petition granted. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

No. 71–6510. LEVY ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

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No. 71–288. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* TATUM ET AL., 408 U. S. 1. Motion to withdraw opinion of this Court denied. Motion to recuse, *nunc pro tunc,* presented to MR. JUSTICE REHNQUIST, by him denied.*

Memorandum of MR. JUSTICE REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.[1]

Respondents contend that because of testimony that I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its hearings during the 92d Cong., 1st Sess., on Federal Data Banks, Computers and the Bill of Rights (hereinafter Hearings), and because of other statements I made in speeches related to this general subject, I should have

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*[REPORTER'S NOTE: See also *post,* p. 901.]

[1] In a motion of this kind, there is not apt to be anything akin to the "record" that supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters that form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the main thrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U. S. C. § 455, which provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enunciated in the statute, there is no occasion for me to give them separate consideration.[2]

Respondents in their motion summarize their factual contentions as follows:

> "Under the circumstances of the instant case, MR. JUSTICE REHNQUIST's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."

Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the sub-

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[2] See S. Exec. Rep. No. 91–12, Nomination of Clement F. Haynsworth, Jr., 10–11.

ject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my "intimate knowledge of the evidence underlying the respondents' allegations" seems to me to make a great deal of very little. When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a dozen. If it is to send one spokesman to testify as to the department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the department, but with those in other areas of the department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

> "As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding . . . ." Hearings 619.

There is one reference to the case of *Tatum* v. *Laird* in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a

colloquy with Senator Ervin. The former appears as follows in the reported hearings:

> "However, in connection with the case of *Tatum* v. *Laird,* now pending in the U. S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed." Hearings 601.

The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of *Laird* v. *Tatum,* other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement that I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the Subcommittee at the request of the latter.

At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law, which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in *Laird* v. *Tatum*, treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the Government's conduct of the case of *Laird* v. *Tatum*.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U. S. C. § 455. The so-called "mandatory" provisions of that section require disqualification of a Justice or judge "in any case in which he has a substantial interest, has been of counsel, is or has been a material witness . . . ."

Since I have neither been of counsel nor have I been a material witness in *Laird* v. *Tatum*, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of MR. JUSTICE WHITE shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both *United States* v. *United States District Court*, 407 U. S. 297 (1972), for which I was not officially responsible in the Department

but with respect to which I assisted in drafting the brief, and in *S&E Contractors* v. *United States,* 406 U. S. 1 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of *Laird* v. *Tatum,* the application of such a rule would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, Disqualification of Judges, 56 Yale L. J. 605 (1947), and Disqualification of Judges: In Support of the Bayh Bill, 35 Law & Contemp. Prob. 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice Department, Mr. Frank explains disqualification practices as follows:

> "Other relationships between the Court and the Department of Justice, however, might well be different. The Department's problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various Departmental divisions, there is almost no connection." *Supra,* 35 Law & Contemp. Prob., at 47.

Indeed, different Justices who have come from the Department of Justice have treated the same or very

similar situations differently. In *Schneiderman* v. *United States*, 320 U. S. 118 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not. 320 U. S., at 207.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of *Laird* v. *Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be, should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Mr. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:

> "And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, it was our manifest duty to take the same position." Hearings Before Committee on the Judiciary on H. R. 2808, 78th Cong., 1st Sess.,

24 (1943), quoted in Frank, *supra,* 56 Yale L. J., at 612 n. 26.

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the popular-name index of the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S. Rep. No. 884, 75th Cong., 1st Sess. (1937). Nonetheless, he sat in the case that upheld the constitutionality of that Act, *United States* v. *Darby,* 312 U. S. 100 (1941), and in later cases construing it, including *Jewell Ridge Coal Corp.* v. *Local 6167, UMW,* 325 U. S. 161 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Mr. Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. The Labor Injunction which he and Nathan Green wrote was considered a classic critique of the abuses by the fed-

[3] See denial of petition for rehearing in *Jewell Ridge Coal Corp.* v. *Local 6167, UMW,* 325 U. S. 897 (1945) (Jackson, J., concurring).

eral courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Labor and the Law, in Felix Frankfurter The Judge 153, 165 (W. Mendelson ed. 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet, in addition to sitting in one of the leading cases interpreting the scope of the Act, *United States* v. *Hutcheson,* 312 U. S. 219 (1941), Justice Frankfurter wrote the Court's opinion.

Mr. Justice Jackson in *McGrath* v. *Kristensen,* 340 U. S. 162 (1950), participated in a case raising exactly the same issue that he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U. S., at 176. Mr. Frank notes that Mr. Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled Liberty, Property, and Social Justice he discussed at some length the doctrine expounded in the case of *Adkins* v. *Children's Hospital,* 261 U. S. 525 (1923). I think that one

would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Mr. Chief Justice Hughes wrote the Court's opinion in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937), in which a closely divided Court overruled *Adkins.* I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and, more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." *Supra,* 35 Law & Contemp. Prob., at 50.

Not only is the sort of public-statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public-statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case be-

fore a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Kristensen would have preferred not to argue before Mr. Justice Jackson; [4] that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Mr. Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

MR. JUSTICE DOUGLAS' statement about federal district judges in his dissenting opinion in *Chandler* v. *Judicial Council,* 398 U. S. 74, 137 (1970), strikes me as being equally true of the Justices of this Court:

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this

[4] The fact that Mr. Justice Jackson reversed his earlier opinion after sitting in *Kristensen* does not seem to me to bear on the disqualification issue. A judge will usually be required to make any decision as to disqualification before reaching any determination as to how he will vote if he does sit.

> when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policymaking divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue that later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, *e. g.,* the statement of Mr. Justice Harlan, joining in *Lewis* v. *Manufacturers National Bank,* 364 U. S. 603, 610 (1961). Indeed, there is weighty authority for this proposition even when the cases are

the same. Mr. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See *Worcester* v. *Street R. Co.,* 196 U. S. 539 (1905), reviewing 182 Mass. 49 (1902); *Dunbar* v. *Dunbar,* 190 U. S. 340 (1903), reviewing 180 Mass. 170 (1901); *Glidden* v. *Harrington,* 189 U. S. 255 (1903), reviewing 179 Mass. 486 (1901); and *Williams* v. *Parker,* 188 U. S. 491 (1903), reviewing 174 Mass. 476 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong-minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." *Supra,* 35 Law & Contemp. Prob., at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance that should not by itself form a basis for disqualification.[5]

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair-minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself

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[5] In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

Here again, one's course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*. *Edwards* v. *United States*, 334 F. 2d 360, 362 n. 2 (CA5 1964); *Tynan* v. *United States*, 126 U. S. App. D. C. 206, 376 F. 2d 761 (1967); *In re Union Leader Corp.*, 292 F. 2d 381 (CA1 1961); *Wolfson* v. *Palmieri*, 396 F. 2d 121 (CA2 1968); *Simmons* v. *United States*, 302 F. 2d 71 (CA3 1962); *United States* v. *Hoffa*, 382 F. 2d 856 (CA6 1967); *Tucker* v. *Kerner*, 186 F. 2d 79 (CA7 1950); *Walker* v. *Bishop*, 408 F. 2d 1378 (CA8 1969). These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal that may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. See, *e. g.*, *Tinker* v. *Des Moines School District*, 258 F. Supp. 971 (SD Iowa 1966), affirmed by an equally divided court, 383 F. 2d 988 (CA8 1967), certiorari granted and judgment reversed, 393 U. S. 503 (1969). While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an

equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem oneself disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances.[6] Since one of the stated reasons for granting certiorari is to resolve a conflict between federal courts of appeals, the frequency of such instances is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down "one rule in Athens, and another rule in Rome" with a vengeance. And since the notion of "public statement" disqualification that I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

The oath prescribed by 28 U. S. C. § 453 that is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the

[6] *Branzburg* v. *Hayes,* 408 U. S. 665 (1972); *Gelbard* v. *United States,* 408 U. S. 41 (1972); *Evansville Airport* v. *Delta Airlines Inc.,* 405 U. S. 707 (1972).

practice of the former Justices of this Court guarantees a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is, denied.[7]

Probable Jurisdiction Noted or Postponed

No. 71–1476. GAFFNEY *v.* CUMMINGS ET AL. Appeal from D. C. Conn. Probable jurisdiction noted. Reported below: 341 F. Supp. 139.

No. 72–77. NORWOOD ET AL. *v.* HARRISON ET AL. Appeal from D. C. N. D. Miss. Probable jurisdiction noted. Reported below: 340 F. Supp. 1003.

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[7] Petitioners in *Gravel* v. *United States*, 408 U. S. 606 (1972), have filed a petition for rehearing which asserts as one of the grounds that I should have disqualified myself in that case.* Because respondents' motion in *Laird* was addressed to me, and because it seemed to me to be seriously and responsibly urged, I have dealt with my reasons for denying it at some length. Because I believe that the petition for rehearing in *Gravel*, insofar as it deals with disqualification, possesses none of these characteristics, there is no occasion for me to treat it in a similar manner. Since such motions have in the past been treated by the Court as being addressed to the individual Justice involved, however, I do venture the observation that in my opinion the petition insofar as it relates to disqualification verges on the frivolous. While my peripheral advisory role in *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), would have warranted disqualification had I been on the Court when that case was heard, it could not conceivably warrant disqualification in *Gravel*, a different case raising entirely different constitutional issues.

*[REPORTER'S NOTE: See *post*, p. 902.]

No. 71–1637. City of Burbank et al. *v.* Lockheed Air Terminal, Inc., et al. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 457 F. 2d 667.

No. 71–1694. Frontiero et vir *v.* Laird, Secretary of Defense, et al. Appeal from D. C. M. D. Ala. Probable jurisdiction noted. Reported below: 341 F. Supp. 201.

No. 72–147. Bullock, Secretary of State of Texas, et al. *v.* Regester et al. Appeal from D. C. W. D. Tex. Probable jurisdiction noted. Reported below: 343 F. Supp. 704.

No. 72–11. Palmore *v.* United States. Appeal from Ct. App. D. C. Motion to dispense with printing jurisdictional statement granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 290 A. 2d 573.

Certiorari Granted

No. 71–1428. Hensley *v.* Municipal Court, San Jose-Milpitas Judicial District, Santa Clara County. C. A. 9th Cir. Certiorari granted. Reported below: 453 F. 2d 1252.

No. 71–1459. United States *v.* Little Lake Misere Land Co., Inc., et al. C. A. 5th Cir. Certiorari granted. Reported below: 453 F. 2d 360.

No. 71–1598. Hodgson, Secretary of Labor *v.* Arnheim & Neely, Inc., et al. C. A. 3d Cir. Certiorari granted. Reported below: 444 F. 2d 609.

No. 71–1665. United States *v.* Cartwright, Executor. C. A. 2d Cir. Certiorari granted. Reported below: 457 F. 2d 567.

No. 71–1698. UNITED STATES *v.* BISHOP. C. A. 9th Cir. Certiorari granted. Reported below: 455 F. 2d 612.

No. 72–10. MOOR ET AL. *v.* COUNTY OF ALAMEDA ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 458 F. 2d 1217.

No. 71–1442. COLGROVE *v.* BATTIN, U. S. DISTRICT JUDGE. C. A. 9th Cir. Motion of International Association of Insurance Counsel for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 456 F. 2d 1379.

No. 71–6481. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 455 F. 2d 919.

No. 71–6698. MORRIS *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 455 F. 2d 775.

No. 71–6742. HURTADO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 452 F. 2d 951.

Certiorari Denied. (See also Nos. 71–1402, 71–1616, 71–6423, 71–6568, 71–6624, 71–6643, 71–6668, 72–20, 72–133, and 72–5107, *supra.*)

No. 71–1168. STRECKFUS STEAMERS, INC., ET AL. *v.* CITY OF ST. LOUIS ET AL. St. Louis Ct. App. Mo. Certiorari denied. Reported below: 472 S. W. 2d 660.

No. 71–1175. FORKS ET AL. *v.* CITY OF WARSAW. Sup. Ct. Ind. Certiorari denied. Reported below: 257 Ind. 237, 273 N. E. 2d 856.

No. 71–1231. PACE *v.* PACE. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–1236. ALABAMA *v.* RENNOW; and
No. 71–6263. RENNOW *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 47 Ala. App. 419, 255 So. 2d 602.

No. 71–1357. REYNOLDS *v.* UNITED STATES; and
No. 71–1358. STAMP *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 147 U. S. App. D. C. 340, 458 F. 2d 759.

No. 71–1360. KABINTO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1087.

No. 71–1373. LACOB *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–1376. GEOGHEGAN & MATHIS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 1324.

No. 71–1378. INTERCONTINENTAL INDUSTRIES, INC. *v.* AMERICAN STOCK EXCHANGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 935.

No. 71–1382. SCHROUD *v.* MILWAUKEE COUNTY DEPARTMENT OF PUBLIC WELFARE. Sup. Ct. Wis. Certiorari denied. Reported below: 53 Wis. 2d 650, 193 N. W. 2d 671.

No. 71–1387. HIKEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 458 F. 2d 24.

No. 71–1390. BENTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 457 F. 2d 1174.

No. 71–1391. SMITH, WARDEN *v.* HIATT. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 979.

No. 71–1393. DANIEL ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 454 F. 2d 1166.

No. 71–1397. MIAMI POLICE BENEVOLENT ASSN., INC. *v.* ADAMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 1315.

No. 71–1403. FORBES LEASING & FINANCE CORP. *v.* LEBOWITZ. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 979.

No. 71–1405. DEMOCRATIC NATIONAL COMMITTEE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 148 U. S. App. D. C. 383, 460 F. 2d 891.

No. 71–1413. BROWN ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 457 F. 2d 731.

No. 71–1418. LOMAYAKTEWA ET AL. *v.* CORCORAN, U. S. DISTRICT JUDGE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 71–1432. DIRECT MAIL ADVERTISING ASSN., INC., ET AL. *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 147 U. S. App. D. C. 394, 458 F. 2d 813.

No. 71–1436. BLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1.

No. 71–1438. CECERE *v.* UNITED STATES; and
No. 71–1568. DECARLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 358.

No. 71–1440. WENGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 457 F. 2d 1082.

No. 71–1455. BURSTEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 605.

No. 71–1463. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–1467. FLYNN *v.* BOARD OF EXAMINERS, BOARD OF EDUCATION OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–1468. BOSLEY ET UX. *v.* GRAND LODGE OF ANCIENT FREE & ACCEPTED MASONS OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 263 Md. 303, 283 A. 2d 587.

No. 71–1480. ALEXANDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1481. COLLINS ET AL. *v.* AVERY ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–1484. FINK ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 197 Ct. Cl. 187, 454 F. 2d 1387.

No. 71–1485. HARNESS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 475 S. W. 2d 485.

No. 71–1486. HART, DBA SAN DIEGO CABINETS, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 215.

No. 71–1488. WACHOVIA BANK & TRUST CO. *v.* HARRIS, TRUSTEE. C. A. 4th Cir. Certiorari denied. Reported below: 455 F. 2d 841.

No. 71–1489. PLASTILINE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied.

No. 71–1490. BETHLEHEM MINES CORP. ET AL. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 1233.

No. 71–1492. DYAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 800.

No. 71–1493. FHAGEN ET AL. *v.* MILLER, COMMISSIONER OF MENTAL HYGIENE, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 348, 278 N. E. 2d 615.

No. 71–1494. TUSCANY FABRICS, INC. *v.* UNITED STATES. C. C. P. A. Certiorari denied. Reported below: 59 C. C. P. A. (Cust.) 77, 454 F. 2d 1188.

No. 71–1496. CASANOVA GUNS, INC. *v.* SHULTZ, SECRETARY OF THE TREASURY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 1320.

No. 71–1497. BECK *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 1040.

No. 71–1498. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. *v.* NORTHEAST AIRLINES, INC. C. A. 1st Cir. Certiorari denied.

No. 71–1499. DEVCON CORP. *v.* WOODHILL CHEMICAL SALES CORP. C. A. 1st Cir. Certiorari denied. Reported below: 455 F. 2d 830.

No. 71–1500. KNOX ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 612.

No. 71–1504. PANOTEX PIPE LINE CO. ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 1279.

No. 71–1506. FICHMAN *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 71–1508. CHONG YUK WAH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 71–1507. MONROE, DBA NORTH AREA REFUSE CO. *v.* CUSSEN. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 1151.

No. 71–1515. RODOVICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 1225.

No. 71–1516. HARRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 655.

No. 71–1518. HANDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 885.

No. 71–1519. BROWN ET AL. *v.* SCOTT. C. A. 8th Cir. Certiorari denied. Reported below: 454 F. 2d 693.

No. 71–1520. KIRKPATRICK *v.* WISCONSIN DEPARTMENT OF NATURAL RESOURCES. Sup. Ct. Wis. Certiorari denied. Reported below: 53 Wis. 2d 522, 192 N. W. 2d 856.

No. 71–1521. HEATH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–1524. LAY ET AL. *v.* CITY OF KINGSPORT, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 454 F. 2d 345.

No. 71–1526. EISENSTADT, SHERIFF *v.* BAKER; and
No. 71–1679. BAKER *v.* EISENSTADT, SHERIFF. C. A. 1st Cir. Certiorari denied. Reported below: 456 F. 2d 382.

No. 71–1527. FLORIDA MACHINE & FOUNDRY CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied.

No. 71–1533. BELLO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 71–1557. NATIONAL SURETY CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 71–1535. TRAVELERS INDEMNITY CO. *v.* ERICKSON'S, INC. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 884.

No. 71–1540. CITIZENS ORGANIZED FOR THE PRESERVATION OF OUR ENVIRONMENT ET AL. *v.* RICHFIELD BOARD OF ZONING APPEALS ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 71–1551. ROSNER *v.* DUCHESS MUSIC CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 2d 1305.

No. 71–1552. HOOVER ET AL. *v.* WYANDOTTE CHEMICALS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 387.

No. 71–1555. JOHNSTON ET UX. *v.* BYRD. Sup. Ct. Ala. Certiorari denied. Reported below: 288 Ala. 156, 258 So. 2d 866.

No. 71–1559. BAXTER ET AL. *v.* RAILWAY EXPRESS AGENCY, INC., AKA REA EXPRESS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 455 F. 2d 693.

No. 71–1561. HEYMAN ET AL. *v.* KLINE. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 123.

No. 71–1564. THOMPSON *v.* AMIS ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 208 Kan. 658, 493 P. 2d 1259.

No. 71–1565. RAIMONDI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 459 F. 2d 639.

No. 71–1569. SINGH *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1092.

No. 71–1570. HOBBS *v.* CUSTOM FINANCE CO. ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–1571. NOSSER ET AL. *v.* BRADLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 835.

No. 71–1575. LEVINE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–1576. ANDREAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 458 F. 2d 491.

No. 71–1578. BERGER *v.* COLUMBIA BROADCASTING SYSTEM, INC. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 991.

No. 71–1580. CATALDO ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1589. SINGER CO. *v.* GREENE. C. A. 3d Cir. Certiorari denied. Reported below: 461 F. 2d 242.

No. 71–1590. HAMLETT *v.* CONCO, INC. C. A. 4th Cir. Certiorari denied.

No. 71–1591. WASHINGTON URBAN LEAGUE, INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 71–1593. ARONOW *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Clara. Certiorari denied.

No. 71–1594. SALVAGGIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1595. MIDDLEBROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 657.

No. 71–1599. COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL–CIO, ET AL. *v.* BYRD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 456 F. 2d 882.

No. 71–1597. Federal Power Commission *v.* Greene County Planning Board et al. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 412.

No. 71–1600. Union Camp Corp. *v.* Dyal et al. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 678.

No. 71–1606. Karlin *v.* Avis et al. C. A. 2d Cir. Certiorari denied. Reported below: 457 F. 2d 57.

No. 71–1609. Regents of the University of California *v.* Karst et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–1610. Mehrtens, U. S. District Judge *v.* Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 100, 103, and 104.

No. 71–1611. W. R. Bean & Son, Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 93.

No. 71–1615. Knapp et ux. *v.* Miami Memorial Park, Inc., et al. Sup. Ct. Fla. Certiorari denied.

No. 71–1619. Baker *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 252, 282 N. E. 2d 614.

No. 71–1621. Estate of Montgomery et al. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 616.

No. 71–1622. Holland *v.* Holland. Sup. Ct. Ohio. Certiorari denied.

No. 71–1629. Edwards *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 71–1630. KELLOGG CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 457 F. 2d 519.

No. 71–1632. CAST OPTICS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 398.

No. 71–1640. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 931.

No. 71–1643. SCHULTE ET AL. *v.* OKLAHOMA CITY. Sup. Ct. Okla. Certiorari denied. Reported below: 494 P. 2d 638.

No. 71–1644. STEINER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied.

No. 71–1650. C & G BOAT CO., INC., ET AL. *v.* CRESCENT RIVER PORT PILOTS ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 1290.

No. 71–1653. MCFARLAND *v.* KNAPP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 457 F. 2d 881.

No. 71–1657. SCOTT *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 71–1660. THOMPSON ET VIR *v.* BOARD OF COMMISSIONERS OF THE OAK BROOK PARK DISTRICT OF DUPAGE COUNTY ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 71–1661. MOVEABLE OFFSHORE, INC. *v.* HALL. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 633.

No. 71–1662. ATLANTIC-RICHFIELD CO. *v.* CHERRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 1310.

No. 71–1659. MILDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 71–1663. MANFREDONIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 459 F. 2d 1392.

No. 71–1667. LOVE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 460 F. 2d 310.

No. 71–1670. BERTRAM YACHT SALES, INC. *v.* MORON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 500.

No. 71–1671. KANSAS CITY *v.* WEBB ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 484 S. W. 2d 817.

No. 71–1673. SAILOR ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–1677. TUCKER *v.* BITONTI. Sup. Ct. Conn. Certiorari denied. Reported below: 162 Conn. 626, 295 A. 2d 545.

No. 71–1678. PRIGNANO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2 Ill. App. 3d 1063, 278 N. E. 2d 128.

No. 71–1682. DENNETT *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–1685. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 169, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 210.

No. 71–1686. HARDY, ACTING WARDEN *v.* VUITCH. C. A. 4th Cir. Certiorari denied.

No. 71–1689. MUIRHEAD *v.* SPANN. Sup. Ct. Miss. Certiorari denied. Reported below: 259 So. 2d 698.

No. 71–1687. EAST TEXAS STEEL CASTINGS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 879.

No. 71–1688. MUIRHEAD *v.* HINDS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 259 So. 2d 692.

No. 71–1692. ANNORENO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 460 F. 2d 1303.

No. 71–1693. IRWIN *v.* EAGLE STAR INSURANCE CO., LTD. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 827.

No. 71–1696. BARTON *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: See 8 Ore. App. 186, 492 P. 2d 828.

No. 71–1697. PACIFIC MARITIME ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 572.

No. 71–1703. KOSHER *v.* WASHINGTON STATE BAR ASSN. Sup. Ct. Wash. Certiorari denied.

No. 71–1704. BORROWDALE ET AL. *v.* BOARD OF JUNIOR COLLEGE DISTRICT NO. 515 ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: See 3 Ill. App. 3d 1006, 279 N. E. 2d 754.

No. 71–1706. SHELTON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. Cr. App. ——, 479 S. W. 2d 817.

No. 71–1707. COUNTY COLLECTOR OF COOK COUNTY ET AL. *v.* NORTHWESTERN UNIVERSITY. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 131, 281 N. E. 2d 334.

No. 71–1708. BUDZANOSKI ET AL. *v.* SABOLSKY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 457 F. 2d 1245.

No. 71–5610. ROLLINS ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5769. RODRIGUEZ *v.* OLSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–6127. OSBORNE ET AL. *v.* NOBLES. Ct. App. Ga. Certiorari denied. Reported below: 124 Ga. App. 454, 184 S. E. 2d 207.

No. 71–6155. JOSHUA *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–6226. DESSUS *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 557.

No. 71–6243. AMOS *v.* MCCARTHY. C. A. 9th Cir. Certiorari denied.

No. 71–6260. MACLEOD *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–6301. ENRIQUEZ *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 71–6309. RALLS *v.* MISSOURI. K. C. Ct. App. Mo. Certiorari denied. Reported below: 472 S. W. 2d 642.

No. 71–6321. THOMAS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 1072.

No. 71–6329. ESTES *v.* NORTHCROSS ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–6349. WEAVER *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1226.

No. 71–6368. PHILLIPS *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 913.

No. 71–6370. FERGUSON *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 1011.

No. 71–6380. ALLERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 1244.

No. 71–6390. HARDING *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 71–6396. HOWARD *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 454 F. 2d 115.

No. 71–6407. THOMAS *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–6412. WARD *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 71–6413. WILSON, AKA GRIFFIN *v.* GAFFNEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 454 F. 2d 142.

No. 71–6414. HUMPHREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 683.

No. 71–6417. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–6420. CRANFORD *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 83 N. M. 294, 491 P. 2d 511.

No. 71–6430. TOWNSEND *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 350.

No. 71–6437. DAVIS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 255 So. 2d 916.

No. 71–6441. ADAMS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 416.

No. 71–6457. GAITO *v.* SCHNUPP ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–6461. CHRISMAN *v.* FIELD, MEN'S COLONY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 175.

No. 71–6464. MURRAY *v.* CITY OF CINCINNATI. Sup. Ct. Ohio. Certiorari denied.

No. 71–6466. LAWLESS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 13 Md. App. 220, 283 A. 2d 160.

No. 71-6486. MAYS *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 71–6487. MEDINA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 455 F. 2d 461.

No. 71–6495. CALDRONE *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–6496. BAKER *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–6503. ECKERT *v.* CLERK'S OFFICE OF THE U. S. DISTRICT COURT. C. A. 3d Cir. Certiorari denied.

No. 71–6506. DOYLE *v.* DOYLE. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 482 S. W. 2d 285.

No. 71–6509. HIGGINS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 50 Ill. 2d 221, 278 N. E. 2d 68.

No. 71–6511. RHODES *v.* HAYNES, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 71–6521. SAILER *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 71–6523. JACOBS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 445 Pa. 364, 284 A. 2d 717.

No. 71–6524. KIRK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6529. ARCHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 455 F. 2d 193.

No. 71–6532. FORRESTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 905.

No. 71–6537. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 932.

No. 71–6540. GRENE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 376.

No. 71–6543. HAMPTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 299.

No. 71–6546. NUNLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–6547. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 502.

No. 71–6549. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 1101.

No. 71–6552. ATKIN, AKA ATKINSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–6555. ROBINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 1374.

No. 71–6551. SKEELS *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 882.

No. 71–6556. TELIO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 1 Ill. App. 3d 526, 275 N. E. 2d 222.

No. 71–6557. FLOURNOY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 1 Ill. App. 3d 918, 275 N. E. 2d 289.

No. 71–6558. WORKMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 1124.

No. 71–6565. MORAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 71–6567. MANNS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 1 Ill. App. 3d 871, 274 N. E. 2d 194.

No. 71–6569. LOWTHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 455 F. 2d 657.

No. 71–6572. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 361.

No. 71–6575. MCQUEEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 1049.

No. 71–6576. HAVELOCK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–6583. LUALLEN *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 428.

No. 71-6580. GIBBONEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6582. GROOMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 1308.

No. 71–6584. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–6585. BUCHOWIECKI-KORTKIEWICZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 972.

No. 71–6586. CHITWOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 457 F. 2d 676.

No. 71–6587. BREDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 1382.

No. 71–6588. RANDAZZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 1058.

No. 71–6594. TYLER *v.* PARKS. C. A. 8th Cir. Certiorari denied.

No. 71–6610. VALENTINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6611. CARTER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–6612. ECKERT *v.* SENATE OF THE UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–6614. ESTRADA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 255.

No. 71–6615. BEHNING *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 71–6619. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 469.

No. 71–6629. HENKEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 777.

No. 71–6631. HELTON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 257 So. 2d 917.

No. 71–6634. BEANE *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 758.

No. 71–6637. JOHNSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 476 S. W. 2d 516.

No. 71–6639. SCIORTINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 1135.

No. 71–6640. MADISON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 458 F. 2d 974.

No. 71–6641. WYSOCKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 1155.

No. 71–6646. GUERIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 22 Cal. App. 3d 775, 99 Cal. Rptr. 573.

No. 71–6648. GONZALEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 28, 280 N. E. 2d 882.

No. 71–6650. GOODWIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 455 F. 2d 710.

No. 71–6651. COPELAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6653. NUNN *v.* COX, ACTING WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–6654. STEVENSON *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6656. MACHADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 1372.

No. 71–6657. SANDERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 459 F. 2d 86.

No. 71–6659. KORCZAK *v.* DIVISION OF EMPLOYMENT, COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT, ET AL. Sup. Ct. Colo. Certiorari denied.

No. 71–6660. PACK, AKA PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6662. CARROLL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 1199.

No. 71–6663. HARRIS *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 191.

No. 71–6664. VILLAUERDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6666. SCHLANGER *v.* SEAMANS, SECRETARY OF THE AIR FORCE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 71–6667. MCDONNELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 457 F. 2d 1049.

No. 71–6669. SIDDLE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 28 Ohio St. 2d 135, 276 N. E. 2d 641.

No. 71–6665. RAY *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 71–6671. BRADLEY *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–6672. MATTHEWS *v.* FLORIDA-VANDERBILT DEVELOPMENT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 194.

No. 71–6673. GOLDEN *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 376.

No. 71–6674. LIPSCOMB *v.* UNITED STATES BOARD OF PAROLE. C. A. 5th Cir. Certiorari denied.

No. 71–6675. COPP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 459 F. 2d 73.

No. 71–6676. MATHERS *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 71–6677. ALLARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 1136.

No. 71–6678. YEATON *v.* WEISENBURG. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 803.

No. 71–6680. FERGUSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 212 Va. 745, 187 S. E. 2d 189.

No. 71–6681. COSTANZA *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 71–6683. SAILER *v.* CALIFORNIA ADULT AUTHORITY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 71–6685. HART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 457 F. 2d 1087.

No. 71–6684. Brown *v.* Wisconsin State Department of Public Welfare. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 257.

No. 71–6686. Ellison *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 493 P. 2d 837.

No. 71–6688. Lara *v.* Harris, Warden, et al. C. A. 10th Cir. Certiorari denied.

No. 71–6691. Zimmer *v.* Gaffney, Warden. C. A. 10th Cir. Certiorari denied.

No. 71–6692. Carter *v.* Roberts, U. S. District Judge. C. A. 5th Cir. Certiorari denied.

No. 71–6695. Randall *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 1132.

No. 71–6696. Perwin *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Reported below: 60 N. J. 138, 286 A. 2d 511.

No. 71–6697. Batista *v.* United States; and
No. 71–6715. Lopez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 749.

No. 71–6699. Albidrez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1288.

No. 71–6701. Harrison *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 270.

No. 71–6702. Tarlton *v.* Wolfe. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 512.

No. 71–6704. Ingraham *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 256 So. 2d 521.

No. 71–6703. JOHNSON *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71–6705. LAMONGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 458 F. 2d 197.

No. 71–6706. MIDDLETON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 482.

No. 71–6707. COX *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 459 F. 2d 50.

No. 71–6708. CIOTTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 457 F. 2d 1027.

No. 71–6709. KAYE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 878.

No. 71–6710. BLACKWOOD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 526.

No. 71–6712. ENGLE, AKA TENNANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 458 F. 2d 1021.

No. 71–6713. MITMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 459 F. 2d 451.

No. 71–6714. RIVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–6716. TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 810.

No. 71–6717. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 1304.

No. 71–6718. CLEAVES *v.* PARKER. C. A. 6th Cir. Certiorari denied.

No. 71–6719. Brown *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 319.

No. 71–6722. Martin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 459 F. 2d 1009.

No. 71–6723. Chais-Shulman *v.* Bank of America Trust No. 54212. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 253.

No. 71–6725. Sanchez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 459 F. 2d 100.

No. 71–6726. Lobon *v.* Government of the Canal Zone; and

No. 71–6727. Lobon *v.* Government of the Canal Zone. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 511.

No. 71–6728. Bailey *v.* United States. C. A. D. C. Cir. Certiorari denied.

No. 71–6729. Weaver *v.* California Department of Corrections et al. C. A. 9th Cir. Certiorari denied.

No. 71–6730. Wilkes *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 71–6731. Dixon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 309.

No. 71–6733. Gali *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–6735. Kennedy, aka Thomas, et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 457 F. 2d 63.

No. 71–6736. Davis *v.* Beto, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 511.

No. 71–6737. DONOHOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 458 F. 2d 237.

No. 71–6738. DENNIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6744. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 459 F. 2d 983.

No. 71–6745. MCCRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 2d 389.

No. 71–6746. EVANS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 459 F. 2d 481.

No. 71–6748. CASTILLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6749. PARKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 71–6750. HAMMONDS *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 71–6751. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6753. SCOGIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 459 F. 2d 182.

No. 71–6754. VAN PELT *v.* DICOSIMO. C. A. 9th Cir. Certiorari denied.

No. 71–6756. CUNNINGHAM *v.* A. S. ABELL CO. Ct. App. Md. Certiorari denied. Reported below: 264 Md. 649, 288 A. 2d 157.

No. 71–6755. MORLAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–6761. SCOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 457 F. 2d 848.

No. 71–6762. CARNATHAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 71–6766. HORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 459 F. 2d 1003.

No. 71–6771. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 457 F. 2d 513.

No. 71–6772. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 457 F. 2d 396.

No. 71–6775. BURDETTE *v.* SHORE ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–6776. JORDAN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 71–6779. LEWIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–6780. MANSOUR *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 71–6782. ELLIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 461 F. 2d 962.

No. 71–6783. RYAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 71–6784. PENDERGRAFT *v.* TURNER ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–6785. KNUDSEN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 443 Pa. 412, 278 A. 2d 881.

No. 71–6786. CROW *v.* EYMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 459 F. 2d 24.

No. 71–6787. BRUCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 458 F. 2d 511.

No. 71–6788. BROWNE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 799.

No. 71–6792. GARDNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 534.

No. 71–6793. KRIKMANIS *v.* MONTGOMERY ET AL. C. A. 1st Cir. Certiorari denied.

No. 71–6794. BOYD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 457 F. 2d 1358.

No. 71–6795. TATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6796. SHAFFER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 447 Pa. 91, 288 A. 2d 727.

No. 71–6797. CURTIS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 71–6798. ARD ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 458 F. 2d 36.

No. 71–6801. QUINN *v.* GAGNON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71–6802. JONES *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 71–6804. SANTANA *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 71–6805. LEWIS *v.* OHIO ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 71–6806. ROSENBERG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1183.

No. 71–6807. COLE *v.* UNITED STATES; and
No. 71–6808. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 1141.

No. 71–6809. MORTON *v.* HAYNES, TRAINING CENTER SUPERINTENDENT. C. A. 8th Cir. Certiorari denied.

No. 71–6810. BATTS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 71–6811. ROSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1144.

No. 71–6813. FERMIN *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. D. C. Cir. Certiorari denied. Reported below: 149 U. S. App. D. C. 122, 461 F. 2d 1208.

No. 71–6814. LEBRUN *v.* CUPP, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–6815. BOWERS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1045.

No. 71–6816. EARP *v.* CUPP, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 378.

No. 71–6817. DORROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–6820. STIDHAM ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 459 F. 2d 297.

No. 71–6818. BARBER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 456 F. 2d 164.

No. 71–6819. NELSON *v.* BUTLER, PRISON SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6821. KNIGHT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 71–6822. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 1361.

No. 71–6823. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 460 F. 2d 1236.

No. 71–6828. LAUCHLI *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–6829. GAUTHIER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 280 N. E. 2d 426.

No. 71–6831. CAGLE *v.* HARRIS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–6832. HALL *v.* SNYDER ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–6833. SINGAL *v.* TWO UNKNOWN NAMED PATROLMEN ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–6834. GREER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6835. KASEY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 369.

No. 71–6838. HOLMES ET AL. *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 148 U. S. App. D. C. 187, 459 F. 2d 1211.

No. 71–6837. DORSEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 462 F. 2d 361.

No. 71–6842. MALLORY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 460 F. 2d 243.

No. 71–6843. DOYAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 1292.

No. 71–6845. THOMAS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 149 U. S. App. D. C. 368, 463 F. 2d 314.

No. 71–6846. VARNELL *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 71–6847. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1370.

No. 71–6848. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 512.

No. 71–6849. JACKSON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 162 Conn. 440, 294 A. 2d 517.

No. 71–6850. BROWN ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 280 N. C. 588, 187 S. E. 2d 85.

No. 71–6851. HEBAH, ADMINISTRATRIX *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 197 Ct. Cl. 729, 456 F. 2d 696.

No. 71–6855. GRANDI, AKA RICOLLET *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 424 F. 2d 399.

No. 71–6862. DICANIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 1335.

No. 71–6854. MASTERS *v.* HARRIS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–6857. MARTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6859. MUNNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 271.

No. 71–6860. CHRISTIAN *v.* NEW YORK STATE BOARD OF PAROLE. Ct. App. N. Y. Certiorari denied.

No. 71–6861. DOCKERY *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 71–6864. SUDDUTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 458 F. 2d 1222.

No. 71–6865. ALSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 48.

No. 71–6866. COLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 460 F. 2d 1038.

No. 71–6867. LARA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 480 S. W. 2d 661.

No. 71–6868. PARTON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. Cr. App. ——, 483 S. W. 2d 753.

No. 71–6870. MATHIS *v.* LAIRD, SECRETARY OF DEFENSE. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 926.

No. 71–6871. LUCAS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–6873. NEELY *v.* FIELD, U. S. DISTRICT JUDGE, ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–6874. MITCHELL *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–6875. MORAN *v.* TUITION PLAN OF NEW HAMPSHIRE, INC. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 1030.

No. 71–6876. BAILES ET UX. *v.* SOUTHERN FARM BUREAU CASUALTY INSURANCE CO. ET AL. Sup. Ct. La. Certiorari denied. Reported below: 261 La. 106, 259 So. 2d 29.

No. 71–6878. ROBINSON *v.* MAMMOTH LIFE & ACCIDENT INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 698.

No. 71–6881. WILLIAMS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–6882. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 443.

No. 71–6883. FAIR *v.* HODGES ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–6884. HUDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 460 F. 2d 1262.

No. 71–6887. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–6889. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–6890. KARTSONIS *v.* DISTRICT UNEMPLOYMENT COMPENSATION BOARD. Ct. App. D. C. Certiorari denied. Reported below: 289 A. 2d 370.

No. 71–6905. DOYAL *v.* DEPARTMENT OF THE TREASURY, BUREAU OF CUSTOMS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 799.

No. 71–6891. HAUFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 461 F. 2d 1061.

No. 71–6892. SAILER *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 2d 1362.

No. 71–6896. LATHROP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 460 F. 2d 761.

No. 71–6900. PATTERSON *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 71–6901. MORROW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–6903. NEASE *v.* UNITED STATES C. A. 6th Cir. Certiorari denied. Reported below: 458 F. 2d 1361.

No. 71–6904. TUBBS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 461 F. 2d 43.

No. 71–6906. SPRINGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 460 F. 2d 1344.

No. 71–6907. WATSON *v.* STYNCHCOMBE, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 71–6910. THORNLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 1188.

No. 71–6911. MEDINA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 459 F. 2d 546.

No. 71–6912. PASQUA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dist. Certiorari denied.

No. 71–6913. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 1203.

No. 71–6924. OBSTEIN *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 60 N. J. 353, 289 A. 2d 798.

No. 71–6915. KILE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6916. DAHL *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–6917. SCOPES *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 71–6919. BIRCH *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 71–6921. MIRANDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 458 F. 2d 1179.

No. 71–6922. LOWRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–2. PALMER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–3. LONG MANUFACTURING CO. *v.* LILLISTON IMPLEMENT CO. C. A. 4th Cir. Certiorari denied. Reported below: 457 F. 2d 1317.

No. 72–4. CHEMICAL CARRIERS, INC., ET AL. *v.* ANDREWS, EXECUTRIX. C. A. 3d Cir. Certiorari denied. Reported below: 457 F. 2d 636.

No. 72–5. KOHN, TRUSTEE, ET AL. *v.* AMERICAN METAL CLIMAX, INC., ET AL.; and

No. 72–132. ROAN SELECTION TRUST LTD. ET AL. *v.* KOHN, TRUSTEE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 255.

No. 72–9. BONKOWSKI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 709.

No. 72–26. DALY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 47 Ala. App. 681, 260 So. 2d 412.

No. 72–7. FIRESTONE *v.* TIME, INC. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 712.

No. 72–13. SEGURA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 1336.

No. 72–14. CARLTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 1390.

No. 72–15. SCHAACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–18. ENGLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 458 F. 2d 1017.

No. 72–27. BITTNER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 188 Neb. 298, 196 N. W. 2d 186.

No. 72–30. EGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 459 F. 2d 997.

No. 72-31. HONOLULU RAPID TRANSIT CO., LTD. *v.* PUBLIC UTILITIES COMMISSION OF HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 459 F. 2d 551.

No. 72–33. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 458 F. 2d 1406.

No. 72–38. SOUTHWESTERN BELL TELEPHONE CO. *v.* FRANKE ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 479 S. W. 2d 472.

No. 72–43. COHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–47. HAYDEN PUBLISHING CO., INC., ET AL. *v.* VAN VALKENBURGH, NOOGER & NEVILLE, INC. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 34, 281 N. E. 2d 142.

No. 72–39. Rederi A/B Nordstjernan et al. *v.* Rivera et al. C. A. 1st Cir. Certiorari denied. Reported below: 456 F. 2d 970.

No. 72–50. Railex Corp. *v.* Speed Check Co., Inc. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 1040.

No. 72–51. Michaud et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 953.

No. 72–52. Skil Corp. *v.* Lucerne Products, Inc. C. A. 6th Cir. Certiorari denied.

No. 72–57. Shelco, Inc., et al. *v.* Dow Chemical Co. et al. C. A. 7th Cir. Certiorari denied.

No. 72–58. National Association of Securities Dealers, Inc. *v.* Harwell et al. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 461.

No. 72–63. Dickson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 462 F. 2d 184.

No. 72–65. John B. White, Inc. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 989.

No. 72–66. Clark Equipment Co. *v.* Wirth. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 1262.

No. 72–68. Lane *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 593.

No. 72–70. Lefkowitz, Attorney General of New York *v.* Weiss et al. C. A. 2d Cir. Certiorari denied.

No. 72–78. Gifford et al. *v.* Allen et ux. C. A. 4th Cir. Certiorari denied. Reported below: 462 F. 2d 615.

No. 72–71. HILLIARD ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 72–73. KLEVE *v.* RETAIL CREDIT CO. Sup. Ct. Ohio. Certiorari denied.

No. 72–80. HELTSLEY ET AL. *v.* DISTRICT No. 23, UNITED MINE WORKERS OF AMERICA, ET AL. Ct. App. Ky. Certiorari denied. Reported below: 477 S. W. 2d 134.

No. 72–85. QUINTANA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 457 F. 2d 874.

No. 72–87. HARRIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 1041.

No. 72–89. CARTER ET AL. *v.* CITY OF FORT WORTH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 572.

No. 72–94. JACQUES *v.* LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied. Reported below: 260 La. 803, 257 So. 2d 413.

No. 72–98. SCHNEIDER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 459 F. 2d 540.

No. 72–99. LUTHER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 47 Ala. App. 647, 259 So. 2d 857.

No. 72–101. AVENI *v.* RICHMAN, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari denied. Reported below: 458 F. 2d 972.

No. 72–102. AUNT MID, INC. *v.* FJELL-ORANJE LINES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 712.

No. 72–100. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 2d 300.

No. 72–103. LLERENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 949.

No. 72–106. BRADSHAW *v.* THOMPSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 454 F. 2d 75.

No. 72–107. SPEARS *v.* HOUGH. C. A. 8th Cir. Certiorari denied. Reported below: 458 F. 2d 529.

No. 72–110. EAGLE STAR INSURANCE GROUP *v.* WALKER, ADMINISTRATOR, ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–112. ZEGERS, INC. *v.* ZEGERS. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 726.

No. 72–113. STERLING DRUG, INC. *v.* SINGER ET VIR. C. A. 7th Cir. Certiorari denied. Reported below: 461 F. 2d 288.

No. 72–122. BISHOP, EXECUTRIX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–123. GUTHRIE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 108 Ariz. 280, 496 P. 2d 580.

No. 72–125. REE ET AL. *v.* MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–126. BOYER BROS., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 555.

No. 72–127. SHERIS ET AL. *v.* SHERIS CO. ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 212 Va. 825, 188 S. E. 2d 367.

No. 72–138. ANDERSON ET AL. *v.* LECON PROPERTIES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 457 F. 2d 929.

No. 72–139. PEARSON *v.* FLORIDA; and

No. 72–140. PEARSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 254 So. 2d 573.

No. 72–143. BRATRUD *v.* DUNNING, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 414.

No. 72–144. WEST TENNESSEE ACLU ET AL. *v.* CITY OF MEMPHIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 454 F. 2d 1162.

No. 72–155. BALLANTYNE *v.* CENTRAL RAILROAD OF NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 460 F. 2d 540.

No. 72–161. ROSE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 2d 28.

No. 72–162. DODSON ET AL. *v.* GRAHAM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 144.

No. 72–170. MOORE *v.* BOARD OF TRUSTEES, CARSON-TAHOE HOSPITAL, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 88 Nev. 207, 495 P. 2d 605.

No. 72–203. LITTON BUSINESS SYSTEMS, INC. *v.* MONROE LODGE NO. 770, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO. C. A. 4th Cir. Certiorari denied.

No. 72–230. FREESE, EXECUTRIX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 455 F. 2d 1146.

No. 72–165. ENYART *v.* ASHLAND DISCOUNT CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–235. MCKY *v.* HOCHFELDER ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–5003. CORCORAN *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 72–5005. ABSHIRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5006. ROBINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 461 F. 2d 248.

No. 72–5008. ABBAMONTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5011. HOHENSEE *v.* SCIENTIFIC LIVING, INC., ET AL. Sup. Ct. Pa. Certiorari denied.

No. 72–5012. EATON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 704.

No. 72–5013. SMITH *v.* CUPP, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 1098.

No. 72–5015. PRESTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 463 F. 2d 544.

No. 72–5016. CLARK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 459 F. 2d 977.

No. 72–5017. ANDERSON *v.* PARKER, COULTER, DALEY & WHITE ET AL. C. A. 1st Cir. Certiorari denied.

No. 72–5018. BREWER *v.* UNITED STATES; and
No. 72–5061. GARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 487.

No. 72–5021. WEST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5023. RAWLS *v.* SECRETARY OF THE INTERIOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 1200.

No. 72–5025. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 293.

No. 72–5027. ZAMORA-YESCAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 1272.

No. 72–5028. SCHOEFIELD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 150 U. S. App. D. C. 380, 465 F. 2d 560.

No. 72–5029. WEAVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 2d 473.

No. 72–5032. ATKINSON *v.* NORTH CAROLINA; and
No. 72–5087. ATKINSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 281 N. C. 51 and 52, 187 S. E. 2d 702 and 703.

No. 72–5036. CHAPA *v.* 1020 N. QUINCEY STREET, LTD., ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–5037. WILSON *v.* LASH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 106.

No. 72–5040. SCHAFER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 F. 2d 856.

No. 72–5041. HILLIARD *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 72–5042. DEFARLO ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5043. WARRINER *v.* WISEHEART ET AL. C. A. 5th Cir. Certiorari denied.

No. 72–5046. FORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 F. 2d 534.

No. 72–5048. DAMERON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 294.

No. 72–5049. RAMSDELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 458 F. 2d 161.

No. 72–5051. BETHEA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5052. COX *v.* MCNAMARA ET AL. Ct. App. Ore. Certiorari denied. Reported below: 8 Ore. App. 242, 493 P. 2d 54.

No. 72–5055. COLLINS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 14 Md. App. 674, 288 A. 2d 221.

No. 72–5056. LONG *v.* ALLDREDGE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 455 F. 2d 466.

No. 72–5057. THACKER *v.* SLAYTON, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–5060. DIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1407.

No. 72–5064. REILLY *v.* CAULDWELL-WINGATE CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 465 F. 2d 1405.

No. 72–5067. WIMBERLEY ET AL. *v.* LYNCH, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 316.

No. 72–5074. PUCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5078. TROY *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied.

No. 72–5076. ESKRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1202.

No. 72–5081. GRIFFITH *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 1036.

No. 72–5083. BRADLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 529.

No. 72–5084. PEEL ET AL. *v.* NICHLOS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 1068.

No. 72–5086. CRUTCH, AKA JENKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 461 F. 2d 1200.

No. 72–5088. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–5093. GAINES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 176.

No. 72–5097. RICHERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 461 F. 2d 935.

No. 72–5098. VERDUZCO-MACIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 2d 105.

No. 72–5101. SERZYSKO *v.* CHASE MANHATTAN BANK. C. A. 2d Cir. Certiorari denied. Reported below: 461 F. 2d 699.

No. 72–5105. HARKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–5106. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5102. SPAULDING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 1346.

No. 72–5111. HARRISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 1127.

No. 72–5115. RICHARDSON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 282 N. E. 2d 95.

No. 72–5124. FOUCHEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 462 F. 2d 585.

No. 72–5129. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5140. TRAHAN *v.* CUPP, WARDEN. Sup. Ct. Ore. Certiorari denied.

No. 72–5142. BUENO *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 457.

No. 72–5153. LEAVITT *v.* HOWARD, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 462 F. 2d 992.

No. 72–5156. SANDERS ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 482 S. W. 2d 648.

No. 71–1012. NEIL, WARDEN *v.* PHILLIPS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 452 F. 2d 337.

No. 71–1065. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* Ross. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 451 F. 2d 298.

No. 71–1148. SMITH, WARDEN *v.* SMITH. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 454 F. 2d 572.

No. 71–1324. ILLINOIS *v.* RAYMOND. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 455 F. 2d 62.

No. 71–1579. BROWN, DIRECTOR, VIRGINIA DEPARTMENT OF WELFARE AND INSTITUTIONS, ET AL. *v.* WOOLFOLK ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 456 F. 2d 652.

No. 71–1588. FLORIDA *v.* ROBERSON. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 258 So. 2d 257.

No. 71–1626. MCMANN, WARDEN *v.* WRIGHT. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 460 F. 2d 126.

No. 71–1636. ELLIOTT, WARDEN *v.* TAYLOR. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 71–1695. MANUFACTURERS NATIONAL BANK OF DETROIT *v.* HARRIS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 457 F. 2d 631.

No. 72–17. LAVALLEE, CORRECTIONAL SUPERINTENDENT *v.* FITZGERALD. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 461 F. 2d 601.

No. 72–8. NEW JERSEY ET AL. *v.* WOODARD. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 71–1279. SINCLAIR *v.* SPATOCCO, AKA REED, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 452 F. 2d 1213.

No. 71–1306. PENDERGRAFT *v.* COOK, PENITENTIARY SUPERINTENDENT. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 446 F. 2d 1222.

No. 71–1359. JUDICE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 457 F. 2d 414.

No. 71–1361. SIMMS *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 P. 2d 516.

No. 71–1452. PANAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–1453. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 456 F. 2d 983.

No. 71–1469. GHASSEMI ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–1473. DEAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–1501. RUGGIRELLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 454 F. 2d 725.

No. 71–1491. TWO TRACTS OF LAND ET AL. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 456 F. 2d 264.

No. 71–1538. BLANK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 383.

No. 71–1573. PELTZMAN *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–1574. JALIL *v.* HAMPTON, CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 148 U. S. App. D. C. 415, 460 F. 2d 923.

No. 71–1603. MILNARIK ET AL. *v.* M–S COMMODITIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 457 F. 2d 274.

No. 71–1608. JOHNSON ET AL. *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 456 F. 2d 68.

No. 71–1614. LOWRY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 455 F. 2d 657.

No. 71–1624. LEWIS *v.* STRACHAN SHIPPING CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 1108.

No. 71–6431. NASH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 S. W. 2d 557.

No. 71–1646. NATIONAL LABOR RELATIONS BOARD *v.* MAY DEPARTMENT STORES CO. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 454 F. 2d 148.

No. 71–6448. BASTION *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–6476. KILBOURNE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 260 La. 569, 256 So. 2d 630.

No. 71–6490. MCINTYRE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 280 N. C. 220, 185 S. E. 2d 633.

No. 71–6500. DOHERTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–6508. SCOTT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 458 F. 2d 670.

No. 71–6554. MILLER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–6566. WARE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 457 F. 2d 828.

No. 71–6598. FUGATE *v.* GAFFNEY. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 453 F. 2d 362.

No. 71–6617. FARRIES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 1057.

No. 71–6711. LEAL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 385.

No. 71–6741. KELLY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–6760. LASCH *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 457 F. 2d 435.

No. 71–6764. EVANS *v.* MOSELEY, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 455 F. 2d 1084.

No. 71–6781. LEANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 457 F. 2d 1208.

No. 71–6825. DYKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 324.

No. 72–37. HOFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 461 F. 2d 846.

No. 72–49. FRANKEL ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 813.

No. 72–60. ERDMANN *v.* STEVENS ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 458 F. 2d 1205.

No. 72–116. RAGLAND *v.* VOLPE, SECRETARY OF TRANSPORTATION, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–108. OSTROWSKI *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 30 Ohio St. 2d 34, 282 N. E. 2d 359.

No. 72–5152. BYRD *v.* LYKES BROTHERS STEAMSHIP CO., INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 461 F. 2d 1264.

No. 71–1345. CRISMON *v.* UNITED STATES. C. A. 8th Cir. Motion to supplement petition granted. Certiorari denied.

No. 71–1394. CALIFORNIA HIGHWAY COMMISSION ET AL. *v.* LA RAZA UNIDA OF SOUTHERN ALAMEDA COUNTY ET AL. Petitioner for certiorari before judgment to C. A. 9th Cir. Motion to dispense with printing respondents' brief granted. Certiorari denied. Reported below: See 337 F. Supp. 221.

No. 71–1401. SMITH, TRUSTEE *v.* BAKER ET AL.;

No. 71–1451. IANNOTTI, TRUSTEE *v.* BAKER ET AL.; and

No. 71–1539. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE *v.* BAKER ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions. Reported below: 457 F. 2d 683.

No. 71–1429. PARTICULAR CLEANERS, INC., ET AL. *v.* COMMONWEALTH EDISON CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 457 F. 2d 189.

No. 72–6. INTERSTATE COMMERCE COMMISSION ET AL. *v.* BURLINGTON NORTHERN, INC. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 149 U. S. App. D. C. 176, 462 F. 2d 280.

No. 71–1471. PENSEC *v.* UNITED STATES. C. A. 3d Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 456 F. 2d 435.

No. 71–1483. MASELLI *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–1525. HOULE ET AL. *v.* DUVALL, COMMISSIONER OF LABOR. Sup. Ct. N. H. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 111 N. H. 333, 287 A. 2d 418.

No. 71–1620. ESTATE OF WITKOWSKI *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 451 F. 2d 1249.

No. 71–1666. HUIE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 458 F. 2d 875.

No. 72–22. GODWIN *v.* FEDERAL LAND BANK OF HOUSTON. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–23. GODWIN *v.* WOODWARD, JUDGE, ET AL. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–97. IN RE HAMPDEN VALLEY CONSTRUCTION CO., INC. C. A. 1st Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–130. CHAMBERLAIN *v.* CHAMBERLAIN. Ct. App. D. C. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 287 A. 2d 530.

No. 71–1505. ASKEW, GOVERNOR OF FLORIDA, ET AL. *v.* AEROJET-GENERAL CORP. C. A. 5th Cir. Motion to strike petitioners' reply brief and certiorari denied. Reported below: 453 F. 2d 819.

No. 71–1514. BERGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari.

No. 71–1522. ALLGOOD ET AL. *v.* BREWER ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 456 F. 2d 943.

No. 71–1605. PAN AMERICAN MATCH INC. *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 454 F. 2d 871.

No. 71–1627. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES ET AL. *v.* REA EXPRESS, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 459 F. 2d 226.

No. 71–1649. A–T–O, INC., ET AL. *v.* SPERRY RAND CORP.; and

No. 71–1700. SPERRY RAND CORP. *v.* A–T–O, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 447 F. 2d 1387 and 459 F. 2d 19.

No. 71–1628. POWER AUTHORITY OF NEW YORK *v.* FADEL ET AL. Ct. App. N. Y. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 29 N. Y. 2d 790, 281 N. E. 2d 838.

No. 71–1658. SEABOARD COAST LINE RAILROAD CO. *v.* MCDANIEL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 254 So. 2d 15.

No. 71–1680. LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. *v.* RODES, TRUSTEE IN BANKRUPTCY, ET AL.;

No. 72–21. METROPOLITAN GOVERNMENT OF NASHVILLE ET AL. *v.* RODES, TRUSTEE IN BANKRUPTCY, ET AL.;

No. 72–24. KOPPERS CO., INC. *v.* RODES, TRUSTEE IN BANKRUPTCY, ET AL.; and

No. 72–62. WILSON COUNTY, TENNESSEE *v.* RODES, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 463 F. 2d 73.

No. 71–6803. ECHEVERRIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 72–93. AMERICAN OIL CO. ET AL. *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 72–174. CITY COUNCIL OF THE CITY OF CHICAGO ET AL. *v.* COUSINS ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 466 F. 2d 830.

No. 71–1546. STAPLETON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 454 F. 2d 1210.

No. 71–6895. GRADSKY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 434 F. 2d 880.

No. 71–1596. PENNSYLVANIA ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 455 F. 2d 989.

No. 71–1604. PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS *v.* INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, AFL–CIO, ET AL. C. A. 5th Cir. Motion of Republic of Liberia for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 456 F. 2d 50.

No. 71–1617. SCHMITZ *v.* SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 71–1635. KEISTER *v.* FROEHLKE, SECRETARY OF THE ARMY, ET AL. C. A. 3d Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 471.

No. 71–1638. NELSON ET AL. *v.* DUNCAN; and

No. 72–5128. DUNCAN *v.* NELSON ET AL. C. A. 7th Cir. Motion of respondent in No. 71–1638 for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–1633. LARSEN *v.* AIR CALIFORNIA. C. A. 9th Cir. Motion to proceed as a veteran granted. Certiorari denied. Reported below: 459 F. 2d 52.

No. 71–1654. MCKINNEY *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied, it appearing that the judgment below rests upon an adequate state ground.

No. 71–1701. WHITE *v.* CENTRAL CHARGE SERVICE, INC. Ct. App. D. C. Motion for leave to proceed on typewritten papers granted. Certiorari denied. Reported below: 285 A. 2d 305.

No. 71–6305. RETTIG *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL would grant certiorari and reverse judgment. *Turner* v. *Louisiana,* 379 U. S. 466 (1965), and *Gonzales* v. *Beto,* 405 U. S. 1052 (1972). MR. JUSTICE BLACKMUN would grant certiorari, vacate judgment, and remand case. *Turner* v. *Louisiana, supra,* and *Gonzales* v. *Beto, supra.* Reported below: 50 Ill. 2d 317, 278 N. E. 2d 781.

No. 71–6415. CHERRY *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari.

No. 71–6451. HARRIS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

No. 71–6467. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

No. 71–6767. WASHINGTON *v.* JACOBS, HOSPITAL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 147 U. S. App. D. C. 366, 458 F. 2d 785.

No. 71–6528. MORNINGSTAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN would grant certiorari, vacate judgment, and remand case for further proceedings in light of the memorandum of the Solicitor General, filed June 7, 1972, stating that the prejeopardy dismissal of the indictment was appealable, not to the Court of Appeals, but directly to this Court. See *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558 (1971), and *United States* v. *Fabrizio*, 385 U. S. 263 (1966). Reported below: 456 F. 2d 278.

No. 71–6536. GUY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Motion to recuse presented to MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST by them severally denied. Reported below: 456 F. 2d 1157.

No. 72–19. WEISS ET AL. *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari and reverse judgment. *Coates* v. *City of Cincinnati*, 402 U. S. 611 (1971). Reported below: 51 Ill. 2d 113, 281 N. E. 2d 310.

No. 72–29. MATHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari and reverse judgment. *Lemke* v. *United States*, 346 U. S. 325 (1953). Reported below: 462 F. 2d 182.

No. 72–134. MCCLURE *v.* SALVATION ARMY. C. A. 5th Cir. Motion of National Organization for Women for leave to file a brief as *amicus curiae* granted. Certiorari denied for reason that petition not timely filed. Reported below: 460 F. 2d 553.

Rehearing Denied

No. 1469, October Term, 1970. HOMART DEVELOPMENT CO. *v.* DIAMOND ET AL., 402 U. S. 988, 404 U. S. 874, 405 U. S. 981. Motion for leave to file third petition for rehearing denied. MR. JUSTICE BLACKMUN would call for a response pursuant to Rule 58 (3).

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL., 407 U. S. 206 and 223;

No. 68–5006. WRIGHT *v.* BETO, CORRECTIONS DIRECTOR, 408 U. S. 934;

No. 68–5013. SCOLERI *v.* PENNSYLVANIA, 408 U. S. 934;

No. 68–5022. KRUCHTEN *v.* EYMAN, WARDEN, 408 U. S. 934;

No. 68–5023. SMITH *v.* TEXAS, 408 U. S. 934;

No. 69–3. PARK *v.* GEORGIA, 408 U. S. 935;

No. 69–5001. MOORE *v.* ILLINOIS, 408 U. S. 786;

No. 69–5006. SULLIVAN *v.* GEORGIA, 408 U. S. 935;

No. 69–5015. MANOR *v.* GEORGIA, 408 U. S. 935;

No. 69–5026. ROBLES *v.* CALIFORNIA, 406 U. S. 972;

No. 69–5027. CUMMINGS *v.* GEORGIA, 408 U. S. 935;

No. 69–5032. ARKWRIGHT *v.* GEORGIA, 408 U. S. 936;

No. 69–5039. LEE, AKA KING *v.* GEORGIA, 408 U. S. 936;

No. 69–5043. HUFFMAN *v.* BETO, CORRECTIONS DIRECTOR, 408 U. S. 936;

No. 69–5045. THACKER *v.* GEORGIA, 408 U. S. 936;

No. 69–5049. WILLIAMS *v.* GEORGIA, 408 U. S. 936;

No. 70–3. WALKER *v.* GEORGIA, 408 U. S. 936;

No. 70–295. FIRST NATIONAL CITY BANK *v.* BANCO NACIONAL DE CUBA, 406 U. S. 759;

No. 70–303. UNITED STATES *v.* KORMAN ET AL., 406 U. S. 952; and

No. 70–322. IN RE WARREN, 408 U. S. 942. Petitions for rehearing denied.

No. 70–5008. DAVID, AKA DAVIS *v.* TEXAS, 408 U. S. 937;

No. 70–5011. THAMES *v.* TEXAS, 408 U. S. 937;

No. 70–5022. TEA *v.* TEXAS, 408 U. S. 937;

No. 70–5024. FARRELL *v.* STOVALL ET AL., 407 U. S. 901;

No. 70–5031. SELLARS *v.* BETO, CORRECTIONS DIRECTOR, 408 U. S. 937;

No. 70–5044. JACKSON *v.* BETO, CORRECTIONS DIRECTOR, 408 U. S. 937;

No. 70–5064. JEFFERSON ET AL. *v.* HACKNEY, COMMISSIONER OF PUBLIC WELFARE, ET AL., 406 U. S. 535;

No. 70–5065. MILLER *v.* GEORGIA, 408 U. S. 938;

No. 70–5066. WILLIAMS *v.* SMITH, WARDEN, 408 U. S. 938;

No. 70–5067. MORALES *v.* TEXAS, 408 U. S. 938;

No. 70–5069. MCKENZIE *v.* TEXAS, 408 U. S. 938;

No. 70–5079. HENDERSON *v.* GEORGIA, 408 U. S. 938;

No. 71–249. ORR *v.* TRINTER ET AL., 408 U. S. 943;

No. 71–308. UNITED STATES *v.* BYRUM, EXECUTRIX, 408 U. S. 125;

No. 71–473. WEG *v.* UNITED STATES, 406 U. S. 962;

No. 71–506. UNITED STATES ET AL. *v.* MIDWEST VIDEO CORP., 406 U. S. 649;

No. 71–1111. MUSE *v.* NORTH CAROLINA, 406 U. S. 974;

No. 71–1147. FORD MOTOR CO. *v.* ELLIPSE CORP., 406 U. S. 948;

No. 71–1164. WATTS *v.* MYLIUS, 406 U. S. 906;

No. 71–1206. DEPUGH *v.* UNITED STATES, 407 U. S. 920;

No. 71–1214. STEIN *v.* UNITED STATES, 408 U. S. 922; and

No. 71–1227. MASTROTATARO *v.* UNITED STATES, 406 U. S. 967. Petitions for rehearing denied.

No. 71–1257. Moore et al. *v.* United States, 407 U. S. 910;

No. 71–1270. McKee *v.* United States, 407 U. S. 910;

No. 71–1280. B. Forman Co., Inc., et al. *v.* Commissioner of Internal Revenue, 407 U. S. 934;

No. 71–1295. Wenger *v.* United States, 407 U. S. 920;

No. 71–1307. Samuels *v.* United States, 407 U. S. 920;

No. 71–1330. Katz *v.* United States, 408 U. S. 923;

No. 71–1379. Watts *v.* Teagle et al., 407 U. S. 920;

No. 71–1383. Pooley *v.* Mississippi, 408 U. S. 928;

No. 71–1457. Monsanto Co. *v.* Rohm & Haas Co., 407 U. S. 934;

No. 71–1466. Gorsalitz *v.* Olin Mathieson Chemical Corp., 407 U. S. 921;

No. 71–1549. Blankner *v.* City of Chicago, 408 U. S. 931;

No. 71–5228. Curry *v.* Texas, 408 U. S. 939;

No. 71–5744. Phelan *v.* Brierley, Warden, 408 U. S. 939;

No. 71–5972. Esgate *v.* English, Sheriff, 406 U. S. 959;

No. 71–6025. Hood *v.* Burnett et al., 405 U. S. 1068;

No. 71–6068. Stanley *v.* Texas, 408 U. S. 939;

No. 71–6158. Foggy *v.* Arizona et al., 407 U. S. 915;

No. 71–6164. Levy *v.* United States District Court for the Southern District of Florida et al., 406 U. S. 916;

No. 71–6183. Matthews *v.* Texas, 408 U. S. 940;

No. 71–6210. Ansley *v.* Georgia, 408 U. S. 929; and

No. 71–6256. Alers *v.* Superior Court of Puerto Rico, 406 U. S. 914. Petitions for rehearing denied.

No. 71–6342. WALTON *v.* VIRGINIA, 408 U. S. 925;

No. 71–6344. QUATTRUCCI *v.* UNITED STATES, 406 U. S. 960;

No. 71–6391. FREEMAN *v.* UNITED STATES, 406 U. S. 975;

No. 71–6400. NASH *v.* AMERADA HESS CORP. ET AL., 406 U. S. 948;

No. 71–6418. KRIKMANIS *v.* WHITE, MAYOR OF BOSTON, ET AL., 406 U. S. 961;

No. 71–6443. CLARK *v.* JOHNSON ET AL., 407 U. S. 913;

No. 71–6452. ECKERT *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL., 406 U. S. 970;

No. 71–6474. ERWING *v.* UNITED STATES, 407 U. S. 922;

No. 71–6519. BLAUNER *v.* UNITED STATES, 407 U. S. 920;

No. 71–6538. HUCKABAY *v.* WOODMANSEE, JUDGE, ET AL., 407 U. S. 926;

No. 71–6573. GERARDI *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL., 407 U. S. 919;

No. 71–6578. PILLIS ET AL. *v.* GOVERNOR OF VIRGINIA ET AL., 407 U. S. 923;

No. 71–6600. IN RE WAYLAND, 407 U. S. 924; and

No. 71–6630. PILLIS ET AL. *v.* STATE BOARD OF ELECTIONS ET AL., 408 U. S. 927. Petitions for rehearing denied.

No. 68–5008. MILLER *v.* MARYLAND, 408 U. S. 934;

No. 69–5013. MEFFORD *v.* WARDEN, MARYLAND PENITENTIARY, 408 U. S. 935;

No. 69–5025. KELBACH ET AL. *v.* UTAH, 408 U. S. 935; and

No. 70–5046. JOHNSON *v.* MARYLAND, 408 U. S. 937. Motions for leave to file petitions for rehearing denied.

No. 70–5062. CUNNINGHAM *v.* WARDEN, MARYLAND PENITENTIARY, 408 U. S. 938;

No. 70–5326. ARRINGTON *v.* MARYLAND, 408 U. S. 938;

No. 71–5008. BARTHOLOMEY *v.* MARYLAND, 408 U. S. 938;

No. 71–5192. TULL *v.* WARDEN, MARYLAND PENITENTIARY, 408 U. S. 939;

No. 71–5197. STRONG *v.* MARYLAND, 408 U. S. 939;

No. 71–5689. NACHBAUR *v.* HERMAN, 405 U. S. 931;

No. 71–6109. NEGRON *v.* AGNEW, STATE HOSPITAL DIRECTOR, 406 U. S. 968;

No. 71–6120. SHIELDS *v.* UNITED STATES, 406 U. S. 910;

No. 71–6137. GILMORE *v.* MARYLAND, 408 U. S. 940;

No. 71–6341. DIGGS *v.* UNITED STATES, 406 U. S. 952;

No. 71–6242. BRADLEY *v.* WINGO, WARDEN, 406 U. S. 915;

No. 71–6257. OWINGS *v.* SECRETARY OF THE AIR FORCE, 406 U. S. 926;

No. 71–6480. TILLI *v.* DAVIS ET AL., 407 U. S. 908. Motions for leave to file petitions for rehearing denied.

No. 71–183. AGUA CALIENTE BAND OF MISSION INDIANS ET AL. *v.* COUNTY OF RIVERSIDE, CALIFORNIA, 405 U. S. 933, 1033;

No. 71–5428. LIPSCOMB *v.* UNITED STATES, 404 U. S. 1021, 406 U. S. 911; and

No. 71–5531. LIPSCOMB *v.* WARDEN, ATLANTA PENITENTIARY, ET AL., 404 U. S. 1005, 1064. Motions for leave to file second petitions for rehearing denied.

No. 71–288. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* TATUM ET AL., 408 U. S. 1. Petition for rehearing denied.*

*[REPORTER'S NOTE: See also *ante*, p. 824.]

No. 69–5003. FURMAN *v.* GEORGIA;

No. 69–5030. JACKSON *v.* GEORGIA; and

No. 69–5031. BRANCH *v.* TEXAS, 408 U. S. 238. Motion of Committee of State Chief Justices (retired) for leave to file a brief as *amicus curiae* in support of rehearing granted. Petitions for rehearing denied.

No. 70–5039. FUENTES *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL., 407 U. S. 67. Motion of National Consumer Law Center, Inc., for leave to file a brief as *amicus curiae* in opposition to petitions for rehearing denied. Petitions for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of these petitions and this motion.

No. 70–5138. PARHAM ET AL. *v.* CORTESE ET AL., 407 U. S. 67. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 71–315. DEEPSOUTH PACKING CO., INC. *v.* LAITRAM CORP., 406 U. S. 518. Motion for leave to supplement petition for rehearing granted. Petition for rehearing denied.

No. 71–573. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* NELMS ET AL., 406 U. S. 797. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 71–1017. GRAVEL *v.* UNITED STATES; and

No. 71–1026. UNITED STATES *v.* GRAVEL, 408 U. S. 606. Motion to recuse, presented to MR. JUSTICE REHNQUIST, by him denied.* Petition for rehearing denied.

No. 71–1169. MOBIL OIL CORP. *v.* MATZEN ET AL. Petition for rehearing denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

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*[REPORTER'S NOTE: See also *ante*, p. 839 n. 7.]

No. 71–1179. AMOCO PRODUCTION CO. *v.* WAECHTER ET AL.;

No. 71–1188. CITIES SERVICE OIL CO. *v.* MATZEN ET AL.; and

No. 71–1326. FEDERAL POWER COMMISSION *v.* MOBIL OIL CORP. ET AL., 406 U. S. 976. Petitions for rehearing denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 71–1232. LANDERMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 406 U. S. 967. Motion to dispense with printing petition for rehearing granted. Motion for leave to file petition for rehearing denied.

No. 71–1291. CHANDLER, U. S. DISTRICT JUDGE *v.* BATTISTI, CHIEF JUDGE, U. S. DISTRICT COURT, 406 U. S. 956. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 71–1411. LII *v.* SIDA OF HAWAII, INC., ET AL., 408 U. S. 930. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 71–1435. STATE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA ET AL. *v.* ZARATE ET AL., 407 U. S. 918. Petition for rehearing or in the alternative for clarification of lower court opinion denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning December 4, 1972, and ending December 8, 1972, 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 12, 1972

Dismissal Under Rule 60

No. 72–273. Northern Acceptance Trust 1065 *v.* Brinkerhoff et al. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

October 16, 1972

Affirmed on Appeal

No. 71–1447. Davidson, Secretary, Maryland Department of Employment and Social Services, et al. *v.* Francis et al. Appeal from D. C. Md. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 340 F. Supp. 351.

No. 71–1547. C & H Transportation Co., Inc., et al. *v.* Interstate Commerce Commission; and

No. 72–149. United States *v.* Interstate Commerce Commission (International Transport, Inc., Case). Affirmed on appeal from D. C. W. D. Mo. Reported below: 337 F. Supp. 985.

No. 71–6774. Simpson *v.* Oates et al. Affirmed on appeal from D. C. E. D. Cal.

No. 72–25. American Yearbook Co., Inc. *v.* Askew, Governor of Florida, et al. Affirmed on appeal from D. C. M. D. Fla. Mr. Justice Brennan and Mr. Justice White would note probable jurisdiction and set case for oral argument. Mr. Justice Blackmun took no part in the consideration or decision of this case. Reported below: 339 F. Supp. 719.

No. 72–150. United States *v.* Interstate Commerce Commission (Ace Doran Hauling Co. Case). Affirmed on appeal from D. C. W. D. Pa. Mr. Justice Douglas would note probable jurisdiction and set case for oral argument. Reported below: 345 F. Supp. 743.

Appeals Dismissed

No. 71–1408. AERO MAYFLOWER TRANSIT CO., INC., ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. S. D. Ind.; and

No. 71–1419. HUTTER ET UX. *v.* KORZEN. Appeal from Sup. Ct. Ill. Motion to supplement jurisdictional statement in No. 71–1408 granted. Appeals dismissed for failure to docket cases within time prescribed by Rule 13 (1) of the Rules of this Court.

MR. JUSTICE DOUGLAS, dissenting.

These cases, here on appeal, are dismissed by the Court, as being out of time under our Rules. I dissent from that disposition.

We held in *United Public Workers* v. *Mitchell,* 330 U. S. 75, 84–86, that the Rules of this Court determine the effect of untimely docketing. Only the filing of the notice of appeal is jurisdictional. Docketing is prescribed by Rule 13 (1), and this Court in case after case has in its discretion waived the strictures of that rule. Up to now it has, indeed, been more concerned with disposing of cases as justice may require rather than finding technical ways to avoid decision of knotty questions.

In the *Aero Mayflower Transit Co.* case the three-judge court entered its judgment on December 29, 1971, and Aero Mayflower filed its notice of appeal on February 14, 1972, within the 60-day period prescribed by 28 U. S. C. § 2101 (a) but did not docket its case within the subsequent 60-day period. Instead, it filed its jurisdictional statement on April 28, 1972, 14 days out of time.

In the *Hutter* case the notice of appeal was filed on February 17, 1972, following denial by the Illinois Supreme Court of Hutter's motion to reconsider on January 18, 1972. This was timely under § 2101 (c). Dock-

eting on May 1, 1972, however, did not occur within the period provided by Rule 13 (1), but was 14 days late.

The delay in each of these appeals was much shorter than that which occurred in *Johnson* v. *Florida,* 391 U. S. 596, where we entertained an appeal that was not docketed until 56 days after the time provided in Rule 13 (1) expired. 391 U. S., at 598 n.

In *Durham* v. *United States,* 401 U. S. 481 (1971), the Court considered a petition for certiorari in which the opinion of the Court of Appeals was filed on November 12, 1969, rehearing was denied on March 5 1970, and the petition was filed on September 26, 1970. Under Rule 22 (2) that applied in that case, the petition was more than five months out of time. Only MR. JUSTICE BLACKMUN dissented.

Our Rules are only guidelines for litigants and we do disservice to the administration of justice by exalting them as Baron Parke doubtless would have done. Our experience with our Rules shows that lateness in docketing may be due to slow delivery of the mail (which is even worse today than it was 10 years ago), to snowstorms [1] that stop or slow up all traffic, to sickness of

[1] *Teague* v. *Regional Comm'r of Customs,* 394 U. S. 977, 984, was a case in which a petition for certiorari was filed two days after the 90-day statutory period had elapsed, the delay being caused by a snowstorm. Justice Black wrote in dissent:

"It might be well to imagine for a moment what would have happened if some Senator or Representative had suggested an amendment to 'clarify' the proposed § 2101 (c) by stating that a petition filed after the 90-day period will not be out of time 'when the delay is caused solely by an interruption of the mail service due to snowstorms.' It is conceivable that more than a few members of Congress would consider such an amendment an insult to this Court's intelligence and would feel it unnecessary to lead this Court by the hand on such matters of elementary common sense. It is impossible, however, to believe that any of them would have regarded an amendment to the opposite effect as properly reflecting the purpose of the statute, and yet this opposite amendment, ruling a peti-

counsel, or to other accidents that make untimely docketing that normally would be on time. Before we penalize litigants for late docketing of appeals we should have a case that shows palpable neglect.[2]

No. 71–1554. UNITED STATES CHAMBER OF COMMERCE *v.* FRANCIS ET AL. Appeal from D. C. Md. Motion of appellee Wright for leave to proceed *in forma pauperis* granted. Motion for consolidation with No. 71–1447 [*Davidson* v. *Francis, supra*] and for other relief denied. Appeal dismissed for want of jurisdiction. Reported below: See 340 F. Supp. 351.

No. 71–6740. LLOYD ET AL. *v.* THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY. Appeal from Sup. Ct. Utah dismissed, it appearing that the judgment below rests upon an adequate state ground. Reported below: 27 Utah 2d 322, 495 P. 2d 1262.

No. 72–189. KISLEY, TRADING AS FALLS CHURCH HEALTH CENTER, ET AL. *v.* CITY OF FALLS CHURCH ET AL. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 212 Va. 693, 187 S. E. 2d 168.

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tion out of time under these circumstances, is precisely the amendment that the Court today tacitly engrafts onto § 2101 (c).

"I would not adopt any such pointlessly harsh interpretation of the statute, one that furthers no congressional objective whatsoever and denies litigants their opportunity to seek review in this Court on the basis of atmospheric events wholly beyond their control. This is a return to all the cruel technicalities of common-law pleading, and then some. . . ."

[2] In many of our cases we have entertained petitions, though docketed after expiration of the time prescribed in our Rules: *Smith* v. *Mississippi,* 373 U. S. 238; *Arnold* v. *North Carolina,* 376 U. S. 773; *Mazzie* v. *United States,* 375 U. S. 32; *Robison* v. *United States,* 390 U. S. 198; *Nelson* v. *United States,* 392 U. S. 303; *Fuller* v. *Alaska,* 393 U. S. 80; *Banks* v. *California,* 382 U. S. 420; *Long* v. *Parker,* 384 U. S. 32; *Serio* v. *United States,* 392 U. S. 305.

No. 72–5252. HOWARD *v.* ALLEN. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 30 Ohio St. 2d 130, 283 N. E. 2d 167.

No. 72–5161. SAFFIOTI *v.* UNITED STATES. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–5294. HILL ET AL. *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 51 Ill. 2d 418, 283 N. E. 2d 225.

Certiorari Granted—Vacated and Remanded

No. 72–5026. GAGLIE *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of position presently asserted by the Government.

Miscellaneous Orders

No. A–294 (72–492). FRIED *v.* UNITED STATES. C. A. 2d Cir. Application for continuance of bail and stay of mandate presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–349. STONE ET AL. *v.* MAINE. Sup. Jud. Ct. Maine. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 294 A. 2d 683.

No. A–360 (72–730). MARKLE ET AL. *v.* ABELE ET AL. D. C. Conn. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. MR. JUSTICE DOUGLAS would deny the application. Reported below: 351 F. Supp. 224.

No. A–377. Board of Education of Memphis City Schools et al. *v.* Northcross et al. D. C. W. D. Tenn. Application for stay presented to Mr. Justice Stewart, and by him referred to the Court, denied. Reported below: See 341 F. Supp. 583.

No. A–393. Slobodian *v.* New Jersey. Sup. Ct. N. J. Application for bail presented to Mr. Justice Brennan, and by him referred to the Court, denied.

No. 9, Orig. United States *v.* Louisiana et al. (Louisiana Boundary Case). Motion of State of Louisiana for entry of a supplemental decree (No. 4) as to the United States granted [see *ante,* p. 17]. Motion of the United States for leave to file an account of funds released from impoundment pursuant to supplemental decree (No. 3) of December 20, 1971 [404 U. S. 388], granted. Mr. Justice Marshall took no part in the consideration or decision of these motions.

No. 58, Orig. American Party et al. *v.* New York et al. Motion for temporary restraining order denied.

No. 70–2. United States *v.* 12 200-ft. Reels of Super 8mm. Film et al. (Paladini, Claimant). Appeal from D. C. C. D. Cal. [Probable jurisdiction noted, 403 U. S. 930.] Motion of First Amendment Lawyers' Assn. for leave to file untimely brief as *amicus curiae* in support of appellees granted. Motion of Joel Hirschhorn for leave to participate in oral argument as *amicus curiae* in support of appellees denied.

No. 70–40. Doe et al. *v.* Bolton, Attorney General of Georgia, et al. Appeal from D. C. N. D. Ga. [Restored to calendar, 408 U. S. 919.] Motion of appellants for leave to present late authorities granted.

No. 72–5238. Kochel *v.* Maryland. Motion for leave to file petition for writ of habeas corpus denied.

No. 71–653. GIBSON ET AL. *v.* BERRYHILL ET AL. Appeal from D. C. M. D. Ala. [Probable jurisdiction noted, 408 U. S. 920.] Motion to dispense with printing appendix granted.

No. 71–718. MCGINNIS, CORRECTION COMMISSIONER, ET AL. *v.* ROYSTER ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 405 U. S. 986.] Motion to permit G. Jeffery Sorge, Esquire, to argue *pro hac vice* in place of James J. McDonough for appellees granted.

No. 71–1134. ROADEN *v.* KENTUCKY. Ct. App. Ky. [Certiorari granted, 406 U. S. 905.] Motion of Charles H. Keating, Jr., for leave to file a brief as *amicus curiae* granted. Motion of First Amendment Lawyers' Assn. for leave to file untimely brief as *amicus curiae* in support of petitioner denied. Motion of Joel Hirschhorn for leave to participate in oral argument as *amicus curiae* in support of petitioner denied.

No. 71–1136. TILLMAN ET AL. *v.* WHEATON-HAVEN RECREATION ASSN., INC., ET AL. C. A. 4th Cir. [Certiorari granted, 406 U. S. 916.] Motion of respondent McIntyre for additional counsel to participate in oral argument granted but motion for additional time for oral argument denied.

No. 71–1192. GOLDSTEIN ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. [Certiorari granted, 406 U. S. 956.] Motions of American Federation of Musicians et al. and Recording Industry Association of America, Inc., for leave to file briefs as *amici curiae* granted.

No. 72–549. SCHOOL BOARD OF RICHMOND, VIRGINIA, ET AL. *v.* STATE BOARD OF EDUCATION OF VIRGINIA ET AL. C. A. 4th Cir. Motion to advance and for *pendente lite* relief denied. Reported below: 462 F. 2d 1058.

No. 71–1315. ALEXANDER ET AL. *v.* VIRGINIA. Sup. Ct. Va. [Certiorari granted, 408 U. S. 921.] Motion of First Amendment Lawyers' Assn. for leave to file untimely brief as *amicus curiae* in support of petitioners granted. Motion of Joel Hirschhorn for leave to participate in oral argument as *amicus curiae* in support of petitioners denied.

No. 72–5038. CHAVEZ ET AL. *v.* FRESHPICT FOODS, INC., ET AL. C. A. 10th Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 456 F. 2d 890.

Probable Jurisdiction Noted

No. 71–1523. HUNT *v.* MCNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL. Appeal from Sup. Ct. S. C. Probable jurisdiction noted. Reported below: 258 S. C. 97, 187 S. E. 2d 645.

No. 72–75. GEORGIA ET AL. *v.* UNITED STATES. Appeal from D. C. N. D. Ga. Probable jurisdiction noted. Reported below: 351 F. Supp. 444.

No. 71–1583. BROWN, SECRETARY OF STATE OF CALIFORNIA *v.* CHOTE. Appeal from D. C. N. D. Cal. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 342 F. Supp. 1353.

Certiorari Granted

No. 71–1005. MICHIGAN *v.* PAYNE. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 386 Mich. 84, 191 N. W. 2d 375.

No. 71–1585. UNITED STATES *v.* RUSSELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 459 F. 2d 671.

No. 72–95. TOLLETT, WARDEN *v.* HENDERSON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 459 F. 2d 237.

No. 71–6732. CHAFFIN *v.* STYNCHCOMBE, SHERIFF. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 455 F. 2d 640.

Certiorari Denied. (See also Nos. 72–5161 and 72–5294, *supra.*)

No. 71–1566. BLASECKI ET AL. *v.* CITY OF DURHAM, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 456 F. 2d 87.

No. 71–1572. BOWLING ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–1618. OTTO *v.* KOSOFSKY ET AL. Ct. App. Ky. Certiorari denied. Reported below: 476 S. W. 2d 626.

No. 71–1705. BOMBACINO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 17, 280 N. E. 2d 697.

No. 71–5601. SWEENEY *v.* COUNTY OF MONROE ET AL. Ct. App. N. Y. Certiorari denied.

No. 71–6185. MALLARD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 490 P. 2d 1383.

No. 71–6298. GABRIELSON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 192 N. W. 2d 792.

No. 71–6326. BLAKE *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 71–6644. VANDERBURGH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 71–6517. DOTSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 260 La. 471, 256 So. 2d 594.

No. 71–6724. PATTERSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 28 Ohio St. 2d 181, 277 N. E. 2d 201.

No. 71–67[illegible]. BOONE ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–6739. EVANS *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 71–6765. FINCHER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 212 Va. 552, 186 S. E. 2d 75.

No. 71–6768. DAVIS *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6839. GOMORI *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–6856. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6872. LOVINGOOD *v.* ROSS, PRISON FARM SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–6898. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6908. HOLIDAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 457 F. 2d 912.

No. 71–6909. PICKERELL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 71–6923. RONSTADT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6925. HANDLEY ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 229, 282 N. E. 2d 131.

No. 72–40. GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 F. 2d 1000.

No. 72–54. PLAQUEMINE EQUIPMENT & MACHINE CO. ET AL. *v.* NEUMAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 1241.

No. 72–74. BARRETT ET AL. *v.* KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: See 331 F. Supp. 266.

No. 72–82. TOMEO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 459 F. 2d 445.

No. 72–118. KROPKE *v.* UNITED STATES;
No. 72–119. STAPLETON *v.* UNITED STATES;
No. 72–120. KUNZ *v.* UNITED STATES;
No. 72–121. MURPHY *v.* UNITED STATES; and
No. 72–128. STERNKOPF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 462 F. 2d 1205.

No. 72–131. GRANT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 462 F. 2d 28.

No. 72–141. GREENSEID ET AL. *v.* STEWART, SUPERINTENDENT OF INSURANCE. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 730, 284 N. E. 2d 152.

No. 72–142. RUISI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 153.

No. 72–152. MING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 1000.

No. 72–153. GNOSS ET AL. *v.* YOUNG ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 3d 18, 496 P. 2d 445.

No. 72–156. ZARATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 2d 514.

No. 72–168. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–183. CRAWFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 597.

No. 72–186. MUNCHAK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 1407.

No. 72–188. MARTINEZ-VILLANUEVA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 2d 1336.

No. 72–194. LANDIS TOOL CO., DIVISION OF LITTON INDUSTRIES *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 460 F. 2d 23.

No. 72–197. WOMACK, EXECUTOR, ET AL. *v.* FAIR ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: —— Tenn. ——, 482 S. W. 2d 555.

No. 72–199. ROMANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 1198.

No. 72 206. COLQUITT COUNTY BOARD OF EDUCATION ET AL. *v.* HARRINGTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 193.

No. 72–5022. WRIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 461 F. 2d 586.

No. 72–209. VLAHAKIS *v.* SCHOSTAK ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 133 Ill. App. 2d 690, 274 N. E. 2d 655.

No. 72–211. LEWRON TELEVISION, INC. *v.* UNITED NETWORK, INC., FORMERLY JAYMAC, INC. C. A. 2d Cir. Certiorari denied. Reported below: 459 F. 2d 556.

No. 72–5033. BULLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 17.

No. 72–5047. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1406.

No. 72–5062. HURD *v.* SLAUGHTER ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5071. VON PERRY *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 879.

No. 72–5077. SMITH *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 72–5085. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5091. BENNETT *v.* RUNDLE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–5094. DOBBS *v.* ANDERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 72–5096. PATURSO *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5103. WION *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5104. WION *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5108. BRUDNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 2d 376.

No. 71–1386. OHIO AFL–CIO, UNITED AUTOWORKERS OF OHIO, ET AL. *v.* INSURANCE RATING BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 451 F. 2d 1178.

MR. JUSTICE DOUGLAS, dissenting.

I would grant certiorari in this case.

The District Court dismissed petitioners' complaint, which alleged that respondents had engaged in an illegal combination and conspiracy in the fixing of automobile insurance premiums in violation of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.*, for lack of subject matter jurisdiction due to the exemption of the insurance industry from antitrust laws by § 2 of the McCarran-Ferguson Act, 59 Stat. 34, 15 U. S. C. § 1012.

The McCarran-Ferguson Act provides, in part, that the Sherman Antitrust Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." In *FTC* v. *National Casualty Co.*, 357 U. S. 560, 563, after examining the statute and its legislative history, we held that federal regulation as to advertising practices was prohibited in those States which were regulating such practices under their own laws. We indicated, however, that the grant of exclusive regulatory power to the State would be ineffective if the state statutory provisions which purported to regulate were a "mere pretense" of regulation.

In the instant case the petitioners allege that the state statutory scheme is such a "mere pretense" of regulation. This allegation is based on the following factors: Although rating organizations are required to be examined at least once every five years under the statutory scheme, the state Department of Insurance has examined only two rate bureaus in the last five years, and only six examinations have been conducted in the last 20

years. The Insurance Rating Board, composed of 129 insurance companies which write approximately 17% of the automobile liability insurance and approximately 22% of the physical damage insurance in the State, is permitted under the statutory scheme to determine the amount of any rate increase and institute that increase at a date picked by it. Review of that determination may occur only upon the challenge of the state Department of Insurance, which has never challenged an increase, and which in fact does not even employ an actuary so as to be able to examine the increase.

A governmental regulatory agency which, in contradiction of a statutory direction, only rarely exercises its examinatory powers; which has never exercised its power of review of rate increases; and which does not even employ the personnel which would be necessary to exercise the power would prima facie seem to be no more than a "mere pretense" of regulation. Perhaps a full hearing would show otherwise. But enough has been tendered to make the trial court's dismissal of the complaint improper and this petition a clear grant.

No. 72-5109. HILL *v.* GAUVIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 511.

No. 72–5112. BRYANT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–5113. ENOCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 1382.

No. 72–5114. TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–5121. DONOVAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5122. WILKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 877.

No. 71–1532. CHONGRIS ET AL. *v.* CORRIGAN ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 29 Ohio St. 2d 39, 278 N. E. 2d 658.

MR. JUSTICE DOUGLAS, dissenting.

In 1946, this Court articulated the standard to be applied in testing flight patterns over private property against the Just Compensation Clause of the Fifth Amendment. *United States* v. *Causby,* 328 U. S. 256. We held that "the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it." We noted that the important factor is whether the intrusion impinges on "the owner's full enjoyment of the property and . . . his exploitation of it." *Id.,* at 264–265. And, in 1962, we reiterated that standard. *Griggs* v. *Allegheny County,* 369 U. S. 84.

State after State, in the years since *Causby,* has come to the conclusion that airport zoning schemes that impose height restrictions on the use of the land located below the flight paths of approaching and departing aircraft are unconstitutional efforts to avoid the costs properly incident to the use of airport facilities, and that the imposition of such regulations upon private property constitutes a "taking" prohibited by the Constitution. *Yara Engineering Corp.* v. *Newark,* 132 N. J. L. 370, 40 A. 2d 559 (1945); *Ackerman* v. *Port of Seattle,* 55 Wash. 2d 400, 348 P. 2d 664 (1960); *Indiana Toll Road Comm'n* v. *Jankovich,* 244 Ind. 574, 193 N. E. 2d 237 (1963); *Roark* v. *Caldwell,* 87 Idaho 557, 394 P. 2d 641 (1964); *Jackson Municipal Airport Authority* v. *Evans,* 191 So. 2d 126 (Miss. 1966); and *Sneed* v. *County of Riverside,* 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963). Lower Ohio courts agreed. *Hageman* v. *Bd. of Trustees,* 20 Ohio App. 2d 12, 251 N. E. 2d 507 (Montgomery Co., 1969); 23 Ohio Misc. 93, 259 N. E. 2d 162 (Common Pleas, Montgomery Co., 1968).

Yet a quarter of a century after *Causby,* the Supreme Court of Ohio has sustained the Airport Zoning Statutes contained in Chapter 4563 of the Ohio Revised Code.

It accomplishes this tour de force through the application of *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365. Reasoning that zoning regulations always involve some restriction on the uses to which land may be put, the court balanced "the loss of use against the benefits to society thus obtained." *Village of Willoughby Hills* v. *Corrigan,* 29 Ohio St. 2d 39, 46, 278 N. E. 2d 658, 663 (1972). It is a nice question when police power comes to an end as a justification for public taking of private property. Is it when the public at large is benefited at the expense of an owner of private property who has refrained from using his land in a way that is not obnoxious to his neighbors? Arguably eminent domain principles then apply; and, although the public may force upon the property owner the public need for his land, compensation is due him.

The Court's denial of the petition for certiorari in this case suggests that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 416 (Holmes, J.).

The present case tenders some of the issues present when the government seeks a scenic easement so as to bar the erection of towers or other high structures. We said in *Causby:*

> "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value." 328 U. S., at 262.

Whether there has been a diminution in value of petitioners' property is not clear from the present record. Whether the zoning regulations themselves constitute a taking is necessarily involved, as is the question of the appropriate remedy for an aggrieved property owner.

These are all important questions of public importance throughout the country and lead me to conclude that the petition should be granted and the case put down for oral argument.

No. 72–5123. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 83.

No. 72–5127. LACAZE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 1075.

No. 72–5130. SALAZAR *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 72–5131. LEWIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 459 F. 2d 315.

No. 71–1537. NEBRASKA STATE BOARD OF EDUCATION ET AL. *v.* SCHOOL DISTRICT OF HARTINGTON, AKA SCHOOL DISTRICT NO. 8, CEDAR COUNTY. Sup. Ct. Neb. Certiorari denied. Reported below: 188 Neb. 1, 195 N. W. 2d 161.

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

I would grant this petition for certiorari and put the case down for oral argument. It involves alleged violations of the First Amendment which are applicable to the States by reason of the Fourteenth Amendment; and the violations, on the papers before us, seem to me to be of the kind that we struck down in *Lemon* v. *Kurtzman,* 403 U. S. 602.

What happened was this: The school district made application to the State for financial aid in instructing stu-

dents in remedial reading and remedial mathematics. The application stated that the school district was leasing the facilities of the Cedar Catholic High School as a place to conduct this project. The students from both the public school and the private school would attend these classes.

The lease provided that no objects, pictures, or other articles having a religious connotation would be visible in the classroom.

This action was instituted in the Nebraska courts when the state authorities refused to undertake the project. The Supreme Court of Nebraska, by a divided vote, approved the project over the objection that it violated the First Amendment. 188 Neb. 1, 195 N. W. 2d 161. Under the project as approved, state funds will be channeled into this parochial school. In this case, as in *Lemon* v. *Kurtzman,* the State is supplying funds for instruction in parochial schools leading to a degree of entanglement between government and religion which runs counter to our opinions.

If a State can finance two courses in a parochial school, there is no reason and logic why it cannot finance the teaching and learning of an entire curriculum. In *Sanders* v. *Johnson,* 403 U. S. 955, we affirmed a district court decision (319 F. Supp. 421) that held invalid a program whereby the State had contracted with parochial schools for the "purchase" by the State of "secular educational services" to be supplied to the children. The contract in that case is different only in scope and in form from the present one. There is no provision in the lease for surveillance of the use of the premises except for making sure that no objects, pictures, or other articles having a religious connotation are present in the classrooms. Yet, those teaching in a parochial school may be members of that faith or under compelling pressures. In light of the command of the First Amendment, the State

in each case must see that all courses of instruction are confined to the "secular" area and do not trench on religious tenets or doctrine. To police this statutory standard would require the exercise of broad powers of surveillance by the State. As stated by the District Court in the *Sanders* case:

> "In the present case, the parochial school function which is funded is the entirety of secular 'instruction' itself. In order to confine assistance to this rather amorphous use, the Act would introduce state supervision into virtually every nook and cranny of a school's administration. Perhaps this is logically necessary. If a conscientious public official is to be certain that tax dollars are spent only for activities which are proper secular subcategories of the school's instruction, he must engage in a program of inspecting and monitoring which even the copious specifications of the Act and its open-ended supplementary regulations only begin to suggest." 319 F. Supp., at 431.

The District Court went on to say:

> "[T]he detailed plan which the legislature has enacted to separate, purchase, 'promote,' and regulate the contents of secular instruction goes well beyond a theoretical 'subsidy' and brings the potentiality of mutually-damaging involvement to life. Public officials must investigate curricula, materials, and manner of teaching in detail, case by case; oversee the training of teachers; and audit financial records. By doing so, they might disentangle the last thread of religious doctrine from all secular instruction; but by this very process, they would certainly enmesh the state in continuous conflict with churches over the effectiveness with which governmental investigating and policing machinery would be operated." *Id.*, at 432.

The necessity for surveillance is necessarily implied.* Denial of certiorari here does not appear consistent with our affirmance of *Sanders*. These considerations lead me to vote to take this case and put it down for oral argument so that the entire plan may be carefully examined against the requirements of the First Amendment.

MR. JUSTICE BRENNAN.

The situation, as I see it, is not that portrayed in my Brother DOUGLAS' dissent. Hartington, Nebraska, is a small town [1] where neither the public nor the parochial schools offered remedial reading and remedial mathe-

*That was the view of Chief Justice White, joined by Justice Spencer of the Supreme Court of Nebraska, as stated in his dissenting opinion:

"In summary, it seems to me, over and beyond the other reasons touched on in this dissent, that this act, this scheme, this procedure requires that the state will be amidst the daily affairs of a religious school. It must be remembered that we are not dealing with something as simple as a bus ride, or a textbook, or a mere lease agreement; we have here an innovative program of noble purpose and it carries with it those highly feared risks of conflict and divisiveness which history has shown follow any close proximity between government and religion.

"If this statute, and the state action asked to be taken under it, is constitutionally permissible, then I see no obstruction or impediment to the state and the federal government taking complete and literal control of the contracting schools and making their entire secular curricula part of its public system for all purposes, including the hiring of teachers, the renting of the physical facilities, and perhaps the admission of students. Such action plainly runs afoul of the state and federal Constitutions. We must remember that the real test of constitutionality is not what is actually done under the act but what the act authorizes." 188 Neb. 1, 13, 195 N. W. 2d 161, 168.

[1] The population of Hartington, according to the 1970 census, is 1,581. The Hartington public schools had a total enrollment of 572 pupils during the 1969–1970 school year.

matics courses.[2] The school district decided to avail itself of the benefits of the federally financed courses in such subjects provided under the Federal Elementary and Secondary Education Act of 1965, 79 Stat. 27, and submitted a grant proposal, as required by that Act, adequate to provide the courses for all educationally deprived children within the school district—91 public school and 48 parochial school children. But there was a problem of space because there were no available classrooms in the public schools.[3] There were, however, two unused classrooms in the Hartington Cedar Catholic High School and the school district proposed to lease one classroom full time and the second classroom half time at an annual rent of $200 for the full-time classroom and $100 for the half-time classroom. The lease provided that the classrooms would be used only for carrying on the project under the Federal Elementary and Secondary Education Act of 1965; that the Hartington School District would have full control over the classrooms and the educational programs; and that no objects, pictures, or other articles having a religious meaning or connotation would be in the classrooms. The lease represented the complete extent of the relations between the school district and the parochial school. There is not the slightest suggestion that this was a subterfuge to make a subsidy to the

[2] The lease agreement states that:

"[T]he above described project for said courses does not and will not duplicate or replace, either in whole or in part, any course of study in the present curricula of either the public schools or the private schools in Hartington and its environs . . . ."

[3] The Superintendent of the Hartington Public Schools, in a letter to the State Board of Education, indicated that a consolidation of rural school districts into the Hartington School District had increased total enrollment in Hartington's public schools from 394 students in 1967–1968 to 572 students in 1969–1970. As a consequence, the school district was making preparations to conduct three kindergarten classes in the city auditorium. R. 10.

parochial school, or anything except an arrangement motivated solely by the lack of space in the public schools. Thus, the school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration. My Brother DOUGLAS relies on *Sanders* v. *Johnson,* 403 U. S. 955 (1971), aff'g 319 F. Supp. 421 (Conn. 1970). The situation there is poles apart from this. That was an undisguised subsidy in the form of "purchasing" "secular educational services" from parochial schools and was patently invalid under our decision in *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* and *Robinson* v. *DiCenso,* 403 U. S. 602 (1971). I have heretofore expressed my view that the First Amendment does not render unconstitutional "every vestige, however slight, of cooperation or accommodation between religion and government." *Abington School District* v. *Schempp,* 374 U. S. 203, 294 (1963) (concurring opinion). The accommodation involved in this case would not trespass beyond permissible bounds. For this reason, I join in denying the petition for certiorari.

No. 71–1582. FELTS *v.* SEABOARD COAST LINE RAILROAD CO.; and

No. 72–163. ADKINS *v.* KELLY'S CREEK RAILROAD CO. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision in No. 71–1582. Reported below: No. 72–163, 458 F. 2d 26.

MR. JUSTICE DOUGLAS, dissenting.

These cases present recurring problems under § 6 of the Federal Employers' Liability Act, 35 Stat. 66, as amended, 45 U. S. C. § 56.

In No. 72–163, Adkins, an employee, lost a part of his left leg while attempting to repair a broken rail. Kelly's Creek was a carrier by rail wholly owned by Warners Collieries Co., a mining company. The jury returned a verdict for Adkins in the amount of $117,568.44. The District Court granted a defense motion for judgment *n. o. v.;* and the Court of Appeals affirmed. 458 F. 2d 26.

In No. 71–1582, Felts was a Pullman conductor who reported for work on the Seaboard Silver Comet Train out of Richmond, Virginia. He was injured while trying to open the trap door which would allow passengers to leave or to board the car. The jury returned a verdict for Felts which the District Court set aside; and the Court of Appeals affirmed.

These two cases are classic examples of the type of cases memorialized in our many FELA controversies—a page in our history highlighted by *Rogers* v. *Missouri Pac. R. Co.,* 352 U. S. 500, where we said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute

> expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence." *Id.*, at 506–507.

Trial by jury is "part and parcel of the remedy afforded railroad workers" under FELA. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 354. The question whether the plaintiff was an employee of the carrier turns on factual elements, to be resolved by the jury under appropriate instructions. *Baker* v. *Texas & P. R. Co.*, 359 U. S. 227.

In *Felts*, while the conductor was a Pullman employee he was under instructions that "[w]hile on cars, on trains, in stations and yards, or on other railroad property" he was also "subject to instructions of the train conductor and officials of the railroad companies." The Seaboard train conductor had control and supervision over Felts, the Pullman conductor, and had authority to make him perform the assigned duties and to remove him if he did not. In other like situations the question whether an employee of one firm had become in performance of his work an employee of a railroad was a jury question.* We so held in *Baker* v. *Texas & P. R. Co.*, *supra*, which should be controlling here.

In *Adkins* the defense, sustained by the lower courts, was that the carrier and its insurance company had settled the claim with the employee. Here again the question whether a carrier sued under FELA should be estopped to plead limitations, *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, or has obtained a valid release from the injured employee, *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, is a question for the jury.

**See Cimorelli* v. *New York Central R. Co.*, 148 F. 2d 575; *Byrne* v. *Pennsylvania R. Co.*, 262 F. 2d 906; *Missouri-Kansas-Texas R. Co.* v. *Hearson*, 422 F. 2d 1037.

The history of FELA litigation shows how narrow, prejudiced judicial constructions of the Act in time subtly amended it, so as to deprive it of its original beneficent purpose of protecting the men who risk life and limb to keep our rail carriers operating. See *Rogers* v. *Missouri Pac. R. Co., supra,* at 507–509.

The emasculation that the judiciary made of this important social legislation led eventually to the revision of the Act by Congress in 1939 (*Rogers* v. *Missouri Pac. R. Co., supra,* at 510) so that litigation under it could start with a new mandate rather than with the crippling construction given by the courts. *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 63–68. It was in that tradition that *Rogers, Bailey, Baker, Glus,* and a host of other cases were decided. If the voice of Hugo Black were still heard and heeded, these two cases would be granted and reversed outright. That would be my vote. But at the very least we should put these cases down for argument. Our rejection of them means the start of a dark and disastrous retreat from the humanitarian purposes of this Act of Congress and a renewal of the ancient judicial art of emasculation of remedial legislation.

No. 71–1602. CRAVEN, WARDEN *v.* CARMICAL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 71–1652. SARNOFF ET AL. *v.* SHULTZ, SECRETARY OF THE TREASURY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 809.

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

Petitioners brought this suit for an injunction against disbursements under certain sections of the Foreign Assistance Act of 1961, 75 Stat. 424, as amended, §§ 510, 610, 614 (a), 22 U. S. C. §§ 2318, 2360, 2364 (a). Re-

spondents, as agents of the Chief Executive, made the disbursements in pursuit of our military venture in Vietnam.* Their request for a three-judge court was denied, and the Court of Appeals affirmed, 457 F. 2d 809, saying that the complaint tendered a "political question" beyond judicial cognizance.

This would be a difficult case under the regime of *Frothingham* v. *Mellon,* 262 U. S. 447, whose broad language denied a federal taxpayer standing to challenge the constitutionality of a federal statute. But *Frothingham* was greatly narrowed by our 1968 decision in *Flast* v. *Cohen,* 392 U. S. 83. *Flast* held that federal taxpayers have standing if the constitutionality of the taxing or spending claims of Art. I, § 8, of the Constitution were squarely involved and if the taxpayer can show that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id.,* at 102–103.

In *Flast* the challenged expenditures were said to have violated the Establishment and Free Exercise Clauses of the First Amendment. Here they are said to contravene the provision in Art. I, § 8, cl. 11, which gives Congress the power to "declare War." No declaration of war has been made respecting Vietnam. Hence the question can be phrased in terms of the constitutionality of the use of funds to pursue a "Presidential war."

The action here, as in *Flast,* is a challenge by federal taxpayers of a violation of a specific constitutional provision. Actions of the Congress and of the Executive Branch are involved here as in *Flast.* The question is

*I have previously filed dissents in various cases tendering this question, the Court having consistently refused to entertain them. See, *e. g., Holmes* v. *United States,* 391 U. S. 936; *Hart* v. *United States,* 391 U. S. 956; *McArthur* v. *Clifford,* 393 U. S. 1002.

therefore no more "political" in this case than in *Flast*.

There has in the past been much confusion over the distinction between a "political" question and one that is "justiciable." We dispelled much of that confusion in *Baker* v. *Carr*, 369 U. S. 186, 217, when we said:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. 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."

We added that a bona fide controversy "as to whether some action denominated 'political' exceeds constitutional authority" cannot be rejected by the courts. *Ibid.*

Whether after full argument and deliberation we would hold that this case falls in the category of *Flast* v. *Cohen* is unknown. But certainly the issue is important and substantial. The provisions in Art. I, § 8, cl. 11, which give Congress, not the President, the power to "declare War" is a specific grant of power that impliedly bars its exercise by the Executive Branch. And the power

is so pervasive in its reach that it may affect the lives, the property, and the well-being of the entire Nation. Arguably the principles announced in *Flast* v. *Cohen* control this case.

I would therefore grant the petition and put the case down for oral argument.

No. 72–368. BENSINGER, CORRECTIONS DIRECTOR, ET AL. *v.* DOSS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 463 F. 2d 576.

No. 71–1656. ACHTENBERG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 459 F. 2d 91.

MR. JUSTICE DOUGLAS, dissenting.

I would grant certiorari.

Petitioner was convicted of attempting to destroy "war material" and "war premises" in violation of 18 U. S. C. § 2153 (a). This section makes it a crime "when the United States is at war, or in *times of national emergency as declared by the President* or by the Congress" to willfully destroy or attempt to destroy "any war material, war premises, or war utilities . . . ." (Emphasis added.)

A criminal statute which fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden is constitutionally infirm. Predicating criminal liability on conduct engaged in under special circumstances or at certain times is not constitutionally infirm, as long as men of common intelligence are not forced to guess as to a statute's meaning or differ as to its application. Under the terms of the above statute, the defendant is prohibited from doing specific acts at "times of national emergency as declared by the President." The declared national emergency under which petitioner was held to have acted is the 1950

declaration of President Truman issued in response to the Korean conflict; the resolution by its terms contemplates termination of the emergency only by act of the President or by concurrent resolution of Congress, neither of which has yet been done.

I doubt that many lawyers, let alone laymen, of ordinary intelligence are aware of the continuing effect of the 1950 national emergency declaration. Under these circumstances, it is questionable whether proper notice of possible criminal liability has been afforded to any individual prosecuted under 18 U. S. C. § 2153 (a). The viability of criminal responsibility predicated upon evaluations of current political temperament or outdated presidential proclamations is an important issue worthy of our consideration on the merits.

No. 71–1690. KRESSE ET AL. *v.* BUTZ, SECRETARY OF AGRICULTURE; and

No. 71–1691. RASMUSSEN, DBA SARIVAL GUERNSEY FARMS *v.* BUTZ, SECRETARY OF AGRICULTURE. C. A. 9th Cir. Motion for leave to amend petition in No. 71–1691 granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 461 F. 2d 595.

No. 71–6512. MARCOVICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 454 F. 2d 138.

No. 71–6544. WALLACE *v.* WARNER, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 451 F. 2d 1374.

No. 72–81. VETERANS AND RESERVISTS FOR PEACE IN VIETNAM *v.* REGIONAL COMMISSIONER OF CUSTOMS, REGION II, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 676.

No. 71–6606. WETTEROFF ET AL. *v.* GRAND, TRUSTEE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 453 F. 2d 544.

No. 71–6869. DORADO ET AL. *v.* KERR, CHAIRMAN, CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 454 F. 2d 892.

No. 72–64. DEMOULIN ET AL. *v.* CITY OF DENVER ET AL. Sup. Ct. Colo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 177 Colo. 129, 495 P. 2d 203.

No. 72–145. NOLAND ET AL. *v.* DESOBRY. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–146. HUNTER, DBA COURIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 205.

No. 72–198. MORTON INTERNATIONAL, INC. *v.* SOUTHERN PACIFIC TRANSPORTATION CO. Sup. Ct. Utah. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 27 Utah 2d 256, 495 P. 2d 31.

No. 71–6489. MCLAMORE *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 257 S. C. 413, 186 S. E. 2d 250.

MR. JUSTICE DOUGLAS, dissenting.

I vote to hear this case because of the importance of the question raised.

A prisoner sentenced in the State of South Carolina, in any case in which confinement is the punishment, can be sent (1) to a county to work on its chain gang (if the county maintains one) (2) or in the alternative to the Department of Corrections and then to the local jail

or state penitentiary.[1] Under the statute, an elected official, the County Supervisor, makes the choice. There are no statutory criteria by which he is to make his choice.

Petitioner was sentenced under S. C. Code Ann. § 17–554 and assigned to the chain gang of Richland County, South Carolina. Under the Post Conviction Relief Statute of South Carolina he sought review of two questions: (1) whether the chain gang was cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, and (2) whether the sending of certain prisoners to the penitentiary where some rehabilitative services are available and others to the chain gang where none exists is a denial of equal protection of the laws under the Fourteenth Amendment.

On April 28, 1971, the relief in both areas was denied and the decision was affirmed by the Supreme Court of South Carolina, 257 S. C. 413, 186 S. E. 2d 250 (1972). The case is here on certiorari.

The delineation of just what conditions constitute cruel and unusual punishment is not well defined. But we know from *Weems* v. *United States,* 217 U. S. 349 (1910), that the concept is not rigid but progressive; that it acquires meaning as the public becomes enlightened.

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[1] S. C. Code Ann. § 17–554 (1962):

"Able-bodied male convicts to work on county or municipal chain gangs.—In every case in which imprisonment is provided as the punishment, in whole or in part, for any crime, all able-bodied male convicts shall be sentenced to hard labor on the public works of the county in which convicted, if such county maintains a chain gang, without regard to the length of service, and in the alternative to imprisonment in the county jail or State Penitentiary at hard labor. . . . In any case the presiding judge shall have the power, by special order, to direct that any person convicted before him be confined in the State Penitentiary if it is considered unsafe or unwise for such convict to be committed to the county chain gang."

Whether the exclusion of women raises an equal protection claim is not raised by the present petition.

Id., at 378. As Mr. Chief Justice Warren said, "the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" *Trop* v. *Dulles,* 356 U. S. 86, 100–101 (1958).

Does the chain gang fit into our current concept of penology? If not, does it violate the Eighth Amendment? This is an important question never decided by the Court.

The second point is of equal importance. South Carolina creates two classes of prisoners, those who work on the chain gang, and those who are sent to the penitentiary. The latter are under the Department of Corrections and have counseling, psychiatric service, and educational and vocational programs, although no penitentiary has all the programs that are available within the system. Those assigned to the chain gang have none of the rehabilitative services made available by the Corrections Department. As I have said, there are no statutory standards for the County Supervisor to use in determining where each man goes; the decision is entirely within his discretion to treat one type of offender differently from another though the two are in the same class, and though each be found guilty of the same crime and sentenced to serve the same number of years.

A State can, of course, create different classes of prisoners and treat them differently as long as those classes are created for legitimate state aims. And if the basis on which groups so defined bears a reasonable relation to the purpose, the class will survive. See *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 158. The courts must determine whether the classification is reasonable in light of its purpose. For this Court to refuse to make the decision in this case allows a procedure to exist which

arguably has many aspects of involuntary servitude for some, while others of the same class are treated in a more enlightened way.[2]

No. 71–6888. HADLEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 288 Ala. 293, 259 So. 2d 853.

MR. JUSTICE DOUGLAS, dissenting.

I vote to hear this case because I assume that equal protection and due process of law under our Constitution apply to the rich as well as to the poor, to whites as well as to the minorities.[1]

In Alabama a certified transcript or sufficient statement of the evidence must be filed within 60 days from the taking of an appeal or from the trial court's ruling on

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[2] *Wilson* v. *Kelley,* 294 F. Supp. 1005, aff'd *per curiam,* 393 U. S. 266, is not determinative of the present case. The *Wilson* case, so far as material here, only held that work camps are not *per se* unconstitutional, saving, however, a prisoner's right to raise "the question of his own particular treatment as being a violation of his constitutional rights," 294 F. Supp., at 1012. No such question was reached in that case, as only a class action was involved.

For a recent account of the dark chapter resulting from the Court's decisions last century that the paramount duty to protect civil rights rested with the States, not the Federal Government, see Scott, Justice Bradley's Evolving Concept of the Fourteenth Amendment From the Slaughterhouse Cases to the Civil Rights Cases, 25 Rutgers L. Rev. 552 (1971).

[1] In *Johnson* v. *Committee on Examinations,* 407 U. S. 915, the Court last Term denied a petition for certiorari in a case from Arizona where a white candidate for admission to the Bar claimed discrimination against him as compared with the treatment accorded black candidates. It seems that the passing grade on the Arizona bar examination is 70. Petitioner alleged that he got below 70 and was rejected, while the blacks were admitted whose grades were likewise below 70 and no better than his own. I dissented from the denial of certiorari in that case. Like the present one, it seemed to be a case of reverse discrimination.

a motion for new trial, whichever is later.[2] Petitioner filed his transcript three days beyond the deadline. The Alabama Court of Criminal Appeals dismissed his appeal as out of time. *Hadley* v. *State,* 47 Ala. App. 738, 259 So. 2d 853 (1971).

The Supreme Court of the State of Alabama affirmed, with three justices dissenting. *Ex parte Hadley,* 288 Ala. 293, 259 So. 2d 853 (1972). Under the case law of the Supreme Court of Alabama, had petitioner been an indigent, such tardiness would not have prevented appeal. In *Leonard* v. *State,* 43 Ala. App. 454, 192 So. 2d 461 (1966), the transcript of evidence was filed approximately sixteen days after its due date. The court did not dismiss for tardiness but laid down a new procedure: "[T]his court will not honor requests to strike where a lower court . . . has ordered a free transcript. See Rule 48." *Id.,* at 457, 192 So. 2d, at 463. Such motion to dismiss was also denied in *Brummitt* v. *State,* 44 Ala. App. 78, 203 So. 2d 133 (1967), where the court allowed a late filing on a showing of indigency the day after defendant's arrest, although no formal adjudication of indigency was ever made.

The question petitioner Hadley raises here and raised in the Alabama Supreme Court below, is whether by case law, a State can give more time for filing of a transcript

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[2] Code of Alabama, Title 7, § 827 (4) (1960):

"The court reporter's certified transcript shall be filed with the clerk within sixty days from the date of the taking of the appeal or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later; and any succinct statement of the evidence made in lieu of such transcript, as authorized in section 827 (3) hereof, shall be filed with the clerk within sixty days from the date of the taking of the appeal, or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later. Provided, that this period may be extended by the trial court for cause."

for a person without funds than for a person of wealth.[3] The exception for indigents was created by Rule 48 of the Supreme Court of Alabama which puts within the court's discretion the power to hear appeals in cases where the transcript filing is late but within time for taking an appeal.[4] Such was the case here. The spirit of the Rule is a generous and progressive one. Although not written to create classes of appellants, the courts have added that feature. The class is defined by wealth. We have held that a class based on wealth is inherently suspect. *Williams* v. *Illinois,* 399 U. S. 235 (1970); *Tate* v. *Short,* 401 U. S. 395 (1971); *Boddie* v. *Connecticut,* 401 U. S. 371 (1971); *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966). And when a suspect classification is made in such a manner as to impair a fundamental right, the burden on the State to prove a compelling state interest is a heavy one. While there is no constitutional right to appeal, a State may not grant appellate review in such a way as to discriminate between those appellants who are wealthy and those who are poor. *Griffin* v. *Illinois,* 351 U. S. 12, 18 (1956).

Alabama's law seems to be out of line with that principle. I would therefore grant the petition and put the case down for oral argument.

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[3] Petitioner obtained private counsel at trial and paid personally for the transcript, but was without counsel on appeal.

[4] Supreme Court of Alabama Rule 48:

"In cases at law where the court reporter's transcript of the evidence is not filed with the clerk of the circuit court within the time prescribed by law, but is filed within the time for taking an appeal, it will be considered by this court if no objection thereto is presented upon the submission of the cause; and it may be so considered in the discretion of the court, even though the point as to the delay be presented on appeal, unless counsel objecting thereto shall point out, with supporting affidavit, material omissions or defects in such certified transcript which should or would have been the subject of contest before the trial judge; in which latter event the certified transcript is not to be considered."

No. 72–53. FRANCIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 457 F. 2d 553.

MR. JUSTICE DOUGLAS, dissenting.

This petition on its face seems to me to be one we should grant and reverse the judgment below on the basis of *Sicurella* v. *United States,* 348 U. S. 385. At the very least we should put the case down for oral argument.

Petitioner was convicted for failure to report for induction into the Armed Forces in violation of 50 U. S. C. App. § 462 (a) and the Court of Appeals affirmed. 457 F. 2d 553.

When classified as I–A, petitioner requested classification as a conscientious objector. The Board rejected his request on five grounds:

"1. Left Church. Religion is not thoroughly understood.

"2. Appears insincere in his I–O request. Possibly coached.

"3. Could help a wounded man, but wouldn't in battle.

"4. Decision to fill out SSS 150 and apply for I–O status came after he fell behind academically.

"5. Won't take military orders. Appears that he is against taking any orders."

The first reason seems plainly untenable as a ground for denying the I–O classification. Two years earlier petitioner had joined the Church of Christ. But the fact that he left it is irrelevant to his I–O status. His tie to a church is irrelevant to his claim, because purely ethical or moral grounds, though unrelated to any church, are adequate, if sincerely believed. *United States* v. *Seeger,* 380 U. S. 163; *Welsh* v. *United States,* 398 U. S. 333.

The third ground is also plainly insufficient. It is true as the Government says that the extent to which petitioner would be willing to help the wounded is relevant as to whether he should be assigned to Class I–A–O for non-

combatant service. Yet one's objection to all military service may well include even that part of military service that one can serve in a noncombatant capacity. That apparently was the point of petitioner's willingness to help an injured man, except in battle. It underlines his asserted belief that service even in a noncombatant capacity infringes upon his beliefs. The fifth ground stated by the Selective Service Board is really part and parcel of petitioner's asserted objection to all military service.

In *Sicurella* v. *United States,* 348 U. S., at 392, it was impossible to say on what grounds the Selective Service Board made the classification. One ground being illegitimate, we set aside the conviction, for the integrity of the system demanded that the Board rely on some legitimate ground. We followed that course in *Clay* v. *United States,* 403 U. S. 698, 703–704, where concededly two of the three grounds on which the Board denied relief were not valid ones. And we noted that, since *Sicurella,* that rule had become the established practice of federal courts, when dealing with the criminal sanction of the Selective Service Laws. *Id.,* at 705.

I see no way to distinguish this case from *Sicurella* and *Clay* and would therefore grant certiorari and reverse. Or, as I said, at the very least we should grant certiorari and put the case down for oral argument.

No. 72–96. MEMPHIS LIGHT, GAS & WATER DIVISION *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 149 U. S. App. D. C. 238, 462 F. 2d 853.

No. 72–105. CAPITAL ASSISTANCE CORP. *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 460 F. 2d 256.

No. 72–151. HENDERSON, WARDEN *v.* FAVRE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 464 F. 2d 359.

No. 72–204. SOLOMON *v.* SEABOARD COAST LINE RAILROAD CO. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 72–207. COLE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 463 F. 2d 163.

OCTOBER 20, 1972

Miscellaneous Order

No. A–406. SCOTT *v.* NEW JERSEY. Sup. Ct. N. J. Application for stay of execution and enforcement of judgment of conviction presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: See 62 N. J. 68, 299 A. 2d 66.

OCTOBER 24, 1972

Affirmed on Appeal

No. 70–15. SWEETENHAM ET AL. *v.* GILLIGAN, GOVERNOR OF OHIO, ET AL. Affirmed on appeal from D. C. S. D. Ohio. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 318 F. Supp. 1262.

No. 72–12. AMOS, SECRETARY OF STATE OF ALABAMA, ET AL. *v.* SIMS ET AL. Affirmed on appeal from D. C. M. D. Ala. Reported below: 336 F. Supp. 924; 340 F. Supp. 691.

No. 70–48. PRATT ET AL. *v.* BEGLEY, SECRETARY OF STATE OF KENTUCKY, ET AL. Affirmed on appeal from D. C. E. D. Ky. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 352 F. Supp. 328.

No. 71–1668. MAYES ET AL. *v.* ELLIS ET AL.; and

No. 71–1684. HILL ET AL. *v.* MCKEITHEN, GOVERNOR OF LOUISIANA, ET AL. Affirmed on appeal from D. C. E. D. La. MR. JUSTICE DOUGLAS would note probable jurisdiction and set cases for oral argument. Reported below: 345 F. Supp. 1025.

No. 72–44. FUGATE, STATE HIGHWAY COMMISSIONER *v.* POTOMAC ELECTRIC POWER CO. ET AL. Affirmed on appeal from D. C. E. D. Va. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 341 F. Supp. 887.

Appeals Dismissed

No. 71–1625. KIRSTEL *v.* MARYLAND. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 13 Md. App. 482, 284 A. 2d 12.

No. 72–180. NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL. *v.* RINGSBY TRUCK LINES, INC., ET AL. Appeal from D. C. Colo. dismissed for want of jurisdiction.

No. 72–232. BOROUGH OF EAST RUTHERFORD ET AL. *v.* NEW JERSEY SPORTS AND EXPOSITION AUTHORITY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 61 N. J. 1, 292 A. 2d 545.

No. 72–234. THOMPSON ET AL. *v.* KANSAS CITY POWER & LIGHT CO. Appeal from Sup. Ct. Kan. 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 would note probable jurisdiction and set case for oral argument. Reported below: 208 Kan. 869, 494 P. 2d 1092.

Vacated and Remanded on Appeal

No. 71–6627. MARTIN *v.* CITY OF NEW ORLEANS. Appeal from Sup. Ct. La. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Gooding* v. *Wilson,* 405 U. S. 518 (1972). See *Lewis* v. *City of New Orleans,* 408 U. S. 913 (1972). THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent for the reasons expressed in the several opinions in *Rosenfeld* v. *New Jersey,* 408 U. S. 901 (1972); *Lewis* v. *City of New Orleans, supra;* and *Brown* v. *Oklahoma,* 408 U. S. 914 (1972). MR. JUSTICE POWELL would remand cause for further consideration only in light of *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). See concurring opinion in *Lewis* v. *City of New Orleans, supra.* Reported below: 260 La. 691, 257 So. 2d 152.

Certiorari Granted—Vacated and Remanded

No. 72–216. SMILOW *v.* UNITED STATES. C. A. 2d Cir. On representation of the Solicitor General, set forth in his Memorandum for the United States, filed September 28, 1972, certiorari granted. Judgment vacated and case remanded for further consideration in light of position presently asserted by the Government. Reported below: 465 F. 2d 802.

Miscellaneous Orders

No. A–263. OXNARD SCHOOL DISTRICT BOARD OF TRUSTEES ET AL. *v.* SORIA ET AL. C. A. 9th Cir. Application for stay presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. Reported below: 467 F. 2d 59.

No. A–419 (72–618). AMERICAN PARTY OF FLORIDA ET AL. *v.* ASKEW, GOVERNOR OF FLORIDA, ET AL. D. C. N. D. Fla. Application for stay presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. 71–485. GOTTSCHALK, ACTING COMMISSIONER OF PATENTS *v.* BENSON ET AL. C. C. P. A. [Certiorari granted, 405 U. S. 915.] Motion of Computer Software Analysts, Inc., et al. for leave to file an untimely brief as *amici curiae* granted. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71–1051. PARIS ADULT THEATRE I ET AL. *v.* SLATON ET AL. Sup. Ct. Ga. [Certiorari granted, 408 U. S. 921.] Motion of Charles H. Keating, Jr., for leave to file an untimely brief as *amicus curiae* in support of respondent granted.

No. 71–1082. ASKEW, GOVERNOR OF FLORIDA, ET AL. *v.* AMERICAN WATERWAYS OPERATORS, INC., ET AL. Appeal from D. C. M. D. Fla. [Probable jurisdiction noted, 405 U. S. 1063.] Motion of American Bar Assn. for leave to file a brief as *amicus curiae* granted.

No. 71–1178. GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. [Certiorari granted, 406 U. S. 956.] Motion of American Public Power Assn. for leave to file a brief as *amicus curiae* granted.

No. 71–1119. INDIANA EMPLOYMENT SECURITY DIVISION ET AL. *v.* BURNEY. Appeal from D. C. N. D. Ind. [Probable jurisdiction noted, 406 U. S. 956.] Motions of National Employment Law Project et al., and American Federation of Labor and Congress of Industrial Organizations for leave to file briefs as *amici curiae* granted.

No. 71–1193. UNITED STATES *v.* ENMONS ET AL. Appeal from D. C. E. D. La. [Probable jurisdiction noted, 406 U. S. 916.] Motion of American Newspaper Publishers Assn. for leave to file a brief as *amicus curiae* granted.

No. 71–1585. UNITED STATES *v.* RUSSELL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 911.] Motion for appointment of counsel granted. It is ordered that Thomas H. S. Brucker, Esquire, of Seattle, Washington, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 72–243. CLEAN AIR COORDINATING COMMITTEE *v.* ROTH ADAM FUEL CO. ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief expressing the views of the United States. Reported below: 465 F. 2d 323.

No. 72–160. DURST *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motions to dispense with printing petition and for leave to use record in No. 72–42 [*Durst* v. *National Casualty Co., Inc., infra*] granted. Motion for leave to file petition for writ of certiorari denied.

No. 72–136. DURST *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. Motion to dispense with printing petition for writ of mandamus granted. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 72–159. DURST *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. Motions to dispense with printing petition for writ of mandamus and for leave to use record in No. 72–42 [*Durst* v. *National Casualty Co., Inc., infra*] granted. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 72–5185. FAIR *v.* ROBERTS, CHIEF JUSTICE, SUPREME COURT OF FLORIDA, ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 71–1623. BULLOCK, SECRETARY OF STATE OF TEXAS *v.* WEISER ET AL. Appeal from D. C. N. D. Tex. Motion to dispense with printing motion to dismiss or affirm granted. Probable jurisdiction noted.

Certiorari Granted

No. 71–1545. BUTZ, SECRETARY OF AGRICULTURE, ET AL. *v.* GLOVER LIVESTOCK COMMISSION CO., INC. C. A. 8th Cir. Certiorari granted. Reported below: 454 F. 2d 109.

No. 71–1553. GILLIGAN, GOVERNOR OF OHIO, ET AL. *v.* MORGAN ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 456 F. 2d 608.

No. 72–178. STRUCK *v.* SECRETARY OF DEFENSE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 460 F. 2d 1372.

No. 72–90. UNITED STATES *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. Ct. Cl. Certiorari granted. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 197 Ct. Cl. 264, 455 F. 2d 993.

Certiorari Denied. (See also No. 72–234, *supra.*)

No. 71–1502. FITZHARRIS, CONSERVATION CENTER SUPERINTENDENT *v.* BLAYLOCK. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 462.

No. 71–1536. CENTRAL GULF STEAMSHIP CORP. *v.* DENNIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 137.

No. 71–1558. KANTNER ET AL. *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 53 Haw. 327, 493 P. 2d 306.

No. 71–1675. ADAM *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 46, 280 N. E. 2d 205.

No. 71–6826. BAILEY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 280 N. C. 264, 185 S. E. 2d 683.

No. 71–6844. JACKSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–176. STEVENS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 461 F. 2d 317.

No. 72–181. J. RAY MCDERMOTT & CO., INC. *v.* THE MORNING STAR ET AL.; and

No. 72–229. FISH MEAL CO. ET AL. *v.* J. RAY MCDERMOTT & CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 815.

No. 72–182. JIFFY JUNE FARMS, INC., ET AL. *v.* COLEMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1139.

No. 72–184. RAIMONDI *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 265 Md. 229, 288 A. 2d 882.

No. 72–192. BUFFALO CAB CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 499.

No. 72–201. STEIN *v.* CLEVELAND BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 29 Ohio St. 2d 77, 278 N. E. 2d 670.

No. 72–208. CARSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 424.

No. 72–215. REDERI A/B SOYA ET AL. *v.* EVERGREEN MARINE CORP., S. A., ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–219. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 906.

No. 72–222. LOUISVILLE & NASHVILLE RAILROAD CO. *v.* KENTUCKY EX REL. LUCKETT, COMMISSIONER OF REVENUE. Ct. App. Ky. Certiorari denied. Reported below: 479 S. W. 2d 15.

No. 72–224. TANNER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 47 F. 2d 128.

No. 72–225. RODULFA ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 149 U. S. App. D. C. 154, 461 F. 2d 1240.

No. 72–226. ANDERSON ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–228. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 198 Ct. Cl. 263, 459 F. 2d 513.

No. 72–236. BUDZANOSKI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 462 F. 2d 443.

No. 72–233. LEBMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–237. RUSCH *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 3 Ill. App. 3d 500, 278 N. E. 2d 198.

No. 72–241. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, NOW UNITED TRANSPORTATION UNION *v.* INDIANA HARBOR BELT RAILROAD CO. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 1077.

No. 72–244. OCCIDENTAL PETROLEUM CORP. ET AL. *v.* BUTTES GAS & OIL CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 461 F. 2d 1261.

No. 72–248. ALGA, INC., DBA MONTGOMERY BOOK MART, ET AL. *v.* CROSLAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 1038.

No. 72–249. CITY OF AKRON *v.* VILLAGE OF MIDDLEFIELD ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 72–367. ESSLING ET AL. *v.* BRUBACHER, COMMISSIONER OF ADMINISTRATION OF MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 72–5069. KIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5116. REYNOLDS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 1026.

No. 72–5135. WILCYNSKI *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 72–5136. WEBSTER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 72–5143. SINCLAIR *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 72–5137. SCHARBROUGH *v.* CUPP, WARDEN. Sup. Ct. Ore. Certiorari denied. Reported below: See 7 Ore. App. 596, 490 P. 2d 529.

No. 72–5141. BENNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 848.

No. 72–5144. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–5147. BENG-JOC, AKA LEE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5148. ROCHE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5149. ROCHE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5150. GARCIA-TURINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 2d 1345.

No. 72–5154. BISHOP, AKA SPEER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 127.

No. 72–5155. PARIS ET AL. *v.* FOREMAN, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied.

No. 72–5158. SIKES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 540.

No. 72–5159. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5160. HAWK *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 72–5164. TYLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 459 F. 2d 647.

No. 72–5163. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 151 U. S. App. D. C. 162, 466 F. 2d 333.

No. 72–5165. DZIALAK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 463 F. 2d 221.

No. 72–5166. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 235.

No. 72–5167. PIERCE *v.* GEORGIA. C. A. 5th Cir. Certiorari denied.

No. 72–5169. LINCOLN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 462 F. 2d 1368.

No. 72–5171. SIBONGA *v.* ADMINISTRATOR OF VETERANS AFFAIRS. Ct. App. D. C. Certiorari denied.

No. 72–5172. STEAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–5173. WADDELL *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 72–5174. GODIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 116.

No. 72–5176. TRIBBLET *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 72–5177. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 462 F. 2d 608.

No. 72–5178. DELUCIA *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 72–5181. LANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 343.

No. 72–5189. BURKLEY *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–1487. CONFEDERATION LIFE INSURANCE CO. *v.* DE LARA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 257 So. 2d 42.

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

I dissent from the Court's refusal to grant certiorari to consider whether the Florida Supreme Court's choice of law in this action on a life insurance contract deprived petitioner of due process under the Fourteenth Amendment and the principles established in *Home Insurance Co.* v. *Dick,* 281 U. S. 397 (1930).

Petitioner, a Canadian insurance company, issued a policy of life insurance in 1938 to German Lopez Sanchez, who was a citizen and resident of Cuba until his death in 1962. The policy provided that all payments would be made in United States dollars, which were then recognized as one of two legal currencies in Cuba. But on June 30, 1951, the Government of Cuba suspended the legal tender status of the dollar and decreed that all previously contracted dollar obligations would henceforth be payable exclusively in Cuban pesos at the rate of one peso per dollar. Petitioner concluded that the decree automatically converted the policy from dollars to pesos, and on July 1, 1951, it notified the insured that

> "[a]ll premiums payable in accordance with this policy as well as all other liabilities contracted under the same and in which a reference is made to American currency, will from now on be payable in Cuban National currency, at par, in accordance with Law No. 13 of 1948 and Decree No. 1384 of April 1951."

The insured declined to terminate the policy in light of this notification, and made all subsequent payments entirely in pesos. By legislation in 1959 and 1961 the Cuban Government reconfirmed the 1951 decree and provided criminal penalties for its violation. Petitioner

maintains peso reserves in Cuba precisely for the purpose of meeting its obligations under this and similar contracts, but it is barred by the Cuban currency laws from transferring those funds outside of Cuba. Under Cuban law it thus seems clear that petitioner was obligated to pay the benefits due under the policy only in Cuba and only in pesos.

Nevertheless, in this suit brought by respondents, beneficiaries of the insured who are now living in Florida, the Supreme Court of Florida held that petitioner's obligations under the contract should be determined according to Florida law. And applying the law of that State, the court concluded that petitioner was obligated to pay the benefits in Florida and in United States dollars. *De Lara* v. *Confederation Life Assn.*, 257 So. 2d 42 (Fla. 1971).

Whether the state court correctly applied its own substantive law is, of course, not in issue here. We are concerned only with the state court's choice of law. Petitioner maintains that the Due Process Clause of the Fourteenth Amendment precludes a State from altering "substantive obligations arising out of a foreign transaction having no significant relation to the state." The general validity of that proposition is clearly established by *Dick, supra,* where we held that the State of Texas was "without power to affect the terms of the contracts" since "[a]ll acts relating to the making of the policy were done in Mexico." In an opinion by Mr. Justice Brandeis, the Court held that the attempt by the Texas courts "to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law." 281 U. S., at 408.

In *Clay* v. *Sun Insurance Office,* 377 U. S. 179 (1964), we reaffirmed by implication the validity of *Dick,* but

concluded that, on the particular facts of that case, the forum State could reasonably apply its own law. We distinguished *Dick* and *Hartford Accident & Indem. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934), on the grounds that in the latter the relationship of the forum State to the transaction was too slight and casual to permit application of local law, and in the former the relationship was "wholly lacking." 377 U. S., at 181–182. The question, therefore, is whether this case is controlled by *Dick* and *Delta & Pine Land Co.* or by *Clay*. In my view, the facts of this case warrant plenary review by this Court of the question whether the obligation of the parties is governed by Cuban law. Florida has no relationship to the insurance policy at issue here. The deceased lived in Cuba until his death in 1962. All premiums were paid in Cuba. And assets held in reserve to meet the insurer's obligations were also maintained in Cuba. Measured under any reasonable choice-of-law test, these facts argue forcefully against the application of Florida law.

Respondents maintain, however, that even if the Florida Supreme Court erred in applying Florida law, the court could properly have applied the law of Canada and reached the same result. As a statement of Canadian law, respondents cite the decision of the Supreme Court of Canada in *Imperial Life Assurance Co. of Canada* v. *Colmenares,* 1967 Can. L. Rep. 443. And they point out that the Florida trial court, reasoning that the contract was made in Toronto, Canada, and that the *lex loci contractus* was Canadian law, applied the decision in *Colmenares* as an alternative basis for its decision. Petitioner's head office is, of course, located in Toronto. But the conclusion of the trial court flies in the face of the undisputed fact that the policy was negotiated in Cuba and became effective there; that it was to be performed in Cuba; that premiums were to be paid there;

that it was drafted in Spanish and in conformance with Cuban law; that it was issued through petitioner's Havana office and was notarized there. It may well be that on this record the Florida Supreme Court perceived no basis for the conclusion that the contract was in any sense "made" in Canada.

In any case, the short answer to respondents' contention is that the Florida Supreme Court relied on Florida law—and Florida law alone—in disposing of the case. The court declined to comment on the trial court's alternative holding, and rested its decision squarely and exclusively on *Confederation Life Assn.* v. *Vega,* 207 So. 2d 33 (Fla. Dist. Ct. App.), aff'd, 211 So. 2d 169 (Fla.), cert. denied, 393 U. S. 980 (1968), where it had applied Florida law to determine the obligations of an insurer under a contract issued to a Cuban. Thus, there is a substantial question whether the only asserted basis of the decision of the Florida Supreme Court—application of Florida law—was erroneous under the Due Process Clause of the Fourteenth Amendment. And since the Government of Canada has represented to us that the decision of the Florida court has significant international ramifications, considerations of comity provide an additional and forceful reason for granting the petition for certiorari and setting the case for oral argument.

No. 72–5190. WOMACK *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–5191. GREGORY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 463 F. 2d 600.

No. 71–6679. ALMOND *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–148. ROTHMAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 488.

No. 71–1645. WEAVER ET UX. *v.* HUTSON, TRUSTEE IN REORGANIZATION. C. A. 4th Cir. Certiorari denied. Reported below: 459 F. 2d 741.

MR. JUSTICE WHITE, dissenting.

Section 70 (b) of the Bankruptcy Act provides in part:

> "[A]n express covenant [in a lease] that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforc[ea]ble." 11 U. S. C. § 110 (b).

In *Finn* v. *Meighan,* 325 U. S. 300 (1945), the Court held § 70 (b) fully applicable in c. X reorganization proceedings despite arguments that enforcement of forfeiture clauses could deprive the debtor of property vital to the continuance of the business and so defeat the very purpose of the reorganization proceedings.* The Court said:

> "There is some suggestion, however, that that provision is applicable only in ordinary bankruptcy proceedings and not to reorganizations under Ch. X. It is pointed out that frequently the value of enterprises is greatly enhanced by leases on strategic

*The petitioner argued, Brief for Petitioner in No. 953, O. T. 1944, pp. 4–5, 11:

"The fundamental purpose of Chapter X of that Act would in many cases be thwarted if valuable, and often vital, assets were lost by the very fact of the institution of reorganization proceedings designed to conserve the debtor's property. . . . In innumerable instances, corporate contracts, including leases, constitute assets which, in many cases, are vital to the continuance of the business. Many such corporate contracts contain clauses of the type involved herein. If the decision in the instant case of the Circuit Court of Appeals for the Second Circuit should in such situations be followed, the very filing and approval of the petition for reorganization would immediately operate to cancel such executory contracts and thus defeat in large part the very purpose of the reorganization proceedings . . . ."

> premises and that if forfeiture clauses were allowed to be enforced, reorganization plans might be seriously impaired. But Congress has made the forfeiture provision of § 70 applicable to reorganization proceedings under Ch. X. . . . Thus we must read § 70 (b) as providing that an express covenant is enforceable which allows the lessor to terminate the lease if a petition to reorganize the lessee under Ch. X is approved. Cf. *In re Walker,* 93 F. 2d 281. That being the policy adopted by Congress, our duty is to enforce it." 325 U. S., at 302–303.

In the case before us the Court of Appeals for the Fourth Circuit refused to apply § 70 (b) in a reorganization proceeding and to enforce a termination provision in a lease, because to do so, in its opinion, would emasculate the reorganization plan. The Court of Appeals relied on *Smith* v. *Hoboken R. Co.,* 328 U. S. 123 (1946), where this Court held that § 70 (b) did not require recognition of a forfeiture provision in the context of a railroad reorganization under § 77 because the forfeiture would deprive the Interstate Commerce Commission of its statutory function. The Court was careful to distinguish *Finn:*

> *"Finn* v. *Meighan, supra,* involved the forfeiture of a lease in reorganization proceedings under Ch. X. But the problem there was not complicated by any provisions of Ch. X giving to an administrative agency the functions entrusted to the Interstate Commerce Commission under § 77. As we stated in *Palmer* v. *Massachusetts,* 308 U. S. 79, 87, '. . . the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates." 328 U. S., at 133 n. 5.

Because the decision of the Court of Appeals appears to depart from the views of the Court expressed in *Finn*, I would grant the petition for certiorari and set the case for argument.

No. 71–6518. MARTINEZ *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 705.

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

I dissent. I think petitioner's guilty plea entered in New York state court was clearly involuntary, particularly after our decision last Term in *Santobello* v. *New York*, 404 U. S. 257 (1971).

On October 23, 1968, petitioner was charged in an indictment returned in New York state court with one count of criminally selling a dangerous drug in the second degree [1] and one count of criminally selling a dangerous drug in the third degree.[2] In November 1968, a second indictment was returned against petitioner in state court charging him with a single count of criminally selling a dangerous drug in the third degree. Prior to the 1969 amendments of the New York Penal Law, criminally selling a dangerous drug in the second degree was punishable by a maximum of 15 years' imprisonment, while the maximum sentence under a third-degree charge was seven years' imprisonment.[3] At arraignment, petitioner pleaded not guilty to all the charges; the case was set for trial.

On February 17, 1969, the State moved for trial. Before the proceedings commenced, the prosecutor, the defense counsel, and the trial judge met in the judge's

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[1] N. Y. Penal Law § 220.35 (Supp. 1972–1973).

[2] N. Y. Penal Law § 220.30 (Supp. 1972–1973).

[3] See N. Y. Penal Law § 70.00, subds. 2 (c)–(d) (1967).

chambers—in the absence of the petitioner—to discuss the case. When the case was subsequently called for disposition, the prosecutor began by stating that he understood petitioner wished to withdraw his earlier pleas of not guilty and to "enter a plea of guilty to the second count of [the October 23 indictment] . . . charging [him] with the crime of Criminally Selling a Dangerous Drug in the Third Degree." At this point the court interrupted the prosecutor and the following exchange occurred:

> "The Court: Wait a minute. Third Degree?
>
> "[Prosecutor]: The second count, your Honor, of [the first indictment].
>
> "[Defense Counsel]: There are two counts of Second Degree and one of Third Degree.
>
> "The Court: That is not what I understood.
>
> . . . . .
>
> "(Whereupon a conversation was had off the record).
>
> "The Court: . . . [A]s far as I am concerned, it may be that two indictments were to be disposed of through one plea, but it was not a plea to Selling a Dangerous Drug in the Third Degree. That was no part of our talk.
>
> "[Defense Counsel]: It was this afternoon, Judge.
>
> "The Court: It was not part of our talk."

Unable to obtain the plea he had expected, defense counsel requested a one-day adjournment because he was "not prepared to go to trial."

> "The Court: The case will proceed to trial or disposition right now.
>
> "[Defense Counsel]: . . . This case was answered ready by my office at the February calendar, but I was not informed until this morning that we were proceeding. And I would again respectfully request

that the court grant me until at least tomorrow morning.

"The Court: Application denied."

When the defense counsel subsequently turned to the prosecutor—the same prosecutor who only a moment before had stated in open court that he understood the defendant wished to change his pleas of not guilty to a plea of guilty to the third degree charge—for assistance in clearing up the confusion, the only response was, "No comment."

Defense counsel indicated that he was going to withdraw "because I can't adequately defend this man without some preparation, and I think the District Attorney should at least give me that kind of notice." Defense counsel was given a few moments to speak with petitioner. Faced with the dilemma of either proceeding immediately to trial on all three charges with unprepared counsel or pleading guilty to one count of selling a dangerous drug in the second degree, petitioner not unexpectedly chose the latter course as the lesser of two evils. The usual litany of the plea then followed.[4] In advance of sentencing, petitioner sought to withdraw his plea, but this was denied and he received an indefinite sentence of from five to 15 years' imprisonment. After appealing his case through the state courts,[5] petitioner sought review of his plea by way of federal habeas corpus. The District Court denied relief without a hearing, and

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[4] Indeed, there was only a single slip by petitioner when he indicated that he had been told what sentence he would receive. Defense counsel quickly denied this, and petitioner naturally corrected himself.

[5] *People* v. *Martinez*, 34 App. Div. 2d 174, 311 N. Y. S. 2d 117 (1970), leave to appeal to the New York Court of Appeals was denied, and a petition for a writ of certiorari was denied by this Court, 401 U. S. 941 (1971).

the Court of Appeals affirmed, with one judge dissenting, 455 F. 2d 705 (CA2 1972).

Last Term in *Santobello* we emphasized the importance of the plea-bargaining process: "If every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities," 404 U. S., at 260. But a guilty plea necessarily involves the waiver of a variety of fundamental constitutional rights, see, *e. g., Duncan* v. *Louisiana,* 391 U. S. 145 (1968) (right to jury trial); *Pointer* v. *Texas,* 380 U. S. 400 (1965) (right to confront one's accusers), and the process by which it is obtained must therefore be governed by a standard of absolute fairness. The plea must be the result of "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina* v. *Alford,* 400 U. S. 25, 31 (1970). See also *Boykin* v. *Alabama,* 395 U. S. 238, 242 (1969); *Machibroda* v. *United States,* 368 U. S. 487, 493 (1962). I think it clear that this petitioner was denied such a choice. To be sure, it is in the nature of the plea-bargaining process that some pressure is brought to bear on the defendant to enter a plea. But here the normal pressures inherent in the plea-bargaining process were improperly augmented by both the prosecutor and the trial judge.

In *Santobello, supra,* at 262, we said "that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." In that decision, we condemned a prosecutor's failure to abide by the agreement of an associate who had promised to make no recommendation as to sentence in return for the guilty plea. What occurred here was far more serious. It would be naive to deny that, at least as between defense counsel and the prosecutor, a clear understanding had been reached in the judge's chambers

that petitioner would be allowed to plead guilty to the third-degree charge. The prosecutor's opening remarks in the subsequent proceedings unquestionably indicate that this was the case. Yet when defense counsel turned to the prosecutor for corroboration that the deal struck was indeed for a plea to the less serious charge in the third degree, he received only the unhelpful "No comment." This is not fulfillment by the prosecutor of his promise. And at this juncture it is impossible to assess what impact affirmative support from the prosecutor might have had upon the trial judge, who quickly became unreceptive to the unsupported efforts of defense counsel to clarify the situation.

I would not stop in this case, however, with the prosecutor. For the trial judge saw fit to become a party to the plea negotiations and agreement. Whatever the considerations when the judge is not a participant in the plea-bargaining process, it seems to me that once he has injected himself into that process he must be held to the same strict standard of fairness as the prosecutor. This is not to say that the trial judge should be deprived of his traditional discretion to reject a plea of guilty; I agree that "[t]here is . . . no absolute right to have a guilty plea accepted," *Santobello, supra,* at 262, citing *Lynch* v. *Overholser,* 369 U. S. 705, 719 (1962). By the same token, though, a trial judge cannot be allowed to use his discretion to apply undue pressures on a defendant. Nothing could be more destructive of the integrity—and ultimately the viability—of the plea-bargaining process. I do not doubt that in this instance there was a misunderstanding between the prosecutor and defense counsel, on the one hand, and the trial judge, on the other, as to the charge to which petitioner would be allowed to plead guilty. In light of this confusion over the plea agreement, the trial judge was justified in refusing to accept the plea to the third-degree

charge. But he certainly was not justified in visiting the consequences of the misunderstanding and the resulting confusion on petitioner by compelling him either to go to trial on all three charges with counsel who was unprepared or to plead guilty to the more serious charge. Having been a party to the negotiations and having thereafter refused to accept the plea that both the other parties to the negotiations thought was agreed upon, the trial judge was obligated to allow petitioner to extract himself from the predicament in which he had been placed by the misunderstanding that subsequently became apparent. Consequently, I believe that the judge should at least have granted the one-day continuance requested by defense counsel.

It is no answer that defense counsel should have been prepared to proceed to trial at once because his office had answered ready to the call of the February calendar. First, it is not disputed that defense counsel was not informed until the morning of the proceeding that the case was to be heard. We cannot ignore that in these days of crowded dockets, attorneys—as well as judges—are often forced to juggle unreasonably large case loads. Moreover, regardless of whether defense counsel technically should have been ready for trial because the case had previously been answered ready at the call of the February calendar, counsel undoubtedly could have made valuable use of the time between the conference in the judge's chambers and the formal disposition of the case had he not been under the misimpression that a bargain had been struck.[6] In short, I question whether defense counsel can be faulted for his unpreparedness for immediate trial upon discover-

[6] Although the record is not entirely clear on this point, it does appear that a substantial amount of time elapsed between the conference in the judge's chambers and when petitioner's case was called for formal disposition.

ing that a plea to a third-degree charge would not be accepted. But whatever the justification for defense counsel's unpreparedness, it was the petitioner, not his counsel, whom the trial judge forced to bear the consequences. I cannot accept this penalizing of petitioner for the conduct of his attorney, given the importance of the rights at stake. Weighed against the right of effective assistance of counsel, the request for a one-day continuance was hardly unreasonable. Previously we have said:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. . . ." *Ungar* v. *Sarafite,* 376 U. S. 575, 589 (1964).

And the alternative to proceeding with unprepared counsel was the waiver of a variety of important constitutional rights by way of a plea of guilty to a charge as to which, as a matter of unfettered choice, petitioner was obviously not prepared to concede guilt. Therefore, I think—as I have already indicated—granting of the short continuance [7] requested was incumbent on the trial judge

[7] The Court of Appeals majority, in discounting the unpreparedness of defense counsel and the importance of the continuance, suggested that "the very request for merely an overnight adjournment would indicate the lack of complexity of the defense." We have noted, though, that whether or not a continuance would in fact "have been useful to the accused, . . . the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect." *Hawk* v. *Olson,* 326 U. S. 271, 278 (1945).

once he had rejected the plea bargain that everyone else understood to have been struck. The judge's refusal to grant the continuance can only be viewed as an unjustified compounding of the coercive circumstances under which petitioner's plea was procured.

Hence, I would grant the petition for certiorari and remand the case with instructions that petitioner's plea be vacated and he be allowed to replead to the original charges. In *Santobello,* the Court declined to direct that the guilty plea there at issue be vacated and simply remanded for reconsideration. The broken promise in *Santobello,* however, affected only the petitioner's sentence, not the charge to which he had pleaded guilty. Here, by contrast, the conduct of the prosecutor and the trial judge improperly coerced petitioner to plead guilty to the second-degree charge.

No. 71–6571. ALBERT *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 257 S. C. 131, 184 S. E. 2d 605.

No. 71–6830. WEST *v.* MILLER, STATE WELFARE ADMINISTRATOR, ET AL. Sup. Ct. Nev. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 88 Nev. 105, 493 P. 2d 1332.

No. 72–210. NICHOLS *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 671.

No. 72–223. HAHN ET UX. *v.* NORWEGIAN AMERICA LINE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–239. CHILDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 390.

No. 72–187. SQUARE D CO. *v.* HODGSON, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 805.

No. 72–258. LEHMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 93.

No. 72–276. TAYLOR, EXECUTRIX *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 1007.

No. 72–5179. POWERS *v.* KLEINDIENST, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 212.

No. 72–5180. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 1183.

No. 72–42. DURST *v.* NATIONAL CASUALTY CO. ET AL. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari and other relief denied.

No. 72–191. HUMBLE OIL & REFINING CO. *v.* CALVERT ET AL. Sup. Ct. Tex. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 478 S. W. 2d 926.

No. 72–213. LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Motion to dispense with printing petitioners' reply brief granted. Certiorari denied. Reported below: 150 U. S. App. D. C. 362, 465 F. 2d 542.

No. 71–6789. SELLARS ET AL. *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion of National Prison Project of the American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 453 F. 2d 661; 456 F. 2d 1303.

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

I vote to hear this case because it raises substantial questions of law in the area of the Eighth and Fourteenth Amendments.

Petitioners are inmates of the Texas Department of Corrections (T. D. C.). They brought a class action under 42 U. S. C. § 1983, challenging the constitutionality of:

(1) a T. D. C. regulation barring all inmate assistance in preparation of legal work;

(2) the primitive conditions of the solitary confinement as administered by the T. D. C.

The District Court denied relief, *Novak* v. *Beto,* 320 F. Supp. 1206 (SD Tex. 1970).

On appeal, the United States Court of Appeals for the Fifth Circuit unanimously reversed as to the prohibition on prisoners' legal assistance, holding that the State had not met its burden of providing alternatives to assure access to the courts as required by *Johnson* v. *Avery,* 393 U. S. 483 (1969).

A divided court affirmed the constitutionality of the conditions of solitary confinement. *Novak* v. *Beto,* 453 F. 2d 661 (1971). A motion for a rehearing and rehearing *en banc* was denied March 8, 1972, six judges dissenting. *Novak* v. *Beto,* 456 F. 2d 1303.

If we are to believe the facts as stated by petitioners, and for purposes of review we must, a prisoner placed in solitary confinement in Texas will find himself in a shockingly primitive condition.

The cell is kept in complete darkness 24 hours a day. A barred iron gate backed up by a wooden door blocks all light and prevents any human contact with those in the hall.[1] Within this black interior is a combination toilet-water basin and a steel bunk. The bunk has no mattress although the prisoner is given a blanket. The cell is otherwise bare. The inmate is fed on a bread and water diet with one full meal every 72 hours.[2] He is clothed only by a cloth gown. In addition to those conditions, which were considered inhumane at the time of Charles Dickens, the prisoner has no opportunity to exercise; he is not permitted correspondence with family, friends, or lawyer; no visits are allowed and he is allowed no reading material of any kind.

The prisoner is not seen by a psychologist, psychiatrist, or counselor before, during, or after confinement to solitary. And all deprivations involved in solitary confinement apply uniformly regardless of the individual's background or criminal record or offense for which he is being punished.

A prisoner can be kept so confined for 15 days and reconfined after a two-day respite. Such practices as above described exist in all of Texas' 14 correctional facilities.

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[1] On July 10, 1972, the T. D. C. revised its regulations on the lighting and diet.

"50.92322 *Lighting*.

"The solid doors of the solitary cells will be left open. If an inmate becomes noisy and creates a disturbance the door will be closed. On some units the open doors create a security problem, and it is not practical to utilize this procedure. If this occurs, artificial lighting will be provided during the normal daylight hours."

[2] "50.9233 *Diet*.

"50.92331 Inmates in solitary [confinement] are to be fed twice a day a hot meal consisting of vegetables from the regular serving line, and are to be given unlimited drinking water."

The petitioners do not question the right of the prison to isolate inmates for cause but do challenge these practices.

Weems v. *United States,* 217 U. S. 349 (1910), was a landmark in the definition of the Cruel and Unusual Punishment Clause. *Robinson* v. *California* made the Eighth Amendment binding on the States through the Fourteenth Amendment. 370 U. S. 660 (1962). We said that the "dignity of man" was the overriding value preserved by that clause. *Trop* v. *Dulles,* 356 U. S. 86, 100 (1958).

The fitness of punishment is to be judged by applying evolving standards, for the clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U. S., at 378. What those standards are is now tendered. The extent to which the prohibition against cruel and unusual punishment will apply in prison must also be determined. In *Haines* v. *Kerner,* 404 U. S. 519 (1972), we held that a bare allegation of onerous penal conditions is sufficient to require a hearing.

Lower courts have often dealt with the issue and have reached divergent results[3] without guidance from us. See *Morales* v. *Schmidt,* 340 F. Supp. 544 (1972).

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[3] Some lower courts have held that some conditions of imprisonment constitute cruel and unusual punishment. See *Wright* v. *McMann,* 387 F. 2d 519 (CA2 1967), on remand, 321 F. Supp. 127 (NDNY 1970), affirmed in part and reversed in part, 460 F. 2d 126 (CA2 1972); *Hancock* v. *Avery,* 301 F. Supp. 786 (MD Tenn. 1969); *Holt* v. *Sarver,* 300 F. Supp. 825 (ED Ark. 1969); *Barnes* v. *Hocker,* No. R 2071 (Nev. Sept. 5, 1969); *Jordan* v. *Fitzharris,* 257 F. Supp. 674 (ND Cal. 1966). *Contra: Sostre* v. *McGinnis,* 442 F. 2d 178, 192 (CA2 1971); *Courtney* v. *Bishop,* 409 F. 2d 1185 (CA8 1969); *Ford* v. *Board of Managers,* 407 F. 2d 937 (CA3 1969); *Krist* v. *Smith,* 309 F. Supp. 497 (SD Ga. 1970), aff'd, 439 F. 2d 146 (CA5 1971).

Denial of the petition here in my view constitutes a travesty of justice. As Judge Tuttle stated in his dissent:

> "I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts, or, as stated by the Supreme Court in Trop v. Dulles, the application of 'evolving standards of decency.'" *Novak* v. *Beto,* 453 F. 2d, at 672.[4]

I would grant this petition and put the case down for argument.

No. 72–221. SHERDON *v.* CARMONA ET AL. Ct. App. Cal., 4th App. Dist. Motion to dispense with printing petition granted. Certiorari denied.

NOVEMBER 3, 1972

Miscellaneous Order

No. A–467. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* SPOCK ET AL. C. A. 3d Cir. Application for stay of judgment of the United States Court of Appeals for the Third Circuit (No. 72–1934) denied. THE CHIEF JUSTICE, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST would grant the stay. Reported below: 469 F. 2d 1047.

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[4] As stated by Judge Kaufman in *Wright* v. *McMann,* 387 F. 2d, at 526:

"We are of the view that civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper. The subhuman conditions alleged by Wright to exist in the 'strip cell' at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency."

NOVEMBER 6, 1972

Affirmed on Appeal

No. 72–175. FIDELL ET AL. *v.* BOARD OF ELECTIONS OF THE CITY OF NEW YORK ET AL. Affirmed on appeal from D. C. E. D. N. Y. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 343 F. Supp. 913.

No. 72–200. CHIEF OF THE CAPITOL POLICE ET AL. *v.* JEANNETTE RANKIN BRIGADE ET AL. Affirmed on appeal from D. C. D. C. Reported below: 342 F. Supp. 575.

No. 72–251. LOFRISCO ET AL. *v.* SCHAFFER, SECRETARY OF STATE OF CONNECTICUT, ET AL. Affirmed on appeal from D. C. Conn. Reported below: 341 F. Supp. 743.

No. 72–252. KERR MOTOR LINES, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. N. D. N. Y.

Appeals Dismissed

No. 71–1584. STAUFFER *v.* WEEDLUN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, ET AL. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 188 Neb. 105, 195 N. W. 2d 218.

No. 72–115. CUNNINGHAM ET AL. *v.* KING COUNTY BOUNDARY REVIEW BOARD ET AL. Appeal from Ct. App. Wash. dismissed for want of substantial federal question. Reported below: 6 Wash. App. 385, 493 P. 2d 811.

No. 72–318. RAFTER *v.* NEWARK INSURANCE CO. Appeal from Ct. App. N. Y. dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–240. HARPER *v.* UNITED STATES. Appeal from C. A. 1st Cir. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–5007. CORRADO *v.* RHODE ISLAND BAR ASSN. Appeal from Sup. Ct. R. I. dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–5290. BIRDWELL *v.* WASHINGTON. Appeal from Ct. App. Wash. dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 6 Wash. App. 284, 492 P. 2d 249.

No. 72–319. KENNECOTT COPPER CORP. ET AL. *v.* STATE TAX COMMISSION OF UTAH. Appeal from Sup. Ct. Utah. Motions of Financial Executives Institute, Tax Executives Institute, Inc., and Committee on State Taxation of the Council of State Chambers of Commerce et al. for leave to file briefs as *amici curiae* granted. Appeal dismissed for want of substantial federal question. MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 27 Utah 2d 119, 493 P. 2d 632.

Certiorari Granted—Reversed. (See No. 72–55, *ante*, p. 41.)

Miscellaneous Orders

No. A–410 (72–5579). BEKENY ET UX. *v.* WANDSCHNEIDER, EXECUTOR, ET AL. C. A. 2d Cir. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–428. Cook et al. *v.* Calhoun et al. C. A. 5th Cir. Application for stay presented to Mr. Justice Powell, and by him referred to the Court, denied. Mr. Justice Marshall took no part in the consideration or decision of this application.

No. D–1. In re Disbarment of Kahn. It is ordered that Frances Kahn, of New York, New York, be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2. In re Disbarment of Abrams. It is ordered that Hyman Abrams, of New York, New York, 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. D–3. In re Disbarment of Konigsberg. It is ordered that Sidney Konigsberg, of New York, New York, 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. D–4. In re Disbarment of Brouner. It is ordered that Samuel B. Brouner, of New York, New York, 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. 27, Orig. Ohio *v.* Kentucky. Exceptions to Report of Special Master set for oral argument in due course. [For earlier orders herein, see, *e. g.*, 406 U. S. 915.]

No. D–5. In re Disbarment of Signer. It is ordered that Burton R. Signer, of Cincinnati, Ohio, be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–6. In re Disbarment of Yudow. It is ordered that Daniel D. Yudow, of New York, New York, 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. D–7. In re Disbarment of Scherman. It is ordered that Benjamin B. Scherman, of New York, New York, 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. D–8. In re Disbarment of Pavsner. It is ordered that Emanuel H. Pavsner, of New York, New York, 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. 71–92. Corkey et al. *v.* Edwards et al. Appeal from D. C. W. D. N. C. Motion to set questions V, VI, and IV for briefing and oral argument denied. Reported below: 322 F. Supp. 1248.

No. 71–829. Mourning *v.* Family Publications Service, Inc. C. A. 5th Cir. [Certiorari granted, 405 U. S. 987.] Motion of the Solicitor General to permit A. Raymond Randolph, Jr., Esquire, to present oral argument *pro hac vice* as *amicus curiae* in support of petition granted.

No. 71–708. TRAFFICANTE ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 9th Cir. [Certiorari granted, 405 U. S. 915.] Motion to permit two counsel to argue on behalf of respondents granted.

No. 71–850. UNITED STATES *v.* MARA, AKA MARASOVICH. C. A. 7th Cir. [Certiorari granted, 406 U. S. 956.] Motion of Legal Aid Society of New York for leave to participate in oral argument as *amicus curiae* in support of respondent granted.

No. 71–1031. TONASKET *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash. [Probable jurisdiction noted, 407 U. S. 908.] Motion of Colville Confederated Tribes for leave to participate in oral argument as *amicus curiae* granted.

No. 71–1082. ASKEW, GOVERNOR OF FLORIDA, ET AL. *v.* AMERICAN WATERWAYS OPERATORS, INC., ET AL. Appeal from D. C. M. D. Fla. [Probable jurisdiction noted, 405 U. S. 1063.] Motions to permit two counsel to argue on behalf of appellants and two counsel to argue on behalf of appellees granted.

No. 71–1192. GOLDSTEIN ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. [Certiorari granted, 406 U. S. 956.] Motion of Information Industry Assn. for leave to file untimely brief as *amicus curiae* granted. Motion of the Attorney General of California for additional time to participate in oral argument as *amicus curiae* denied.

No. 71–1470. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 406 U. S. 943.] Motion of Pennsylvania Association of Independent Schools to permit two counsel to argue on behalf of appellees denied.

No. 71–5139. HAM *v.* SOUTH CAROLINA. Sup. Ct. S. C. [Certiorari granted, 404 U. S. 1057.] Motion of the Attorney General of South Carolina to permit Timothy G. Quinn to present oral argument *pro hac vice* on behalf of respondent granted.

No. 71–6356. DOE ET AL. *v.* MCMILLAN ET AL. C. A. D. C. Cir. [Certiorari granted, 408 U. S. 922.] Motion to permit two counsel to argue on behalf of respondents granted.

No. 72–11. PALMORE *v.* UNITED STATES. Appeal from Ct. App. D. C. [Probable jurisdiction postponed, *ante,* p. 840.] Motion of appellant for leave to proceed further herein *in forma pauperis* granted.

No. 72–5214. FLOYD *v.* HENDERSON, WARDEN;

No. 72–5282. BACA *v.* HARRIS, WARDEN, ET AL.; and

No. 72–5295. SHELTON *v.* HENDERSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–6827. SAMS *v.* FRANKEL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 72–269. LEVITT, COMPTROLLER OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.;

No. 72–270. BRYDGES *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.; and

No. 72–271. CATHEDRAL ACADEMY ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. Appeals from D. C. S. D. N. Y. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 342 F. Supp. 439.

No. 72–129. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK CITY REGION OF NEW YORK CONFERENCE OF BRANCHES, ET AL. *v.* NEW YORK ET AL. D. C. D. C. Probable jurisdiction postponed to hearing of case on the merits. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.

Certiorari Granted

No. 71–6757. FONTAINE *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also Nos. 72–240, 72–318, 72–5007, and 72–5290, *supra.*)

No. 71–1474. EASON ET AL. *v.* DANDRIDGE ET AL.; and No. 71–1601. JEFFERSON PARISH SCHOOL BOARD ET AL. *v.* DANDRIDGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 552.

No. 71–1544. MAHONEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 13 Md. App. 105, 281 A. 2d 421.

No. 71–1613. MCBRIDE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 71–5803. GOMEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 71–6122. WILWORDING *v.* BURRELL ET AL. C. A. 8th Cir. Certiorari denied.

No. 71–6649. FAIR *v.* SEBESTA. C. A. 5th Cir. Certiorari denied.

No. 71–6758. DUDLEY *v.* BRANTLEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 461 F. 2d 653.

No. 71–6682. STOCKMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6759. HUTCHINSON *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–6799. CRAWFORD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 479 S. W. 2d 682.

No. 71–6840. MCLAIN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 503.

No. 71–6853. TAFOYA, AKA HERRERA *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 1265.

No. 71–6863. KOMES *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Clara. Certiorari denied.

No. 71–6877. MOORE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 79, 281 N. E. 2d 294.

No. 71–6914. SNIPES *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 478 S. W. 2d 299.

No. 71–6920. BULLY *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 458 F. 2d 1406.

No. 71–6930. TYLER *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 72–59. UNITED STATES *v.* HARTFORD ACCIDENT & INDEMNITY CO. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 17.

No. 72–202. IN RE MACLEOD. Sup. Ct. Mo. Certiorari denied. Reported below: 479 S. W. 2d 443.

No. 72–86. CLARK SHERWOOD OIL FIELD CONTRACTORS ET AL. *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 1339.

No. 72–117. IANNELLI *v.* UNITED STATES;
No. 71–6858. SQUIRES, AKA SPEARS *v.* UNITED STATES; and
No. 72–5274. TORTORA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 461 F. 2d 483.

No. 72–173. JACKSONVILLE TERMINAL CO. *v.* HODGE, ADMINISTRATRIX. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 260 So. 2d 521.

No. 72–196. JAVITS *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 442, 316 N. Y. S. 2d 943.

No. 72–247. NACIREMA OPERATING CO., INC., ET AL. *v.* OOSTING, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 456 F. 2d 956.

No. 72–253. PET, INC. *v.* KYSOR INDUSTRIAL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 2d 1010.

No. 72–255. NATIONAL AMERICAN BANK OF NEW ORLEANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1168.

No. 72–257. ALVAREZ-FRANCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 F. 2d 1261.

No. 72–260. MEYER ET AL. *v.* CITY OF OKLAHOMA CITY ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 496 P. 2d 789.

No. 72–259. ALOGDELIS *v.* BROOKLYN COLLEGE OF THE CITY UNIVERSITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 39 App. Div. 2d 728, 332 N. Y. S. 2d 414.

No. 72–261. MILLER *v.* UNITED STATES; and
No. 72–5292. PINEDA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–262. O'BRIEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–263. AIKIN, AKA AKIN, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 7.

No. 72–265. PENNSYLVANIA *v.* COHEN. Super. Ct. Pa. Certiorari denied. Reported below: 221 Pa. Super. 244, 289 A. 2d 96.

No. 72–268. SCHOTT *v.* CITY OF KINGMAN. C. A. 9th Cir. Certiorari denied. Reported below: 461 F. 2d 593.

No. 72–277. FORTENBERRY *v.* NEW YORK LIFE INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 2d 114.

No. 72–278. CRAVENS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–280. MOJAR *v.* SIGNORELLI ET UX. Super. Ct. N. J. Certiorari denied.

No. 72–281. LAWRENCE CHRYSLER PLYMOUTH, INC. *v.* CHRYSLER CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 461 F. 2d 608.

No. 72–282. BOARD OF EDUCATION OF THE CITY OF BESSEMER, ALABAMA, ET AL. *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 382.

No. 72–283. MAHIN, DIRECTOR OF REVENUE OF ILLINOIS *v.* MITCHELL ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 452, 283 N. E. 2d 465.

No. 72–284. NORTH CAROLINA STATE PORTS AUTHORITY *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO. C. A. 4th Cir. Certiorari denied. Reported below: 463 F. 2d 1.

No. 72–285. TIBBITTS ET UX. *v.* CUSSEN, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1314.

No. 72–286. AMERICAN AIRLINES, INC. *v.* LOCAYNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 1253.

No. 72–289. DIEHL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 511.

No. 72–290. CALIFORNIA *v.* HALPIN ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 6 Cal. 3d 885, 495 P. 2d 1295.

No. 72–291. UNITED STATES FIRE INSURANCE CO. *v.* MARINE SULPHUR TRANSPORT CORP. ET AL.; and

No. 72–344. MARINE SULPHUR TRANSPORT CORP. ET AL. *v.* HEARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 89.

No. 72–293. GASTON COUNTY DYEING MACHINE CO. *v.* BROWN. C. A. 4th Cir. Certiorari denied. Reported below: 457 F. 2d 1377.

No. 72–296. LEGARI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 462 F. 2d 1328.

No. 72–299. PILGRIM EQUIPMENT COMPANY OF HOUSTON *v.* TEXAS ET AL. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 473 S. W. 2d 945.

No. 72-297. PORTNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 462 F. 2d 678.

No. 72-301. COMEAUX *v.* BULLER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1407.

No. 72-305. ARVIDSON ET AL. *v.* DILLINGHAM CORP., DBA ALBINA ENGINE & MACHINE WORKS. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 1.

No. 72-306. STANLEY *v.* TAYLOR. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 4 Ill. App. 3d 98, 278 N. E. 2d 824.

No. 72-310. RAINIER AVENUE CORP. *v.* CITY OF SEATTLE. Sup. Ct. Wash. Certiorari denied. Reported below: 80 Wash. 2d 362, 494 P. 2d 996.

No. 72-311. SPEED *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 52 Ill. 2d 141, 284 N. E. 2d 636.

No. 72-314. KEEFER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 464 F. 2d 1385.

No. 72-315. NEW YORK CENTRAL RAILROAD CO. *v.* RAINES, SPECIAL ADMINISTRATOR. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 428, 283 N. E. 2d 230.

No. 72-320. LIGHTENBURGER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 391.

No. 72-323. KHEEL ET AL. *v.* PORT OF NEW YORK AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 457 F. 2d 46.

No. 72-328. PARTEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 430.

No. 72–324. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 462 F. 2d 1252.

No. 72–325. STECHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 567.

No. 72–329. SCHRENZEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 462 F. 2d 765.

No. 72–333. BIBLE *v.* CHEVRON OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 1218.

No. 72–336. PENAAT *v.* CITY OF SAN JOSE. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 24 Cal. App. 3d 707, 101 Cal. Rptr. 258.

No. 72–337. ROSS *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 618.

No. 72–340. CANTWELL ET AL. *v.* BOARD OF TRUSTEES FOR UTILITIES, CITY OF INDIANAPOLIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–342. HANDEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 679.

No. 72–5010. HAWKINS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 162 Conn. 514, 294 A. 2d 584.

No. 72–5019. CAREF *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 220, 282 N. E. 2d 1.

No. 72–5024. CAMPBELL *v.* GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 1039.

No. 72–5050. WILSON *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–5059. JAMES *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 254 So. 2d 838.

No. 72–5079. PASCHALL *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 72–5193. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5194. SHEPPARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 149 U. S. App. D. C. 175, 462 F. 2d 279.

No. 72–5197. MARAS *v.* LIPOW. C. A. D. C. Cir. Certiorari denied.

No. 72–5198. ROBERTSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–5201. WRIGHT *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 1402.

No. 72–5202. LOPEZ, AKA BELIX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5205. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 2d 1363.

No. 72–5207. SHELTON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 1234.

No. 72–5208. DAVIDSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–5211. CARPENTER *v.* UNITED STATES; and
No. 72–5232. MORRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 463 F. 2d 397.

No. 72–5209. JONES *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 72–5212. KERR *v.* TRAVELERS INSURANCE CO. C. A. 4th Cir. Certiorari denied.

No. 72–5213. STOKES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5215. BRIGGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 457 F. 2d 908.

No. 72–5216. LINES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 461 F. 2d 282.

No. 72–5217. WEBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1324.

No. 72–5219. DEVILLE *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied.

No. 72–5220. NINOV *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1360.

No. 72–5223. O'CLAIR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–5224. MARTIN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied.

No. 72–5225. TURNER ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 290 A. 2d 821.

No. 72–5228. VOEGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 222.

No. 72–5229. KING *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 48 Ala. App. 154, 262 So. 2d 764.

No. 72–5233. PADILLA-PARTIDA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 619.

No. 72–5235. SZCZYTKO *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–5237. CHISUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5241. JERKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 1073.

No. 72–5242. GOODMAN *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 72–5245. STARNES *v.* CONNETT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 524.

No. 72–5246. LUCCHETTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5248. THOMAS *v.* NELSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5249. PEAPER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 14 Md. App. 201, 286 A. 2d 176.

No. 72–5250. GABBARD *v.* GABBARD. Ct. App. Ky. Certiorari denied.

No. 72–5251. PARKER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 168, 181 S. E. 2d 432.

No. 72–5255. KIRK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 457 F. 2d 400.

No. 72–5263. VALENTINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: See 422 F. 2d 358.

No. 72–5259. DeVerse *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 80.

No. 72–5260. Ammons *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 414.

No. 72–5261. Collins *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 462 F. 2d 792.

No. 72–5262. Wright *v.* Perini, Correctional Superintendent. C. A. 6th Cir. Certiorari denied.

No. 72–5264. Thacker *v.* Henry, Prison Administrator, et al. C. A. 4th Cir. Certiorari denied.

No. 72–5266. Story *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 463 F. 2d 326.

No. 72–5267. Waterman *v.* Schutzer et al. C. A. 2d Cir. Certiorari denied.

No. 72–5268. Griffin et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 463 F. 2d 177.

No. 72–5271. Brown *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 576.

No. 72–5276. Hunter *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 481 S. W. 2d 806.

No. 72–5277. McClard *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 462 F. 2d 488.

No. 72–5280. Nordlof *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 72–5281. Thompson *v.* Department of the Army et al. C. A. 2d Cir. Certiorari denied.

No. 72–5285. Barron *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 72–5286. McGee *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 542.

No. 72–5287. Wetzel *v.* Blackledge, Warden. C. A. 4th Cir. Certiorari denied.

No. 72–5288. Hessler *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 469 F. 2d 1294.

No. 72–5289. Frierson *v.* Spruill, Judge, et al. C. A. 4th Cir. Certiorari denied.

No. 71–1380. Caldwell, Warden *v.* Mathis. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 455 F. 2d 979.

No. 71–6550. Davidson *v.* Warden, California State Prison at San Quentin. Sup. Ct. Cal. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 71–6885. Hillen *v.* Director, Department of Social Service and Housing et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 455 F. 2d 510.

No. 71–6927. Jashunsky *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 51 Ill. 2d 220, 282 N. E. 2d 1.

No. 72–16. Karr et al. *v.* Schmidt et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 460 F. 2d 609.

No. 72–227. Waller *v.* City of St. Petersburg. Sup. Ct. Fla. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 261 So. 2d 151.

No. 72–238. Birch *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 72–242. HANLY ET AL. *v.* KLEINDIENST, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 640.

No. 72–295. LEBLANC ET AL. *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 1228.

No. 72–309. SANDLER *v.* NATIONAL DIRECTOR OF SELECTIVE SERVICE ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 1096.

No. 72–316. AZZONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 236.

No. 72–330. CAREY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 1259.

No. 72–5001. JONES *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 479.

No. 72–5031. CLINTON, ADMINISTRATRIX *v.* INGRAM CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 455 F. 2d 741.

No. 72–5039. BISNO *v.* MARTIN, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL WELFARE. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5063. JACKSON *v.* GEORGIA. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 461 F. 2d 682.

No. 72–5072. BRAUN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 209 Kan. 181, 495 P. 2d 1000.

No. 72–5134. COX *v.* WOODSON, PENAL INSTITUTIONS DIRECTOR, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5192. BELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 667.

No. 72–5210. HURT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 30 Ohio St. 2d 86, 282 N. E. 2d 578.

No. 72–5222. CARPENTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 1363.

No. 72–5231. FEATHERSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 461 F. 2d 1119.

No. 72–5234. KERESTY *v.* UNITED STATES; and

No. 72–5236. PHILLIPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 36.

No. 72–5270. NAMMACK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 1045.

No. 72–5240. THOMAS ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.* Reported below: 294 A. 2d 164.

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

On May 27, 1971, a member of the District of Columbia Metropolitan Police Department obtained from a United States Magistrate a search warrant on the basis of an affidavit setting forth sufficient facts to establish probable cause to believe that narcotics and related contraband were on specified premises. The warrant was sought pursuant to 21 U. S. C. § 879 (a)—§ 509 (a) of the Controlled Substances Act of 1970, 84 Stat. 1274. The warrant was executed by members of the Metropolitan Police Force at 9:40 p. m. on May 29, 1971, and resulted in the seizure of narcotics paraphernalia. The defendants moved to suppress the evidence on the ground that the search warrant did not detail any basis for execution at night, as required by 21 U. S. C. § 879 (a) and D. C. Code Ann. § 23–521 (f)(5) (Supp. 1972) and that motion was granted. The District of Columbia Court of Appeals reversed with one judge dissenting. 294 A. 2d 164.

Petitioners raise two questions that entail an interpretation of the Controlled Substances Act of 1970. This Act was passed by Congress to consolidate many of the then-existing narcotics Acts in order to make a concerted attack on the drug problem. It was based on the recommendations of two presidential studies and contains both rehabilitative and punitive provisions.

The old provisions, 18 U. S. C. §§ 1405 (1) and (2) (1964 ed.), provided (1) that a search warrant may be

*[REPORTER'S NOTE: The following dissenting opinion of MR. JUSTICE DOUGLAS was filed on November 13, 1972.]

served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist; and (2) that a search warrant may be directed to any officer of the Metropolitan Police of the District of Columbia authorized to enforce or assist in enforcing a violation of any of such provisions.

These sections have now been replaced. 21 U. S. C. § 878 provides: "Any officer or employee of the Bureau of Narcotics and Dangerous Drug[s] designated by the Attorney General may . . . (2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpenas, and summonses issued under the authority of the United States."

Section 879 (a) provides that "A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant *and for its service at such time.*" (Emphasis added.)

Petitioners first contend that since the Congress did not include the clause allowing the District police to secure warrants under this provision, they have no power to do so. But since the police have power under D. C. Code Ann. § 4–138 (1967) to secure any warrant issued in the District of Columbia, this contention would seem to lose merit.

Of more substance is the second assertion. Under former 18 U. S. C. § 1405 a search warrant could be served day or night on a showing of probable cause. In the District of Columbia the requirements for the service of a warrant in the nighttime required a showing of more than probable cause. Both parties agree that the warrant in question did not meet those standards. When Con-

gress changed § 1405 and added the phrase "probable cause to believe that grounds exist for the warrant and for its service at such time" did § 879 incorporate § 23–521 (f)(5) of the D. C. Code?*

Judge Gesell in *United States* v. *Gooding*, 328 F. Supp. 1005 (1971), ruled that the warrant was not adequate for a nighttime search and that case is now before the Court of Appeals for the District of Columbia. I would hold this case for that decision or grant certiorari and put it down for argument.

Section 23–521 is an important component in the criminal procedure amendments of the Court Reform Act of 1970, effective February 1, 1971. There is an indication that Congress intended that this section should protect a person against unreasonable invasions of privacy. See D. C. Code Leg. & Adm. Service, 91st Cong., 2d Sess., 502 (1970). Since the Court Reform Act did not distinguish between local and federal prosecutions in its procedure, it is arguable that the local rules are binding. Roughly 60% of the search warrants issued in the District of Columbia are drug related. Congress is not unaware of this fact. One would expect that if federal

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*That section provides in part:

"(f) A search warrant shall contain . . . (5) a direction that the warrant be executed during the hours of daylight or, where the judicial officer has found cause therefor, including one of the grounds set forth in section 23–522 (c)(1), an authorization for execution at any time of day or night."

Section 23–522 (c)(1) provides:

"(c) The application may also contain—(1) a request that the search warrant be made executable at any hour of the day or night, upon the ground that there is probable cause to believe that (A) it cannot be executed during the hours of daylight, (B) the property sought is likely to be removed or destroyed if not seized forthwith, or (C) the property sought is not likely to be found except at certain times or in certain circumstances."

narcotics search warrants were to be excluded from coverage, it would have said so.

The District of Columbia Court of Appeals, however, took the position that since § 1405 used the standard of probable cause for both day and night searches and § 879 was merely its substitute, there is no change in the law. The majority is supported in its view by the District Court's opinion in *United States* v. *Green,* 331 F. Supp. 44 (1971). The dissent, however, thought that that construction made the added phrase in § 879 (a) meaningless.

We should resolve this controversy. As Judge Gesell stated: "The search warrant statutes of possible application to narcotics searches in this jurisdiction are a bramblebush of uncertainties and contradictions. It is difficult if not impossible to determine the present congressional intent. This uncertainty should be clarified immediately, so that future search warrants will not be invalidated because of misunderstandings as to the applicable law." *United States* v. *Gooding, supra,* at 1008.

No. 72–5243. MAUCHLIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 1280.

No. 71–6743. BRYANT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 280 N. C. 551, 187 S. E. 2d 111.

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

I would grant certiorari in this case.

Petitioner was convicted of rape and sentenced to life imprisonment. At trial petitioner took the stand and admitted the fact of intercourse, but argued that the alleged victim had consented. Upon cross-examination by the State, petitioner was asked if he had talked with

two police officers making certain statements while in custody and admitting his use of force. Petitioner replied that he had talked with the officers but denied making the statements. In rebuttal, the State called the two police officers to the stand. Over petitioner's objection they testified that petitioner had admitted to them just after his arrest that he had used force to subdue the victim. Prior to this testimony, the trial judge instructed the jury that the testimony was being offered solely for the purpose of impeaching the defendant, and not as substantive evidence. There was no allegation that prior to the time the alleged statement was made to the officers, petitioner had been advised of his rights under *Miranda* v. *Arizona,* 384 U. S. 436. Nor was there ever any determination as to the voluntariness of petitioner's alleged statements.*

A defendant's constitutional right to the fullest opportunity to meet the accusations against him and to be free to deny all the elements of the case against him (*Walder* v. *United States,* 347 U. S. 62), must include the right to remain silent unless he chooses to speak in the *unfettered* exercise of his own will. The allowance of tainted statements to impeach the accused who takes the stand fetters that choice. The instant case is just another example of the way *Harris* v. *New York,* 401

*The only discussion of voluntariness in the opinion of the Supreme Court of North Carolina is that, "While there was evidence he had been given the required warnings, *it was admitted* he had not waived his right to counsel, had not been given a voir dire hearing, and *the court had not found facts showing his statements and admissions were voluntary.*" *North Carolina* v. *Bryant,* 280 N. C. 551, 554, 187 S. E. 2d 111, 113 (emphasis added). The North Carolina Supreme Court never specifically states that petitioner did not raise these objections at trial; the decision appears to be based on the assumption that these issues are irrelevant since the statement is only being offered for impeachment purposes.

U. S. 222, compromises these constitutionally guaranteed rights.

But my objection goes much farther. The instant case goes a step beyond *Harris* in allowing the introduction of illegally obtained statements for the impeachment of the defendant when the statement was merely a remembered verbal conversation rather than a typed signed statement; when the statement was presented as direct testimony rather than for the purpose of impeachment by cross-examination; when, although there was an issue of voluntariness, the statement was permitted without a prior determination as to its voluntariness; and when the jury instruction that the statement should not be considered as substantive evidence did not contain the admonition that the statement could not be considered as evidence of guilt.

If *Harris* is to be extended, we should do so only after argument and mature deliberation.

No. 72–5258. STONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 779.

No. 72–5291. WALL *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–294. L. GOLDSTEIN'S SONS, INC. *v.* TRIO PROCESS CORP. C. A. 3d Cir. Motion of Ford Motor Co. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 461 F. 2d 66.

No. 72–302. PICTURE MUSIC, INC. *v.* BOURNE, INC. C. A. 2d Cir. Motion of Composers & Lyricists Guild of America, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 457 F. 2d 1213.

No. 72–109. PRESIDENTS COUNCIL, DISTRICT 25, ET AL. *v.* COMMUNITY SCHOOL BOARD NO. 25 ET AL. C. A. 2d Cir. Motion of Authors League of America, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE STEWART would grant the petition for certiorari and set case for oral argument. Reported below: 457 F. 2d 289.

MR. JUSTICE DOUGLAS, dissenting.

A book entitled Down These Mean Streets by Piri Thomas was purchased by the librarians of three junior high schools in School District 25 in Queens, New York. The novel describes in graphic detail sexual and drug and drug-related activities that are a part of everyday life for those who live in Spanish Harlem. Its purpose was to acquaint the youth of Queens with the problems of their contemporaries in this social setting. The book was objected to by some parents and, after a public meeting, the School Board by a vote of 5–3 banned it from the libraries. A later vote by the Board amended the order so the book is now kept on the shelves for direct loan to any parent who wants his or her children to have access to it. No child can borrow it directly.

This suit was brought on behalf of a principal, a librarian, and various parents and children who request that the court declare the resolution adopted by the Board unconstitutional, and order the defendants to place the book in normal circulation in the libraries and enjoin them from interfering with other school libraries within their jurisdiction which desire to purchase the book.

Actions of school boards are not immune from constitutional scrutiny. *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Bartels* v. *Iowa,* 262 U. S. 404 (1923); *Epperson* v. *Arkansas,* 393 U. S. 97 (1968); *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503 (1969). Academic freedom has been upheld against attack on various fronts.

Sweezy v. *New Hampshire,* 354 U. S. 234 (1957); *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967). The First Amendment involves not only the right to speak and publish, but also the right to hear, to learn, to know. *Martin* v. *Struthers,* 319 U. S. 141, 143 (1943); *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969); *Thomas* v. *Collins,* 323 U. S. 516, 534 (1945); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 386, 390 (1969). And this Court has recognized that this right to know is " 'nowhere more vital' than in our schools and universities," *Kleindienst* v. *Mandel,* 408 U. S. 753, 763 (1972); *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960); *Sweezy* v. *New Hampshire,* 354 U. S., at 250 (opinion of Warren, C. J.); *Keyishian* v. *Board of Regents,* 385 U. S., at 603. The book involved is not alleged to be obscene either under the standards of *Roth* v. *United States,* 354 U. S. 476 (1957), or under the stricter standards for minors set forth in *Ginsberg* v. *New York,* 390 U. S. 629 (1968).

The Board, however, contends that a book with such vivid accounts of sordid and perverted occurrences is not good for junior high students. At trial both sides produced expert witnesses to prove the value or harm of the novel. At school the children are allowed to discuss the contents of the book and the social problems it portrays. They can do everything but read it. This in my mind lessens somewhat the contention that the subject matter of the book is not proper.

The First Amendment is a preferred right and is of great importance in the schools. In *Tinker,* the Court held that the First Amendment can only be restricted in the schools when a disciplinary problem is raised. No such allegation is asserted here. What else can the School Board now decide it does not like? How else will its sensibilities be offended? Are we sending children to school to be educated by the norms of

the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?

Another requirement of the First Amendment is that any statute that imposes restrictions on the freedoms it protects must be narrowly drawn so as to impose any limitation in only the least restrictive way. N. Y. Educ. Law § 2590–e (3) (1970) gives the Board power to "determine matters relating to the instruction of students, including the selection of textbooks and other instructional materials . . . ," provided they are approved by the Chancellor. The regulation of the State Commissioner of Education says that secondary school book collections "shall consist of books approved as satisfactory for (1) supplementing the curriculum (2) reference and general information (3) appreciation and (4) pleasure reading," 8 N. Y. Code, Rules & Regs. Educ., § 91.1 (b) (1966). Even a casual reading of these regulations shows that they contain no discrete limitations of the type spoken of in *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), *Speiser* v. *Randall,* 357 U. S. 513 (1958), or *Shelton* v. *Tucker, supra.*

Because the issues raised here are crucial to our national life, I would hear argument in this case.

No. 72–218. FUGATE, COMMISSIONER, DEPARTMENT OF HIGHWAYS OF VIRGINIA *v.* ARLINGTON COALITION ON TRANSPORTATION ET AL. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE POWELL would grant certiorari. Reported below: 458 F. 2d 1323.

No. 72 266. STONE *v.* STONE ET AL. C. A. 4th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 460 F. 2d 64.

No. 72–275. KATZ ET AL. *v.* ASPINWALL ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 459 F. 2d 1045.

No. 72–303. NEW HAMPSHIRE BANKERS ASSN. ET AL. *v.* NELSON, BANK COMMISSIONER OF NEW HAMPSHIRE, ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 460 F. 2d 307.

No. 72–313. METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY ET AL. *v.* KELLEY ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 463 F. 2d 732.

No. 72–321. SEABOARD COAST LINE RAILROAD CO. *v.* JACKSON. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 256 So. 2d 568.

No. 72–327. HOOGASIAN ET AL. *v.* SEARS, ROEBUCK & CO. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 52 Ill. 2d 301, 287 N. E. 2d 677.

No. 72–339. LAMB ENTERPRISES, INC. *v.* TOLEDO BLADE CO. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 461 F. 2d 506.

No. 72–5269. RAYMOND *v.* UNITED STATES. C. A. 8th Cir. Motion for an order reinstating case No. 71–6536, *Guy* v. *United States* [*ante,* p. 896], and for simultaneous consideration denied. Certiorari denied. Reported below: 456 F. 2d 1157.

Rehearing Denied

No. 71–1433. BELLISTON ET AL. *v.* TEXACO INC., 408 U. S. 928. Motion for leave to file petition for rehearing denied.

No. 71–1624. LEWIS *v.* STRACHAN SHIPPING CO. ET AL., *ante,* p. 887;

No. 71–6260. MACLEOD *v.* SLAYTON, PENITENTIARY SUPERINTENDENT, *ante,* p. 853;

No. 71–6536. GUY *v.* UNITED STATES, *ante,* p. 896;

No. 71–6564. NEWELL *v.* BOHANNON, U. S. DISTRICT JUDGE, *ante,* p. 823; and

No. 71–6907. WATSON *v.* STYNCHCOMBE, SHERIFF, *ante,* p. 873. Petitions for rehearing denied.

No. 71–1218. HOLMES ET AL. *v.* UNITED STATES, 407 U. S. 909. Motion to dispense with printing motion for leave to file petition for rehearing granted. Motion for leave to file petition for rehearing denied.

NOVEMBER 10, 1972

Miscellaneous Order

No. A–444. POPKIN *v.* UNITED STATES. C. A. 1st Cir. Application for stay presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the stay. Reported below: 460 F. 2d 328.

NOVEMBER 13, 1972

Affirmed on Appeal

No. 72–104. KAPLAN ET AL. *v.* MILLIKEN, JUDGE, ET AL. Affirmed on appeal from D. C. W. D. Ky.

No. 72–246. INTERSTATE COMMERCE COMMISSION *v.* IML SEATRANSIT, LTD., ET AL. Affirmed on appeal from D. C. N. D. Cal. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST would note prob-

able jurisdiction and set case for oral argument. Reported below: 343 F. Supp. 32.

Appeals Dismissed

No. 71–6752. WALKER *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. Reported below: 476 S. W. 2d 630.

No. 72–32. WINTER *v.* PRATT ET AL. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. Reported below: 258 S. C. 397, 189 S. E. 2d 7.

No. 72–354. ROCKLAND COUNTY BUILDERS ASSN., INC., ET AL. *v.* MCALEVEY ET AL.; and

No. 72–369. GOLDEN ET AL. *v.* PLANNING BOARD OF THE TOWN OF RAMAPO ET AL. Appeals from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 30 N. Y. 2d 359, 285 N. E. 2d 291.

No. 72–365. REILLEY *v.* REILLEY. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question.

No. 72–5513. CORRADO, DBA PERRY'S SECOND HAND PLUMBING *v.* PROVIDENCE REDEVELOPMENT AGENCY. Appeal from Super. Ct. R. I. dismissed for want of substantial federal question.

No. 72–373. TEXAS EASTERN TRANSMISSION CORP. *v.* BENSON, COMMISSIONER OF REVENUE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: —— Tenn. ——, 480 S. W. 2d 905.

Certiorari Granted—Vacated and Remanded. (See also No. 72–5256, *ante,* p. 56.)

No. 72–5317. FRAZIER *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Stewart* v. *Massachusetts,* 408 U. S. 845 (1972). Reported below: 280 N. C. 181, 185 S. E. 2d 652.

Miscellaneous Orders

No. A–394 (72–5535). DYE *v.* NEW JERSEY. Sup. Ct. N. J. Application for bail presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant bail. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. Reported below: 60 N. J. 518, 291 A. 2d 825.

No. A–460. IN RE BERG ET AL. C. A. 9th Cir. Application for stay of execution of judgment and bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would continue the stay.

No. 71–1178. GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. [Certiorari granted, 406 U. S. 956.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of respondent cities granted and 15 minutes allotted for that purpose. Petitioner also allotted 15 additional minutes for oral argument.

No. 72–95. TOLLETT, WARDEN *v.* HENDERSON. C. A. 6th Cir. [Certiorari granted, *ante,* p. 912.] Motion of respondent for appointment of counsel granted. It is ordered that H. Fred Hoefle, Esquire, of Cincinnati, Ohio, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 71–1192. GOLDSTEIN ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. [Certiorari granted, 406 U. S. 956.] Motion of Recording Industry Association of America, Inc., et al. for leave to participate in oral argument as *amici curiae* denied.

No. 71–6757. FONTAINE *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, *ante,* p. 978.] Motion of petitioner 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 petitioner in this case.

No. 72–312. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* WARE ET AL. Ct. App. Cal., 1st App. Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 24 Cal. App. 3d 35, 100 Cal. Rptr. 791.

No. 72–5324. MCCRARY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

No. 72–5336. STEELE *v.* LAMBROS, JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 72–214. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* WICHITA BOARD OF TRADE ET AL.; and

No. 72–433. INTERSTATE COMMERCE COMMISSION *v.* WICHITA BOARD OF TRADE ET AL. Appeals from D. C. Kan. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 352 F. Supp. 365.

No. 72–350. UNITED STATES *v.* STATE TAX COMMISSION OF MISSISSIPPI ET AL. Appeal from D. C. S. D. Miss. Probable jurisdiction noted. Reported below: 340 F. Supp. 903.

*Certiorari Denied**

No. 71–1556. McGOWAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 258 So. 2d 801.

No. 71–6720. FLETCHER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 265 Md. 256, 288 A. 2d 885.

No. 71–6880. DAVIS *v.* CALDWELL, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 229 Ga. 122, 189 S. E. 2d 423.

No. 71–6897. ANDERSEN *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 22 Cal. App. 3d 763, 99 Cal. Rptr. 531.

No. 72–67. HILL ET UX. *v.* HILL. Sup. Ct. Cal. Certiorari denied. Reported below: See 23 Cal. App. 3d 760, 100 Cal. Rptr. 458.

No. 72–79. COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL. *v.* ACREE ET AL.; and
No. 72–167. DRUMMOND ET AL. *v.* ACREE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 486.

No. 72–135. PROJANSKY *v.* UNITED STATES;
No. 72–272. LEAVITT *v.* UNITED STATES;
No. 72–390. GEIER *v.* UNITED STATES; and
No. 72–514. BRAININ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 465 F. 2d 123.

No. 72–157. LONQUEST *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 495 P. 2d 575.

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*[REPORTER'S NOTE: For dissenting opinion of MR. JUSTICE DOUGLAS, filed November 13, 1973, in No. 72–5240, *Thomas* v. *United States*, see *ante*, p. 992.]

No. 72–177. MILLER *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 457 F. 2d 700.

No. 72–288. POTTS ET AL. *v.* FLAX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 865.

No. 72–335. LEFLORE *v.* ALABAMA EX REL. MOORE. Sup. Ct. Ala. Certiorari denied. Reported below: 288 Ala. 310, 260 So. 2d 581.

No. 72–343. LOESER ET AL. *v.* LOESER. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 567, 283 N. E. 2d 884.

No. 72–346. HUMBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–347. CUSTOM RECORDING CO., INC., ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC. Sup. Ct. S. C. Certiorari denied. Reported below: 258 S. C. 465, 189 S. E. 2d 305.

No. 72–353. CERTIFIED GROCERS OF ILLINOIS, INC., ET AL. *v.* SPARKLE FOOD CENTER, INC., ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 51 Ill. 2d 389, 282 N. E. 2d 728.

No. 72–358. BISHOP *v.* CORAL DRILLING, INC., ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 260 So. 2d 463.

No. 72–360. INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 460 F. 2d 497.

No. 72–362. WINCHESTER TV CABLE CO., INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 462 F. 2d 115.

No. 72–361. GOTTLIEB *v.* DURYEA ET AL. Ct. App. N. Y. Certiorari denied.

No. 72–363. GRIMES *v.* NOTTOWAY COUNTY SCHOOL BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 462 F. 2d 650.

No. 72–372. ROAD MATERIALS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied.

No. 72–374. SWARTHOUT *v.* OLUND. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 2d 999.

No. 72–375. SAN FRANCISCO NEWSPAPER PRINTING CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 699.

No. 72–377. CAMPBELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 480 S. W. 2d 391.

No. 72–378. HERSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 F. 2d 228.

No. 72–379. M. J. PIROLLI & SONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied.

No. 72–380. PERILLO ET UX. *v.* UNITED AMERICAN LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 254.

No. 72–381. BASYAP, INC., ET AL. *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 72–383. TEXACO INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 462 F. 2d 812.

No. 72–384. KANSAI IRON WORKS, LTD. *v.* MARUBENI-IIDA, INC., ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 80 Wash. 2d 707, 497 P. 2d 1311.

No. 72–387. SCHWARTZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 499.

No. 72–391. ROBINSON, TRUSTEE IN BANKRUPTCY *v.* FRASHER ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 2d 492.

No. 72–395. JOHN NUVEEN & Co., INC., ET AL. *v.* SANDERS. C. A. 7th Cir. Certiorari denied. Reported below: 463 F. 2d 1075.

No. 72–420. MONTANO *v.* UNITED STATES; and
No. 72–5182. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 F. 2d 1352.

No. 72–5004. COUSINO *v.* COULON ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–5014. CONNORS *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–5297. CARTER *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 1406.

No. 72–5298. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 1343.

No. 72–5305. HAYS *v.* CANALE ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–5306. LABADIE *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 72–5307. GRAY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 164.

No. 72–5309. BENNETT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5314. HIBBERD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5316. KNOX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 462 F. 2d 982.

No. 72–5318. DOUGLAS *v.* NIXON, SHERIFF. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 2d 325.

No. 72–5321. BENNETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5325. CODY *v.* UNITED STATES C. A. 8th Cir. Certiorari denied. Reported below: 460 F. 2d 34.

No. 72–5326. GRANTHAM *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–5327. MONJE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 141.

No. 72–5330. WOLFE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 72–5332. HAGAN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 72–5333. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 1376.

No. 72–5334. LEBRUN *v.* OREGON. Sup. Ct. Ore. Certiorari denied.

No. 72–5335. JACKSON *v.* WOLFORD. C. A. 6th Cir. Certiorari denied. Reported below: 460 F. 2d 319.

No. 72–5338. WAGNER *v.* WORKMEN'S COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5339. EMDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 378.

No. 72–5340. CHACON *v.* MCCLAIN ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5341. SPINKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 470 F. 2d 64.

No. 72–5342. HOUP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 462 F. 2d 1338.

No. 72–5344. STROTHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 424.

No. 72–5345. COOK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 251.

No. 72–5514. CORRADO *v.* PROVIDENCE REDEVELOPMENT AGENCY. Sup. Ct. R. I. Certiorari denied. Reported below: 109 R. I. 956, 288 A. 2d 272.

No. 71–1642. FARR *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 22 Cal. App. 3d 60, 99 Cal. Rptr. 342.

No. 71–6700. VENABLE ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–349. SCARPETTA *v.* DEMARTINO ET UX. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 262 So. 2d 442.

No. 72–352. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–355. RUSSELL, EXECUTRIX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 461 F. 2d 605.

No. 72–356. SMITH, TRUSTEE *v.* BAKER, TRUSTEE, ET AL. C. A. 3d Cir. Petition for certiorari before judgment to C. A. 3d Cir. denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–371. NATIONAL LABOR RELATIONS BOARD *v.* TAMIMENT, INC. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 451 F. 2d 794.

No. 72–382. CARTER ET AL. *v.* PANAMA CANAL CO. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 150 U. S. App. D. C. 198, 463 F. 2d 1289.

No. 72–388. GERACE ET VIR *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–389. ZIZZO *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 105.

No. 72–5296. CHAGOIS *v.* LYKES BROS. STEAMSHIP CO., INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 457 F. 2d 343.

No. 72–5315. BOATWRIGHT *v.* HENDRICKS, PRISON CAMP SUPERINTENDENT. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5328. BROADWAY *v.* TEXAS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 483.

No. 72–5337. NIX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 90.

No. 71–6589. SLADE *v.* VALLEY NATIONAL BANK, GLENDALE. App. Dept., Super. Ct. Cal., County of Los Angeles. Motion for leave to dispense with printing *amicus curiae* brief by National Legal Aid & Defender Assn. granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–41. WASHINGTON PARISH SCHOOL BOARD ET AL. *v.* MOSES ET AL. C. A. 5th Cir. Motion for leave to dispense with printing respondents' brief granted. Certiorari denied. Reported below: 456 F. 2d 1285.

No. 72–307. RUSSO ET AL. *v.* BYRNE, U. S. District Judge. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari.

MR. JUSTICE DOUGLAS, dissenting.

I regret that the Court does not take this occasion to lay down some further ground rules for the conduct of criminal cases involving electronic surveillance in the sensitive area which involves both the Fourth and the Sixth Amendments.

In *Alderman* v. *United States,* 394 U. S. 165, we laid down rules governing the district courts where there had been electronic surveillance of the defendant in a criminal case or where in other surveillance his words had been recorded. *Alderman* and its descendants made possible the conduct of criminal trials with fairness to all sides and with no disturbance to orderly proceedings.

The present case is one of several that have come across my desk this year involving not the surveillance of a

defendant in a criminal case but the surveillance of his lawyer.

It is time, I think, that we hold that the confidences of the lawyer-client relationship remain inviolate. It is also time that we set forth the prescribed procedures in an *Alderman* type of opinion.

The problems where the lawyer is involved seem to me to be as critical as those where the defendant's privacy under the Fourth Amendment is violated.[1] The ruling

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[1] Wiretapping, which Justice Holmes called "dirty business," *Olmstead* v. *United States*, 277 U. S. 438, 470 (dissenting), was put by Justice Brandeis in a constitutional frame of reference:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Id.*, at 478.

And he added:

"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Id.*, at 485.

which I made this last summer when I granted the stay in this case was based on the premise that the teaching of *Alderman* would fully apply to a case where the Sixth Amendment rights of a defendant were imperiled.

We held in *United States* v. *United States District Court,* 407 U. S. 297, that electronic surveillance of internal security measures was not permissible on the basis of an order of the Attorney General, but only on judicial search warrants. We reserved decision "with respect to activities of foreign powers or their agents." *Id.,* at 322. When the argument was held last summer on the stay order, the prosecution in oral presentation distinguished that case on the ground that it involved "domestic" surveillance while the present one involved "foreign" surveillance. The prosecution seemed reluctant to enlarge on that distinction, which led me to note in the opinion I filed granting the stay that we may be dealing only with a matter of semantics. The prosecution never submitted to me *in camera* the logs in question. I have now seen them, and it appears that the electronic surveillance was of a telephone of a foreign national and that the intercepted conversations in this case had nothing to do "with respect to activities of foreign powers or their agents," the question we reserved in the previous case. *Ibid.* As I understand it, the conversation was an inquiry by one of the counsel concerning wholly personal social and commercial matters. It is not conceivable to me that this conversation is in the "foreign" field in the sense the word is used in the statutes involved in the *United States District Court* case. No activity of any foreign "agent" is even suggested. We should therefore take the case to resolve what immunity the Executive Branch has in setting up schemes of pervasive surveillance of foreign nationals that is unrelated to espionage.

It is, however, said that the conversation is utterly irrelevant to the issues in the present case. How can we know? Only one immersed in building a case for the prosecution or constructing a defense can know whether an innocuous-appearing conversation would be a "link" in a chain of evidence which in time would be necessary or convenient for either the prosecution or the defense. That is why I feel strongly that, as we held in *Alderman* v. *United States, supra,* the question of relevance must be submitted for adversary hearing before the trial judge.[2]

I suspect that if that had been done here, the dispute that has delayed this trial for some months would have been quickly resolved. A grave injustice may or may not ride on the denial of certiorari today. My concern is

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[2] In *Alderman* v. *United States* we read:

"Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

"Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands. It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant." 394 U. S., at 183–184.

not that, but the administration of the law. I use the word law in its largest sense—where the prosecution as well as the defense is required to live within the spirit and letter of the constitutional rules designed to keep Government off the backs of the people and to take no shortcuts because of public hysteria or political pressures.

That question concerning the applicability of the pretrial procedures laid out in *Alderman* to the protection of Sixth Amendment claims makes this case a singularly appropriate occasion for laying down the ground rules that will apply in federal trials.

No. 72–345. RAO *v.* BOARD OF COUNTY COMMISSIONERS (PIERCE COUNTY) ET AL. Sup. Ct. Wash. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 80 Wash. 2d 695, 497 P. 2d 591.

No. 72–5247. GRUBB *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 497 P. 2d 1305.

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

Petitioner and Lynette Murphy lived together as husband and wife in Collinsville, Oklahoma, from September 1970 through the end of January 1971. After leaving petitioner, Lynette went to live with her sister and brother-in-law, Lana and Larry Sanders, in Collinsville. At approximately 8 p. m. on February 2, 1971, petitioner went to the Sanders' residence, displayed a gun, and informed Gary Hany, another occupant, that he intended to take Lynette with him. After a wait of approximately 45 minutes, Lynette, Lana, and Larry arrived at the residence. Petitioner told Lynette that if she refused to go with him he would kill them all. Lynette became "kind of shook up" and agreed to go. Petitioner then

took Larry Sanders' money (three dollars) and car keys, and left with Lynette in the Sanders' car. After an extensive chase, petitioner was apprehended by the Oklahoma police and was charged with kidnaping, two counts of armed robbery, and unauthorized use of a motor vehicle.*

Although all of these charges arose out of the "same transaction or occurrence," they were prosecuted by the State in two separate proceedings. At the first trial, petitioner was convicted of the armed robbery of Larry Sanders. At the second trial, he was convicted of kidnaping Lynette Murphy, and was acquitted of a charge of armed robbery of Lana Sanders. Petitioner's contention that this second prosecution was barred by the provisions against double jeopardy in both the State and Federal Constitutions was rejected by the Oklahoma Court of Criminal Appeals, one judge dissenting. *Grubb* v. *State,* 497 P. 2d 1305 (1972).

I would grant the petition for certiorari and reverse. I adhere to my view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the prosecution, except in most limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (concurring opinion); see *Miller* v. *Oregon,*

*The charge of unauthorized use of a motor vehicle was dismissed by the trial court on the ground that it violated petitioner's right against double jeopardy. The court apparently ruled that the prosecution for armed robbery of Larry Sanders, which included the forcible taking of Sanders' car keys, precluded an additional prosecution for unauthorized use of the vehicle itself.

405 U. S. 1047 (1972) (dissenting opinion); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (concurring opinion). Under this "same transaction" test, all charges against petitioner should have been brought in a single prosecution.

No. 72–5299. SALTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari.

Rehearing Denied

No. 71–6594. TYLER *v.* PARKS, *ante,* p. 858;

No. 71–6691. ZIMMER *v.* GAFFNEY, WARDEN, *ante,* p. 862;

No. 71–6729. WEAVER *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL., *ante,* p. 864;

No. 71–6813. FERMIN *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante,* p. 868;

No. 71–6819. NELSON *v.* BUTLER, PRISON SUPERINTENDENT, *ante,* p. 869;

No. 71–6861. DOCKERY *v.* CALIFORNIA, *ante,* p. 871; and

No. 72–5067. WIMBERLEY ET AL. *v.* LYNCH, ATTORNEY GENERAL OF CALIFORNIA, ET AL., *ante,* p. 882. Petitions for rehearing denied.

No. 71–1270. MCKEE *v.* UNITED STATES, 407 U. S. 910, and *ante,* p. 899. Motion for leave to file second petition for rehearing denied.

No. 71–1401. SMITH, TRUSTEE *v.* BAKER ET AL., *ante,* p. 890. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 71–5689. NACHBAUR *v.* HERMAN, 405 U. S. 931. Second motion for leave to file petition for rehearing denied.

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Affirmed on Appeal

No. 72–334. ROSE *v.* BONDURANT, CHAIRMAN, BOARD OF BAR EXAMINERS OF NEW MEXICO, ET AL. Affirmed on appeal from D. C. N. M. MR. JUSTICE STEWART would vacate judgment and remand case to determine whether case has become moot. Reported below: 339 F. Supp. 257.

No. 72–413. SIMON *v.* SARGENT, GOVERNOR OF MASSACHUSETTS, ET AL. Affirmed on appeal from D. C. Mass. Reported below: 346 F. Supp. 277.

No. 72–432. MORITT *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeal from D. C. S. D. N. Y. Motion to dispense with printing jurisdictional statement granted. Judgment affirmed. MR. JUSTICE DOUGLAS would postpone question of jurisdiction to a hearing of case on the merits. Reported below: 346 F. Supp. 34.

Appeals Dismissed

No. 71–1478. FALKNER ET UX. *v.* PASTRANO ET UX. Appeal from Sup. Ct. Fla. Motion to dispense with printing jurisdictional statement and motion to dismiss granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 255 So. 2d 688.

No. 72–412. MARTINEZ *v.* TEXAS STATE BOARD OF MEDICAL EXAMINERS. Appeal from Ct. Civ. App. Tex., 4th Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 476 S. W. 2d 400.

No. 72–415. CONN-WOOD INVESTMENT CORP. ET AL. *v.* WORKMEN'S COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 72–5118. MARTIN *v.* TEXAS. Appeal from Ct. Crim. App. 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: 475 S. W. 2d 265.

Other Summary Disposition

No. 71–1133. UPPER PECOS ASSN. *v.* PETERSON, SECRETARY OF COMMERCE, ET AL. C. A. 10th Cir. [Certiorari granted, 406 U. S. 944.] Upon consideration of memorandum for respondents suggesting mootness and brief in opposition thereto, judgment vacated and case remanded to determine whether case has become moot. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 452 F. 2d 1233.

*Miscellaneous Orders**

No. A–360 (72–730). MARKLE ET AL. *v.* ABELE ET AL. D. C. Conn. Motion to vacate stay heretofore granted by the Court on October 16, 1972 [*ante*, p. 908], denied. Reported below: 351 F. Supp. 224.

No. A–457. BORKENHAGEN *v.* UNITED STATES. C. A. 7th Cir. Application for stay and/or bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the stay. 468 F. 2d 43.

No. 58, Orig. AMERICAN PARTY ET AL. *v.* NEW YORK ET AL. Motion for leave to file bill of complaint denied.

No. 71–1043. HELLER *v.* NEW YORK. Ct. App. N. Y. [Certiorari granted, 406 U. S. 916.] Motion of Charles H. Keating, Jr., to file untimely brief as *amicus curiae* in support of respondent granted.

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*For reference to Court's order prescribing Rules of Evidence for United States Courts and Magistrates, Amendments to the Federal Rules of Civil Procedure, and Amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1132.

No. 72–397. BONELLI CATTLE CO. ET AL. *v.* ARIZONA ET AL. Sup. Ct. Ariz. The Solicitor General is invited to file a brief expressing the views of the United States. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this order. Reported below: 108 Ariz. 258, 495 P. 2d 1312.

No. 72–400. ROSE, WARDEN *v.* RIVERA. C. A. 6th Cir. Motion of petitioner to consolidate case with Nos. 71–1281 [*Linder, Warden* v. *Recor*] and 71–1472 [*Neil, Warden* v. *Pendergrass*] denied. Reported below: 465 F. 2d 727.

Certiorari Denied. (See also Nos. 71–1478 and 72–5118, *supra.*)

No. 71–1567. BERRY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 13 N. C. App. 310, 185 S. E. 2d 463.

No. 71–6824. MORTON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied.

No. 71–6841. SIGMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 50 Ill. 2d 229, 278 N. E. 2d 73.

No. 71–6894. MCGHEE *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 455 F. 2d 987.

No. 71–6899. REARDON *v.* MEACHAM. Sup. Ct. Wyo. Certiorari denied.

No. 72–396. JOHNS *v.* JOHNS. C. A. 5th Cir. Certiorari denied.

No. 72–401. CITIZENS UTILITIES WATER COMPANY OF ARIZONA *v.* SUPERIOR COURT OF ARIZONA IN AND FOR THE COUNTY OF PIMA ET AL. Sup. Ct. Ariz. Certiorari denied. Reported below: 108 Ariz. 296, 497 P. 2d 55.

No. 72–404. DISPOSABLE SERVICES, INC. *v.* ITT LIFE INSURANCE COMPANY OF NEW YORK. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 218 and 457 F. 2d 972.

No. 72–405. MERRICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 464 F. 2d 1087.

No. 72–409. LAURIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 1129.

No. 72–411. MASONITE CORP. ET AL. *v.* HENDRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 955.

No. 72–423. HADCO PRODUCTS, INC. *v.* WALTER KIDDE & Co. C. A. 3d Cir. Certiorari denied. Reported below: 462 F. 2d 1265.

No. 72–424. CITY OF CRYSTAL CITY *v.* DEL MONTE CORP., DBA DEL MONTE FOODS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 976.

No. 72–427. SUN SHIPBUILDING & DRY DOCK Co. *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 198 Ct. Cl. 693, 461 F. 2d 1352.

No. 72–428. ALABAMA *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 198 Ct. Cl. 683, 461 F. 2d 1324.

No. 72–429. BOLTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–430. DOSS *v.* LEWIS-GALE HOSPITAL, INC. Cir. Ct. Roanoke, Va. Certiorari denied.

No. 72–437. MADER ET AL. *v.* ARMEL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 461 F. 2d 1123.

No. 72–439. ALEXANDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 2d 18.

No. 72–440. SAEZ *v.* GOSLEE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 463 F. 2d 214.

No. 72–443. CAMPO CORP. ET AL. *v.* SUPREME JUDICIAL COURT OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 285 N. E. 2d 419.

No. 72–445. DUQUESNE BREWING COMPANY OF PITTSBURGH *v.* CONNOR ET AL. Sup. Ct. Pa. Certiorari denied.

No. 42–447. HUTTER ET UX. *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied.

No. 72–449. CAPITOL TILE & MARBLE, INC., ET AL. *v.* DEESE. C. A. D. C. Cir. Certiorari denied.

No. 72–450. BELLINGHAM STEVEDORING CO. *v.* DAMPSKIBSAKTIESELSKABET ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 889.

No. 72–454. ESTATE OF HEDRICK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 501.

No. 72–458. HOSPITAL TELEVISION, INC. *v.* WELLS TELEVISION, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 462 F. 2d 417.

No. 72–460. GARRISON *v.* SHAW. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 113.

No. 72–5020. GAY *v.* LICENSE BRANCH, REAL ESTATE COMMISSION OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 72–5132. REDMAN *v.* CONBOY, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5044. HUGHES *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 14 Md. App. 497, 287 A. 2d 299.

No. 72–5346. RENSING *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5347. WYNN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5350. DAPPER *v.* O'CONNOR ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5351. NEWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5352. JOHNSON *v.* MEACHAM. Sup. Ct. Wyo. Certiorari denied.

No. 72–5354. BUSTILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5355. MITCHELSON *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5357. PRIORE *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 72–5360. NAVALLEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5361. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 558.

No. 72–5364. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5369. HARBOLT *v.* ALLDREDGE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 464 F. 2d 1243.

No. 72–5365. CASSIDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 813.

No. 72–5366. YEAGER *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–5370. CONGROVE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 72–5373. POTTS *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5374. ETHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–5376. JOHNS *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 72–5378. PEJOKOVICH *v.* BOARD OF EDUCATION, PRINCE GEORGE'S COUNTY, ET AL. Ct. App. Md. Certiorari denied. Reported below: 265 Md. 488, 290 A. 2d 510.

No. 72–5380. BANKS *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5382. KELLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1136.

No. 72–5384. ROBERTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 193.

No. 72–5393. FERRER-VEGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 12.

No. 72–5394. HITCHCOCK *v.* GOMES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–5395. BUCKLES *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 500 P. 2d 518.

No. 72–5396. McBride *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 44.

No. 72–5397. Linwood et al. *v.* Board of Education of City of Peoria, School District No. 150. C. A. 7th Cir. Certiorari denied. Reported below: 463 F. 2d 763.

No. 72–5402. Tate *v.* D. C. Transit Co. Ct. App. D. C. Certiorari denied.

No. 72–5404. LeBrun *v.* Cupp, Warden. C. A. 9th Cir. Certiorari denied.

No. 72–5410. Black *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 71–1381. Caldwell, Warden *v.* Thornton. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 454 F. 2d 1167.

No. 71–6690. Keeny *v.* Swenson, Warden. C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 458 F. 2d 680.

No. 72–326. Charlton *v.* United States et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 462 F. 2d 59.

No. 72–370. Marcus et al. *v.* New York. Ct. App. N. Y. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 31 N. Y. 2d 12, 286 N. E. 2d 234.

No. 72–398. WAIT Radio *v.* Federal Communications Commission. C. A. D. C. Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 148 U. S. App. D. C. 179, 459 F. 2d 1203.

No. 72–417. Ware et al. *v.* Estes, Superintendent, Dallas Public Schools, et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 458 F. 2d 1360.

No. 72–406. DOMINEY *v.* DOMINEY. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 S. W. 2d 473.

No. 72–416. SEWARD MOTOR FREIGHT, INC., ET AL. *v.* NEBRASKA STATE RAILWAY COMM'N ET AL. Sup. Ct. Neb. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 188 Neb. 223, 196 N. W. 2d 200.

No. 72–418. HAMMOND *v.* UNITED PAPERMAKERS & PAPERWORKERS UNION, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 174.

No. 72–431. CLARK ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 198 Ct. Cl. 593, 461 F. 2d 781.

No. 72–5353. BROWNSTEIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 1132.

No. 72–5362. HEREDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 611.

No. 72–5363. GANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 216.

No. 72–5399. TATUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5409. GEDARRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–399. WILLIAMS *v.* HILLIARD. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 465 F. 2d 1212.

No. 72–5073. ZEIGLER *v.* RILEY, PENITENTIARY SUPERINTENDENT. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS would deny the petition on ground of mootness.

Rehearing Denied

No. 71–1109. NORRIS ET AL. *v.* JORDAN ET AL.; and

No. 71–1439. NORRIS ET AL. *v.* JORDAN ET AL., *ante*, p. 811. Motion of appellants for specification of grounds for finding want of jurisdiction denied. Petition for rehearing of appellant Kerns denied.

No. 71–1666. HUIE ET AL. *v.* UNITED STATES, *ante*, p. 891;

No. 71–6487. MEDINA *v.* UNITED STATES, *ante*, p. 855;

No. 71–6673. GOLDEN *v.* HENDERSON, WARDEN, *ante*, p. 861;

No. 71–6723. CHAIS-SHULMAN *v.* BANK OF AMERICA TRUST NO. 54212, *ante*, p. 864;

No. 71–6786. CROW *v.* EYMAN, WARDEN, ET AL., *ante*, p. 867; and

No. 72–5133. BUCHANAN *v.* TEXAS, *ante*, p. 814. Petitions for rehearing denied.

No. 71–1680. LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. *v.* RODES, TRUSTEE IN BANKRUPTCY, ET AL., *ante*, p. 893. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 72–5101. SERZYSKO *v.* CHASE MANHATTAN BANK, *ante*, p. 883. Motion to recuse MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST denied. Petition for rehearing denied.

NOVEMBER 22, 1972

Dismissal Under Rule 60

No. 71–1586. WOOD *v.* GOODSON, JUDGE. Cir. Ct. Ark., Miller County. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

NOVEMBER 27, 1972

Dismissal Under Rule 60

No. 72–536. THIRD BREVOORT CORP. *v.* BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK ET AL. Ct. App. N. Y. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

DECEMBER 1, 1972

Miscellaneous Order

No. A–555. ADAMS *v.* MAYLIN. Sup. Ct. La. Application for stay of execution and enforcement of judgment presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application.

DECEMBER 4, 1972

Order Appointing Librarian

It is ordered that Edward G. Hudon, be, and he is hereby, appointed Librarian of this Court in the place of Henry Charles Hallam, Jr., retired.

Appeals Dismissed

No. 71–6658. ANDERSON ET AL. *v.* LOUISIANA. Appeal from Sup. Ct. La. 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 would note probable jurisdiction and set case for oral argument. Reported below: 261 La. 244, 259 So. 2d 310.

No. 72–484. FELLAND *v.* SCHAEFER ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question.

No. 72–516. O'CONNOR ET AL. *v.* NEW JERSEY ET AL. Appeal from Super. Ct. N. J. dismissed for want of substantial federal question. Reported below: See 117 N. J. Super. 575, 285 A. 2d 270.

No. 72–570. WASHER ONE, INC., DBA IRISH WASHWOMAN, ET AL. *v.* KENTUCKY EX REL. DIVISION OF UNEMPLOYMENT INSURANCE. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. Reported below: 482 S. W. 2d 590.

No. 72–546. FINGER LAKES RACING ASSN., INC. *v.* NEW YORK STATE OFF-TRACK PARI-MUTUEL BETTING COMMISSION ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 30 N. Y. 2d 207, 282 N. E. 2d 592.

No. 72–5412. RUDERER *v.* UNITED STATES. Appeal from C. A. 8th Cir. 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: 462 F. 2d 897.

Certiorari Dismissed

No. 72–517. PENNSYLVANIA *v.* LINDE. Sup. Ct. Pa. It appearing that respondent, a defendant in a state criminal proceeding, died on November 2, 1972, the petition for writ of certiorari to the Supreme Court of Pennsylvania, Western District, is dismissed. *Gersewitz* v. *New York,* 326 U. S. 687 (1945). Reported below: 448 Pa. 230, 293 A. 2d 62.

Certiorari Granted—Vacated and Remanded or Reversed. (See also No. 71–6647, *ante,* p. 95; and No. 72–72, *ante,* p. 100.)

No. 72–5206. ALEXANDER *v.* HENDERSON, WARDEN. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed and case remanded for further proceedings. See *Stewart* v. *Massachusetts,* 408 U. S. 845 (1972). Reported below: 459 F. 2d 1391.

Miscellaneous Orders. (See also No. 71–6883, *infra,* p. 1051.)

No. 70–279. UNITED STATES ET AL. *v.* FLORIDA EAST COAST RAILWAY CO. ET AL. Appeal from D. C. M. D. Fla. [Probable jurisdiction noted, 407 U. S. 908.] Motion of appellee Seaboard Coast Line Co. to permit two counsel to argue on behalf of appellees granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. A–552 (72–640). OREGON STATE ELKS ASSN. ET AL. *v.* FALKENSTEIN ET AL. D. C. Ore. Application for stay of judgment presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

MR. JUSTICE DOUGLAS, dissenting.

A three-judge court has declared Oregon's tax exemption to the Benevolent and Protective Order of Elks unconstitutional because the Elks Lodge in question practices racial discrimination in membership selection. The Elks Lodge seeks to have the judgment of the three-judge court stayed pending its appeal to this Court, not on the merits, but from denial of its application to intervene. If the Elks Lodge could intervene as a matter of right, the order of the court denying intervention is generally appealable. *Sutphen Estates, Inc.* v. *United States,* 342

U. S. 19, 20; *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129, 132–136. The ground of intervention is the inadequacy of the representation of their interests by the Oregon tax authorities in the litigation.

The cases cited above were not appeals from a three-judge court but appeals from a single district judge in antitrust cases, where appeal lies to this Court from "the final judgment." 32 Stat. 823, as amended, 15 U. S. C. § 29. Title 28 U. S. C. § 1253, however, gives the right of appeal to this Court to "any party" where there has been an order "granting or denying" an injunction by a three-judge court.

Applicants were not parties; they are only seeking to be made parties. Whether such persons are "any party" within the meaning of § 1253, so far as unsuccessful intervenors are concerned, seems not to have been decided by this Court. The Voting Rights Act of 1965, 79 Stat. 437, 42 U. S. C. § 1973 *et seq.*, gives the District Court for the District of Columbia, sitting in a panel of three, the right to sit on and determine the issues in those cases. 42 U. S. C. § 1973b. And it is provided that the court is constituted the same as the other three-judge courts, since § 1973b refers to 28 U. S. C. § 2284, under which the three-judge court in the Oregon case was constituted. And the Voting Rights Act of 1965 provides that "any appeal shall lie to the Supreme Court." *Ibid.* It is therefore arguable that "any appeal" under the Voting Rights Act is restricted to those who are parties.

On November 6, 1972, we postponed the question of jurisdiction to the merits in No. 72–129, *NAACP* v. *New York*. That case raises the question whether the NAACP, which was denied intervention by a three-judge court sitting in a case under the Voting Rights Act of 1965, may appeal to this Court. That issue has not been resolved.

Even if we were to decide that applicants are "any party" within the meaning of § 1253, that section still permits appeal to this Court only from the grant or denial of an injunction, whereas the Voting Rights Act refers to "any appeal." It would appear, then, that regardless of our decision in *NAACP* v. *New York,* the appeal in this case should have been taken to the Court of Appeals. In that event, applicants also should apply to that court for a stay.

Finally, applicants allege that they will lose their right to appeal on the merits if the final judgment below has not been stayed, even if they are successful on appeal from the denial of intervention. That result, however, is problematical. See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra,* where we vacated the judgment below upon reversing the order denying intervention.

Since we decided to review *NAACP* v. *New York,* I would grant the stay.

No. 71–1136. TILLMAN ET AL. *v.* WHEATON-HAVEN RECREATION ASSN., INC., ET AL. C. A. 4th Cir. [Certiorari granted, 406 U. S. 916.] Motion of respondents for leave to file supplemental memorandum after oral argument granted.

No. 71–1178. GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. [Certiorari granted, 406 U. S. 956.] Motion of Public Service Company of Indiana, Inc., for leave to participate in oral argument and for additional time denied.

No. 71–1193. UNITED STATES *v.* ENMONS ET AL. Appeal from D. C. E. D. La. [Probable jurisdiction noted, 406 U. S. 916.] Motion of Chamber of Commerce of the United States for leave to file untimely brief as *amicus curiae* granted.

No. 71–1497. BECK *v.* CONNECTICUT GENERAL LIFE

INSURANCE Co., *ante,* p. 845. Respondent requested to file response to petition for rehearing within 30 days.

No. 71–1371. ROSARIO ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, 406 U. S. 957.] Motion of County Attorney for Nassau County, New York, for leave to participate in oral argument denied.

No. 71–1583. BROWN, SECRETARY OF STATE OF CALIFORNIA *v.* CHOTE. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, *ante,* p. 911.] It is ordered that Philip Elman, Esquire, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for appellee in this case.

No. 71–6272. ROBINSON *v.* NEIL, WARDEN. C. A. 6th Cir. [Certiorari granted, 406 U. S. 916.] Motion of counsel for petitioner to allow additional time and/or division of argument denied.

No. 71–6278. ALMEIDA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 406 U. S. 944.] Motion of Gilbert Foerster for leave to file untimely brief as *amicus curiae* granted.

No. 71–6316. GOOSBY ET AL. *v.* OSSER ET AL. C. A. 3d Cir. [Certiorari granted, 408 U. S. 922.] Motion of Elliot P. Platt and Joseph A. Torregrossa to permit Ann I. Torregrossa to argue *pro hac vice* for petitioners granted. Motion of the Attorney General of Pennsylvania for divided argument granted and an additional 10 minutes allotted for that purpose. Reported below: 452 F. 2d 39.

No. 72–77. NORWOOD ET AL. *v.* HARRISON ET AL. Appeal from D. C. N. D. Miss. [Probable jurisdiction noted, *ante,* p. 839.] Motion of appellants for leave to proceed further herein *in forma pauperis* granted.

No. 72–5388. ROBINSON *v.* WAINWRIGHT, CORREC-

TIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

No. 71–6356. DOE ET AL. *v.* MCMILLAN ET AL. C. A. D. C. Cir. [Certiorari granted, 408 U. S. 922.] Motion of Legislative Respondents for further divided argument granted and an additional five minutes for oral argument allotted to respondents for that purpose.

No. 72–5377. MAGEE *v.* SUPERIOR COURT OF SAN FRANCISCO COUNTY, CALIFORNIA, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 72–493. VLANDIS *v.* KLINE ET AL. Appeal from D. C. Conn. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 346 F. Supp. 526.

No. 72–534. UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. *v.* MORENO ET AL. Appeal from D. C. D. C. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 345 F. Supp. 310.

Certiorari Granted

No. 72–212. CUPP, PENITENTIARY SUPERINTENDENT *v.* MURPHY. C. A. 9th Cir. Certiorari granted. Reported below: 461 F. 2d 1006.

No. 72–490. MCDONNELL DOUGLAS CORP. *v.* GREEN. C. A. 8th Cir. Certiorari granted. Reported below: 463 F. 2d 337.

No. 72–419. PITTSBURGH PRESS CO. *v.* PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL. Pa. Commw. Ct. Motion of American Newspaper Publishers Assn. for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 4 Pa. Commw. 448, 287 A. 2d 161.

No. 72–486. FEDERAL POWER COMMISSION *v.* MEMPHIS LIGHT, GAS & WATER DIVISION ET AL.; and

No. 72–488. TEXAS GAS TRANSMISSION CORP. *v.* MEMPHIS LIGHT, GAS & WATER DIVISION ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 149 U. S. App. D. C. 238, 462 F. 2d 853.

No. 72–5323. KEEBLE *v.* UNITED STATES. C. A. 8th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented by the petition which reads as follows: "Whether the District Court's refusal to give a lesser included offense instruction under 18 U. S. C. 1153 violated the Fifth Amendment's due process guarantee." Reported below: 459 F. 2d 757 and 762.

No. 72–5443. BARNES *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 466 F. 2d 1361.

Certiorari Denied. (See also Nos. 71–6658 and 72–5412, *supra.*)

No. 71–1465. ROSENTHAL *v.* ARKANSAS LOUISIANA FINANCE CORP. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–1648. NAPOLITANO *v.* WARD, JUSTICE, SUPREME COURT OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 279.

No. 71–6694. WILSON *v.* DOWNIE, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 228 Ga. 656, 187 S. E. 2d 293.

No. 72–472. SIMS, GUARDIAN, ET AL. *v.* IDAHO STATE DEPARTMENT OF HIGHWAYS ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 94 Idaho 801, 498 P. 2d 1274.

No. 71–6777. HESTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 29 Ohio St. 2d 152, 280 N. E. 2d 376.

No. 72–111. BLOOM ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 261 So. 2d 578.

No. 72–231. BISCUITTI *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 253 So. 2d 750.

No. 72–322. THE FLYING FOAM ET AL. *v.* IRON ORE TRANSPORT CO., LTD. C. A. 4th Cir. Certiorari denied. Reported below: 461 F. 2d 779.

No. 72–422. BENEVENTO ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 198 Ct. Cl. 772, 461 F. 2d 1316.

No. 72–435. MELANCON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 82.

No. 72–436. PATTERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 360.

No. 72–442. LOWENTHAL ET AL. *v.* TCHEREPNIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 461 F. 2d 544.

No. 72–461. MODLA *v.* SOUTHSIDE HOSPITAL ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 17 Ariz. App. 54, 495 P. 2d 494.

No. 72–462. FORD MOTOR CO. *v.* FORTUNATO. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 962.

No. 72–494. DELLA CROCE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 72–467. KAUFMAN *v.* DIVERSIFIED INDUSTRIES,

INC. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 1331.

No. 72–468. SHATTERPROOF GLASS CORP. *v.* GUARDIAN GLASS CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 462 F. 2d 1115.

No. 72–471. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 14 Md. App. 721, 288 A. 2d 622.

No. 72–473. MAHONEY *v.* HODGSON, SECRETARY OF LABOR. C. A. 1st Cir. Certiorari denied. Reported below: 460 F. 2d 326.

No. 72–477. STEPHENSON ET AL. *v.* LANDEGGER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 133.

No. 72–479. GARREN ET AL. *v.* CITY OF WINSTON-SALEM, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 463 F. 2d 54.

No. 72–487. PRISCO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 808, 286 N. E. 2d 279.

No. 72–495. STIGLETS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 242.

No. 72–496. BENSON *v.* NEWMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 689.

No. 72–497. OKLAHOMA *v.* CHEROKEE NATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 461 F. 2d 674.

No. 72–508. CHARLES C. WILSON, INC., ET AL. *v.* MEDICENTERS OF AMERICA, INC. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 847.

No. 72–499. TREMARCO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 72–505. PRICE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 1217.

No. 72–509. DIPAOLO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 962, 287 N. E. 2d 618.

No. 72–512. BOLT ASSOCIATES, INC. *v.* WESTERN GEOPHYSICAL COMPANY OF AMERICA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 463 F. 2d 101.

No. 72–513. DEROSA *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 72–518. ATWELL *v.* HARDY ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–519. AMERICAN MANNEX CORP. *v.* ROZANDS, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 688.

No. 72–526. PERREIRA *v.* DAMPSKIBSSELSKABET NORDEN A/S ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 461 F. 2d 848.

No. 72–527. POTOMAC SAND & GRAVEL CO. *v.* GOVERNOR OF MARYLAND ET AL. Ct. App. Md. Certiorari denied. Reported below: 266 Md. 358, 293 A. 2d 241.

No. 72–530. LEVINE *v.* LONG ISLAND RAILROAD CO. ET AL. Ct. App. N. Y. Certiorari denied.

No. 72–531. DOW CHEMICAL CO. *v.* DIXIE CARRIERS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 120.

No. 72–543. SMITH, ADMINISTRATRIX *v.* OLSEN & UGELSTAD. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 2d 915.

No. 72–533. LUTTRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–544. BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS ET AL. *v.* DOWELL. C. A. 10th Cir. Certiorari denied. Reported below: 465 F. 2d 1012.

No. 72–547. LESKIW ET AL. *v.* LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO–CLC, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 464 F. 2d 721.

No. 72–548. MICHAEL *v.* GOMES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 626.

No. 72–551. DALY ET AL. *v.* MCCARTHY, CLERK, SUPREME COURT OF MINNESOTA, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 294 Minn. 351, 200 N. W. 2d 913.

No. 72–554. MIMS ET AL. *v.* YARBOROUGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 461 F. 2d 1266.

No. 72–556. SID HARVEY, INC., ET AL. *v.* LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 1.

No. 72–561. FLORIDA VANDERBILT DEVELOPMENT CORP., FORMERLY FLORIDA REALTY CO., ET AL. *v.* CHANDLER LEASING DIVISION, PEPSICO SERVICE INDUSTRIES LEASING CORP. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 267.

No. 72–563. MCKY *v.* UNION BANK & TRUST COMPANY OF HELENA, MONTANA, EXECUTOR. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 1035.

No. 72–564. BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 OF THE TOWN OF ADDISON ET AL. *v.* JAMES. C. A. 2d Cir. Certiorari denied. Reported below: 461 F. 2d 566.

No. 72–565. BALDASSARO *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 72–572. SCHOENLING BREWING CO., INC. *v.* WURZBURGER HOFBRAU AKTIENGESELLSCHAFT ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–573. MARSH *v.* CURRY. C. A. 6th Cir. Certiorari denied. Reported below: 461 F. 2d 1003.

No. 72–576. ROBINSON ET AL. *v.* MCCORKLE, COMMISSIONER, DEPARTMENT OF INSTITUTIONS AND AGENCIES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 462 F. 2d 111.

No. 72–5030. WOLFE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 260 So. 2d 425.

No. 72–5038. CHAVEZ ET AL. *v.* FRESHPICT FOODS, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 456 F. 2d 890.

No. 72–5058. LOTZ *v.* KOLOSKI, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 460 F. 2d 1284.

No. 72–5082. WOCHER *v.* LOS ANGELES CITY SCHOOL DISTRICT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5089. TAHL *v.* O'CONNOR, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 1068.

No. 72–5100. MILLS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 72–5145. NUDO *v.* BRANTLEY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–5157. KYLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 461 F. 2d 1265.

No. 72–5196. WATSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 281 N. C. 221, 188 S. E. 2d 289.

No. 72–5204. TANNER *v.* TWOMEY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–5356. FORD *v.* CALIFORNIA STATE PERSONNEL BOARD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5383. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 1037.

No. 72–5385. KOTRLIK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 976.

No. 72–5387. MCEACHERN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 833.

No. 72–5392. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 60.

No. 72–5400. OVERTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–5403. GARRETT *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 72–5408. JACKSON *v.* BOHLINGER. C. A. 1st Cir. Certiorari denied.

No. 72–5415. WILSON *v.* SCOTT, DISTRICT ATTORNEY OF KENOSHA COUNTY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–5416. FIDANIAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 755.

No. 72–5417. MURDOCK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 152 U. S. App. D. C. 371, 471 F. 2d 923.

No. 72–5418. PERRY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 72–5419. FLINCHUM *v.* CLINCHFIELD RAILROAD CO. C. A. 6th Cir. Certiorari denied. Reported below: 460 F. 2d 252.

No. 72–5420. OLDEN *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5421. NICHOLS *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 72–5422. DAILEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5423. TRABER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 483.

No. 72–5424. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–5425. COONEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 464 F. 2d 497.

No. 72–5427. CARVER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 30 Ohio. St. 2d 280, 285 N. E. 2d 26.

No. 72–5428. STARNES *v.* HARRIS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 72–5430. FLETCHER *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 460 F. 2d 444.

No. 72–5429. GRAYTON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 72–5433. STOCK *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 72–5435. HURST, AKA CLOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–5436. LEWIS *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5438. WARNER *v.* UNITED STATES PATENT OFFICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 72–5439. EPPERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5440. WOODS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 2d 1024.

No. 72–5444. JACKSON *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 462 F. 2d 1041.

No. 72–5445. HURD *v.* BAILEY ET AL. C. A. 1st Cir. Certiorari denied.

No. 72–5446. NELSON *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 465 F. 2d 1121.

No. 72–5447. TYLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 2d 920.

No. 72–5448. WADDELL *v.* ALLDREDGE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 72–5449. RATLIFF *v.* COINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 72–5450. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 1067.

No. 72–5452. DARAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 1361.

No. 72–5456. FLORES *v.* EMPLOYERS' FIRE INSURANCE COMPANY OF SAN ANTONIO, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 1276.

No. 72–5457. STROLLO *v.* ALLDREDGE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 463 F. 2d 1194.

No. 72–5461. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 513.

No. 72–5462. LEE *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 72–5463. HILL *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 72–5465. BERRYHILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 466 F. 2d 621.

No. 72–5466. LEWIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 281 N. C. 564, 189 S. E. 2d 216.

No. 71–1634. ZEMLIAK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–6929. KOCHEL *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–164. HONEYCUTT *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Cumberland County, N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–453. ROGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 996.

No. 72–469. BRADFORD TOWNSHIP ET AL. *v.* ILLINOIS STATE TOLL HIGHWAY AUTHORITY ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 537.

No. 72–476. BALDIVID *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 1277.

No. 72–500. DAVIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 30 Ohio St. 2d 312, 285 N. E. 2d 38.

No. 72–504. SLONE *v.* SUPREME COURT OF OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–553. IN RE SCHWARZ. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 51 Ill. 2d 334, 282 N. E. 2d 689.

No. 72–5053. MCCLENAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5120. KWITEK ET AL. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 53 Wis. 2d 563, 193 N. W. 2d 682.

No. 72–5203. CRADLE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 281 N. C. 198, 188 S. E. 2d 296.

No. 72–5386. VINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5407. KEPHART *v.* UNITED STATES; and
No. 72–5459. ROTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 466 F. 2d 1111.

No. 72–5458. GRIFFITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 71–1699. GODWIN *v.* DIES, SECRETARY OF STATE OF TEXAS. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–171. STEWARD *v.* VIRGINIA. Sup. Ct. Va. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–426. COREY *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. D. C. Cir. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–463. SILVER *v.* CASTLE MEMORIAL HOSPITAL ET AL. Sup. Ct. Hawaii. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 53 Haw. 475, 497 P. 2d 564.

No. 72–464. ALFAR DAIRY, INC. *v.* PALM BEACH COUNTY BOARD OF PUBLIC INSTRUCTION. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 458 F. 2d 1258.

No. 72–475. AUSTIN *v.* UNITED STATES;
No. 72–5451. SAVIDGE *v.* UNITED STATES; and
No. 72–5476. BEEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 462 F. 2d 724.

No. 72–520. TILLMAN *v.* NEW JERSEY. Super. Ct. N. J. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–478. PERINI, CORRECTIONAL SUPERINTENDENT *v.* JOHNS. C. A. 6th Cir. Motions to dispense with printing petition and respondent's brief granted. Certiorari denied. Reported below: 462 F. 2d 1308.

No. 72–489. DAUER ET AL. *v.* CONLEY ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 463 F. 2d 63.

No. 72–571. ZELKER, CORRECTIONAL SUPERINTENDENT *v.* LOPEZ. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 72–507. GOUDIE *v.* SEARS, ROEBUCK & CO. ET AL. Ct. App. D. C. Motion to dispense with printing portions of appendix granted. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion and petition. Reported below: 290 A. 2d 826.

Rehearing Denied

No. 71–1403. FORBES LEASING & FINANCE CORP. *v.* LEBOWITZ, *ante,* p. 843;

No. 71–1408. AERO MAYFLOWER TRANSIT CO., INC., ET AL. *v.* UNITED STATES ET AL., *ante,* p. 905;

No. 71–1419. HUTTER ET UX. *v.* KORZEN, *ante,* p. 905;

No. 71–1519. BROWN ET AL. *v.* SCOTT, *ante,* p. 846;

No. 71–1547. C & H TRANSPORTATION CO., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION; and

No. 72–149. UNITED STATES *v.* INTERSTATE COMMERCE COMMISSION (INTERNATIONAL TRANSPORT, INC., CASE), *ante,* p. 904. Petitions for rehearing denied.

No. 71–1573. PELTZMAN *v.* NATIONAL LABOR RELATIONS BOARD, *ante,* p. 887;

No. 71–1614. LOWRY ET AL. *v.* UNITED STATES, *ante,* p. 887;

No. 71–1640. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* UNITED STATES, *ante,* p. 850;

No. 71–1651. NEWBERN, EXECUTRIX, ET AL. *v.* ALABAMA, *ante,* p. 813;

No. 71–6329. ESTES *v.* NORTHCROSS ET AL., *ante,* p. 853;

No. 71–6431. NASH *v.* TEXAS, *ante,* p. 887;

No. 71–6464. MURRAY *v.* CITY OF CINCINNATI, *ante,* p. 855;

No. 71–6495. CALDRONE *v.* GAFFNEY, WARDEN, *ante,* p. 855;

No. 71–6518. MARTINEZ *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT, *ante,* p. 959;

No. 71–6606. WETTEROFF ET AL. *v.* GRAND, TRUSTEE, *ante,* p. 934;

No. 71–6643. PICKING *v.* YATES ET AL., *ante,* p. 812;

No. 71–6677. ALLARD *v.* UNITED STATES, *ante,* p. 861;

No. 71–6680. FERGUSON *v.* VIRGINIA, *ante,* p. 861;

No. 71–6717. ROBINSON *v.* UNITED STATES, *ante,* p. 863;

No. 71–6873. NEELY *v.* FIELD, U. S. DISTRICT JUDGE, ET AL., *ante,* p. 871;

No. 71–6875. MORAN *v.* TUITION PLAN OF NEW HAMPSHIRE, INC., *ante,* p. 872;

No. 72–134. MCCLURE *v.* SALVATION ARMY, *ante,* p. 896;

No. 72–148. ROTHMAN ET AL. *v.* UNITED STATES, *ante,* p. 956; and

No. 72–150. UNITED STATES *v.* INTERSTATE COMMERCE COMMISSION (ACE DORAN HAULING CO. CASE), *ante,* p. 904. Petitions for rehearing denied.

No. 72–152. MING *v.* UNITED STATES, *ante,* p. 915;

No. 72–156. ZARATE *v.* UNITED STATES, *ante,* p. 915;

No. 72–5011. HOHENSEE *v.* SCIENTIFIC LIVING, INC., ET AL., *ante,* p. 880;

No. 72–5065. CRAWFORD *v.* MISSOURI, *ante,* p. 811; and

No. 72–5158. SIKES ET AL. *v.* UNITED STATES, *ante,* p. 951. Petitions for rehearing denied.

No. 71–1555. JOHNSTON ET UX. *v.* BYRD, *ante,* p. 847;

No. 71–1633. LARSEN *v.* AIR CALIFORNIA, *ante,* p. 895; and

No. 71–1655. FALKNER *v.* SUPREME COURT OF FLORIDA ET AL., *ante,* p. 823. Motions to dispense with printing petitions for rehearing granted. Petitions for rehearing denied.

No. 71–6754. VAN PELT *v.* DICOSIMO, *ante,* p. 865;

No. 72–2. PALMER ET AL. *v.* UNITED STATES, *ante,* p. 874; and

No. 72–5109. HILL *v.* GAUVIN ET AL., *ante,* p. 918. Motions for leave to file petitions for rehearing denied.

No. 71–6883. FAIR *v.* HODGES ET AL., *ante,* p. 872. Application to enjoin respondents from hearing petitioner's future cases, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application. Petition for rehearing denied.

DECEMBER 11, 1972

Affirmed on Appeal

No. 72–506. ROBINSON *v.* MCCORKLE, COMMISSIONER, DEPARTMENT OF INSTITUTIONS AND AGENCIES, ET AL. Affirmed on appeal from D. C. N. J.

Appeals Dismissed

No. 72–583. BEARDEN *v.* METROPOLITAN DADE COUNTY. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 265 So. 2d 48.

No. 72–585. PEPPER & TANNER, INC. *v.* INTERNATIONAL EQUITY CORP. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question. Reported below: 222 Pa. Super. 118, 293 A. 2d 108.

No. 72–588. LOYAL ORDER OF MOOSE, LODGE No. 107 *v.* PENNSYLVANIA HUMAN RELATIONS COMMISSION. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 448 Pa. 451, 294 A. 2d 594.

No. 72–589. KRAUSE, ADMINISTRATOR *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 31 Ohio St. 2d 132, 285 N. E. 2d 736.

No. 72–600. CITIES SERVICE GAS CO. *v.* WESTERN NATURAL GAS CO. ET AL. Appeal from Sup. Ct. Okla. dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 507 P. 2d 1236.

No. 72–5529. IN RE NEGRON. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

Vacated and Remanded on Appeal

No. 72–582. LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* SHIRLEY ET AL. Appeal from D. C. N. D. N. Y. Judgment vacated and case remanded for further consideration in light of Chapter 687 of the 1972 Laws of New York (N. Y. Soc. Serv. Law § 101–a, as amended). *Diffenderfer* v. *Central Baptist Church,* 404 U. S. 412 (1972).

Reversed on Appeal

No. 72–5401. CASON *v.* CITY OF COLUMBUS. Appeal from Sup. Ct. Ohio. Motion for leave to proceed *in forma pauperis* granted. Judgment reversed. *Gooding* v. *Wilson,* 405 U. S. 518 (1972).

MR. JUSTICE POWELL, concurring in the result.

As the court below applied a *per se* rule, apparently without regard to the circumstances under which the words were used, I join in the reversal. See my dissenting opinion in *Rosenfeld* v. *New Jersey,* 408 U. S. 901, 903 (1972); *Lewis* v. *City of New Orleans,* 408 U. S. 913 (1972), and *Brown* v. *Oklahoma,* 408 U. S. 914 (1972) (both concurring in result).

THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent for the reasons expressed in the several opinions in *Rosenfeld* v. *New Jersey,* 408 U. S. 901 (1972); *Lewis* v. *City of New Orleans,* 408 U. S. 913 (1972); and *Brown* v. *Oklahoma,* 408 U. S. 914 (1972).

Certiorari Granted—Affirmed. (See No. 72–376, *ante,* p. 232.)

Certiorari Granted—Vacated and Remanded

No. 72–217. ALLMAN *v.* MANNS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Colten* v. *Kentucky,* 407 U. S. 104 (1972).

Miscellaneous Orders

No. A–433 (72–762). REYES *v.* NEW YORK. Ct. App. N. Y. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 30 N. Y. 2d 881, 286 N. E. 2d 917.

No. A–556. BERBLING, STATE'S ATTORNEY OF ALEXANDER COUNTY, ET AL. *v.* LITTLETON ET AL. C. A. 7th

Cir. Application for stay of judgment presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted insofar as it applies to applicants O'Shea and Spomer pending the timely filing of a petition for writ of certiorari. Should such a petition be so timely filed, this order is to continue pending this Court's action on the petition. If the petition for writ of certiorari is denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to remain in effect pending the sending down of the judgment of this Court. Reported below: 468 F. 2d 389.

No. A–580 (72–804). RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. Application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending this Court's action on the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to remain in effect pending the sending down of the judgment of this Court. MR. JUSTICE DOUGLAS would deny the stay.

No. A–600. HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. *v.* FITZGERALD ET AL. C. A. D. C. Cir. Application for extension of time to file petition for writ of certiorari presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. It is ordered that the time for filing such petition be, and the same is hereby, extended to and including January 13, 1973. Reported below: 152 U. S. App. D. C. 1, 467 F. 2d 755.

No. 71–1193. UNITED STATES *v.* ENMONS ET AL. Appeal from D. C. E. D. La. [Probable jurisdiction noted, 406 U. S. 916.] Motion of appellees for leave to file supplemental brief after argument granted.

No. A–605. HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. *v.* FITZGERALD ET AL. C. A. D. C. Cir. Application for stay of mandate presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending timely filing of petition for writ of certiorari. Should such petition be so timely filed, this order is to continue pending this Court's action on the petition. If the petition for writ of certiorari is denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to remain in effect pending the sending down of the judgment of this Court. Reported below: 152 U. S. App. D. C. 1, 467 F. 2d 755.

No. 71–1442. COLGROVE *v.* BATTIN, U. S. DISTRICT JUDGE. C. A. 9th Cir. [Certiorari granted, *ante,* p. 841.] Motion of Nooter Corp. for leave to file a brief as *amicus curiae* granted.

No. 72–11. PALMORE *v.* UNITED STATES. Appeal from Ct. App. D. C. [Probable jurisdiction postponed, *ante,* p. 840.] Motion of appellee for additional time for oral argument granted and 15 minutes allotted for that purpose. Appellant also allotted 15 additional minutes for oral argument.

No. 72–239. CHILDS *v.* UNITED STATES, *ante,* p. 966. Respondent requested to file a response to petition for rehearing within 30 days.

No. 72–578. BUBLICK *v.* UNITED STATES. C. A. 7th Cir. Motion of Chicago Bar Assn. et al. for leave to file a brief as *amici curiae* granted.

No. 72–5162. BRADEN *v.* CAPPS, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 72–5493. STRODE *v.* MISSISSIPPI. Motion for leave to file petition for writ of mandamus denied.

No. A–603. SCHLESINGER *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 7th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

MR. JUSTICE DOUGLAS, dissenting.

Applicant, a lieutenant in the United States Army Reserve, has asked this Court for a stay of the order requiring him to report to Fort Sill, Oklahoma, for active duty for training, concededly a part of his military obligation. He claims, however, that he is entitled to a medical discharge.

Applicant was examined by three physicians at the Great Lakes Naval Training Center in Illinois. Each was a specialist in the area in which he conducted his examination. Purporting to follow Army regulations governing the standards for retention in the Army, one determined that applicant has a disqualifying foot condition and another that he has a disqualifying allergic condition. The third, a psychiatrist, found that applicant's psychiatric condition, if further documented, would render him ineligible for service. Despite these findings, the Surgeon General, exercising his *ex parte* discretion pursuant to Army Regulation 40–501, determined that applicant is qualified for active duty. The only substantiation for that decision submitted to the Court is a letter written by the Surgeon General to Senator Percy, in which he stated that applicant's problems are not of sufficient severity to render him unfit under Army regulations.[1]

Applicant brought an action in the United States District Court for the Northern District of Illinois, challenging the decision of the Surgeon General on the grounds

[1] The Surgeon General apparently considered earlier physical examinations of applicant in addition to those conducted at the Great Lakes Naval Training Center.

that it constituted an abuse of discretion and was without a basis in fact. While this action was pending, applicant was ordered to active duty for training.[2] Subsequently, the District Court granted summary judgment for the Government, finding that the Surgeon General's action was not arbitrary or capricious. Applicant's appeal from that judgment is now pending before the United States Court of Appeals for the Seventh Circuit, which refused to stay his order to active duty pending appeal.[3]

Applicant does not challenge the validity of the regulation allowing the Surgeon General to review the decisions of examining physicians. And, indeed, it may be that applicant is in fact qualified for retention and that the Surgeon General has not abused his discretion. The difficulty I have with the procedure afforded applicant is that the record does not disclose any basis for the Surgeon General's action. When the District Court concluded that the decision was not arbitrary or capricious and granted summary judgment for the Government, it in effect refused to inquire into the basis for overriding the judgment of the specialists who had examined applicant. This amounts to a conclusion that the Surgeon General has unreviewable discretion.

However one views the merits of military service, there can be no question that it results in very real and severe restrictions on personal liberty. We have always demanded that such restraints, at a minimum, accord with accepted notions of procedural due process. In *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94, we stated: "The Commission's action cannot be upheld merely because findings

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[2] The order to active duty was postponed pending decision by the District Court. We are told that applicant subsequently was scheduled to report for active duty on December 6 or 7.

[3] Applicant has requested a stay pending his petition to this Court for a writ of certiorari to the Seventh Circuit to review the order denying a stay pending appeal.

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. . . . For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." Certainly, no less protection should be afforded a person who is subjected to significant restraints on his personal liberty as a result of administrative action.

Since I conclude that the decision of the Surgeon General failed to comport with this basic requirement of procedural due process, I would grant the stay requested.

No. 72–5474. MORTON *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 71–1639. BROADRICK ET AL. *v.* OKLAHOMA ET AL. Appeal from D. C. W. D. Okla. Probable jurisdiction noted. Reported below: 338 F. Supp. 711.

No. 72–402. UNITED STATES *v.* GENERAL DYNAMICS CORP. ET AL. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. Reported below: 341 F. Supp. 534.

No. 72–634. UNITED STATES CIVIL SERVICE COMMISSION ET AL. *v.* NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 346 F. Supp. 578.

Certiorari Granted

No. 71–1647. FEDERAL MARITIME COMMISSION *v.* SEATRAIN LINES, INC., ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 148 U. S. App. D. C. 424, 460 F. 2d 932.

No. 72–586. CADY, WARDEN *v.* DOMBROWSKI. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 471 F. 2d 280.

Certiorari Denied. (See also No. 72–600, *supra.*)

No. 71–6670. RICHBURG *v.* LEEKE, CORRECTIONS DIRECTOR. C. A. 4th Cir. Certiorari denied.

No. 71–6926. SPLINTER *v.* HANRAHAN, STATE'S ATTORNEY OF COOK COUNTY. Sup. Ct. Ill. Certiorari denied. Reported below: 52 Ill. 2d 70, 285 N. E. 2d 129.

No. 72–220. PHELPS DODGE CORP. *v.* AFL–CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE ET AL.; and

No. 72–359. NATIONAL LABOR RELATIONS BOARD *v.* AFL–CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 722.

No. 72–317. GOMEZ *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–332. FIOCCONI ET AL. *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 462 F. 2d 475.

No. 72–491. BRACH *v.* UNITED STATES; and

No. 72–492. FRIED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 983.

No. 72–503. HARRIS TRUST & SAVINGS BANK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 470 F. 2d 6.

No. 72–522. ROGERS ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 965.

No. 72–574. SELLARS *v.* COMMITTEE ON ADMISSIONS OF THE DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied.

No. 72–577. CAWY BOTTLING CO., INC. *v.* MALTINA CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 1021.

No. 72–587. HOLLAND-AMERICA LINE *v.* FOREIGN STUDY LEAGUE. Sup. Ct. Utah. Certiorari denied. Reported below: 27 Utah 2d 442, 497 P. 2d 244.

No. 72–596. ADAMS ET AL. *v.* EVANSVILLE-VANDERBURGH SCHOOL CORP. ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–597. MCDANIEL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 499 P. 2d 613.

No. 72–602. HARSH BUILDING CO. ET AL. *v.* BIALAC ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 2d 1185.

No. 72–605. BUCKELEW *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 48 Ala. App. 411, 265 So. 2d 195.

No. 72–607. GAILLOT *v.* UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 598.

No. 72–614. SHAPS *v.* UNION COMMERCE BANK. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 476 S. W. 2d 466.

No. 72–5175. MEYER *v.* WEIL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 1068.

No. 72–5473. SADLER *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 72–626. UNIVERSITY OF ILLINOIS FOUNDATION *v.* BLONDER-TONGUE LABORATORIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 465 F. 2d 380.

No. 72–639. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* SUTTON'S STEEL & SUPPLY, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 72–652. BROWN, EXECUTOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 512.

No. 72–688. WHITE MOTOR CORP. ET AL. *v.* STEWART ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 465 F. 2d 1085.

No. 72–5075. MYERS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 6 Wash. App. 557, 494 P. 2d 1015.

No. 72–5095. MCINNIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 6 Cal. 3d 821, 494 P. 2d 690.

No. 72–5151. SMITH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 2d 1407.

No. 72–5168. WHITNEY *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 1267.

No. 72–5188. HOOD *v.* PURCELL, SHERIFF. Ct. App. Ore. Certiorari denied. Reported below: 8 Ore. App. 352, 494 P. 2d 461.

No. 72–5478. SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5483. DRIVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 808.

No. 72–5481. BANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1235.

No. 72–5482. CARBONARO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 461 F. 2d 1108.

No. 72–5485. DREW *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 292 A. 2d 164.

No. 72–5487. ENGLISH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5488. LEGO *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 72–5489. PERKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 1392.

No. 72–5490. BRYANT *v.* PICKETT, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 72–5491. RICHARDS *v.* MARYLAND. Ct. Sp. Ann. Md. Certiorari denied.

No. 72–5495. DALTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 32.

No. 72–5498. WHITE *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–5502. BARTLEY *v.* KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 462 F. 2d 610.

No. 72–5511. TRACY *v.* HAWKS. C. A. 10th Cir. Certiorari denied.

No. 72–5532. CAMPBELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 2d 529.

No. 72–5515. HARMON *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 1229.

No. 72–5517. ROONEY ET UX. *v.* FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–5518. KASEY ET UX. *v.* MOLYBDENUM CORPORATION OF AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 1284.

No. 72–482. MARCHETTI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART would grant certiorari. Reported below: 466 F. 2d 1309.

No. 72–501. TERMINAL FREIGHT COOPERATIVE ASSN. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 447 F. 2d 1099.

No. 72–515. SANTORO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 1202.

No. 72–541. VON SLEICHTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 153 U. S. App. D. C. 169, 472 F. 2d 1244.

No. 72–559. WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 8.

No. 72–592. CITIES SERVICE OIL CO., FORMERLY COLUMBIAN FUEL CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 1134.

No. 72–5545. IN RE ENGLER. Sup. Ct. Ind. Certiorari denied.

No. 72–5090. PETERS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 23 Cal. App. 3d 522, 101 Cal. Rptr. 403.

No. 72–5138. MINOR *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 S. W. 2d 716.

No. 72–5486. CROSSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 96.

No. 72–5492. GLASS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–590. ANDERS *v.* UNITED STATES. Ct. Cl. Motion of petitioner to strike matter from brief for respondent denied. Certiorari denied. Reported below: 199 Ct. Cl. 1, 462 F. 2d 1147.

No. 72–599. PHIPPS ET AL. *v.* ASSOCIATE FUNDINGS, INC., ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 464 F. 2d 1136.

No. 72–629. SPENCE ET AL. *v.* CANTERBURY. C. A. D. C. Cir. Motion to dispense with printing respondent's brief granted. Certiorari denied. Reported below: 150 U. S. App. D. C. 263, 464 F. 2d 772.

No. 72–5537. MARKOFF *v.* NEW YORK LIFE INSURANCE CO. Sup. Ct. Nev. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 88 Nev. 319, 497 P. 2d 904.

No. 72–5301. NUGENT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

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

Acting on an informant's tip that one "Cherokee" had a mill for diluting narcotics in a certain apartment building, police officers secured the consent of the landlord to search, and then searched the basement area of the building open to use by both landlord and tenants. In one storage room they saw a closed but unlocked trunk, on top of which were a can of milk-sugar, a scale, rubber bands, and a brown paper bag with a message telling Cherokee that "we are out of . . . action." The trunk was then opened. Heroin and narcotics paraphernalia were discovered, seized, and used against Cherokee who was later arrested and tried.

Whether the search of the trunk and seizure of its contents squared with the Fourth Amendment is a substantial question warranting review here. The seizure was not incident to petitioner's arrest, which occurred later at another place. The officers were legally in the storage room by virtue of the landlord's consent, *Frazier* v. *Cupp,* 394 U. S. 731, 740 (1969), but nothing in the trunk was in plain view as long as the trunk was unopened, and it would seem that the landlord had no authority whatsoever to consent to the search of the trunk or the seizure of its contents, which were petitioner's effects within the protection of the Fourth Amendment.

The United States argues that there was probable cause to search the trunk and a warrant should not be required, because the items sought could be so easily moved. The Court has embraced such a rationale in the *Carroll-Chambers* line of cases with respect to automobiles, but

has expressly questioned this approach with respect to other movable personal property. See *Coolidge* v. *New Hampshire,* 403 U. S. 443, 461 n. 18 (1971) ("We have found no case that suggests such an extension of *Carroll*" to "containers" that are "equally movable, *e. g.,* trunks, suitcases, boxes, briefcases, and bags"). Moreover, in *Chimel* v. *California,* 395 U. S. 752 (1969), searches incident to arrest were limited to the person and immediate vicinity, even though there is clearly probable cause to believe that contraband or evidence of crime will be found elsewhere on the premises where the arrest takes place. The Court there rejected the argument urged in dissent that a warrant could be dispensed with to avoid the disappearance of the property for which there was probable cause to search.

Because the decision below is arguably at odds with decisions of this Court, I would grant the petition for certiorari.

No. 72–5455. SMITH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 464 F. 2d 194.

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

Petitioners were convicted of sexually assaulting a fellow inmate while incarcerated in the Federal Youth Center, in violation of 18 U. S. C. § 13 and Colo. Rev. Stat. Ann. § 40–2–31 (1963). Immediately following the assault, petitioners were placed in segregated confinement and were not arraigned until more than five months later, after an indictment had been returned. They appealed their convictions, in part on the ground that they had not been brought promptly before a United States Commissioner as required by former Rule 5 (a) of the Federal

Rules of Criminal Procedure.* The Court of Appeals for the Tenth Circuit held that Rule 5 does not apply when the person affected is "in custody pursuant to an unrelated valid conviction." Accord, *United States* v. *Reid*, 437 F. 2d 1166, 1167 (CA7 1971).

The result below stemmed from a narrow, technical reading of the word "arrest" in former Rule 5 (a). Since petitioners "were already in custody for unrelated convictions," 464 F. 2d 194, 196, according to the Court of Appeals, they had not been "arrested" for the alleged offense. The issue presented here is whether former Rule 5 (a) should be interpreted in this myopic fashion, without regard to the policies underlying Rule 5 as a whole.

Former Rule 5 (b) required the commissioner, *inter alia*, to "inform the defendant . . . of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel . . . . He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him." A basic purpose of this rule is to interpose a judicial officer between the accused and the accuser early in the process of custodial interrogation. This procedure insures that the accused is objectively and intelligently apprised of his rights and helps prevent the "utilization of intensive interrogation, easily gliding into the evils of 'the third degree.'" *Mallory* v. *United*

*Rule 5 (a) then provided:

"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 5 was amended, effective October 1, 1972. References herein are to the Rule as it existed at the time of the decision below.

States, 354 U. S. 449, 453. The Court of Appeals effectively has deprived petitioners of the protection afforded by Rule 5 (b), even though there is no reason to believe that they were less vulnerable to the overbearing effects of custodial interrogation. The policies underlying Rule 5 (b) apply with as much force to the accused already in custody pursuant to an unrelated conviction as they do to the accused in custody solely on the basis of the alleged offense. Indeed, in the case at hand, the danger of overreaching by prison officials is vividly apparent from the very fact that petitioners were placed in segregated confinement. Certainly, it cannot be suggested that petitioners, because they previously had been convicted of another offense, were any less entitled to the rudimentary procedures afforded to a person who stands accused of a crime.

I would grant the petition for a writ of certiorari solely to consider whether petitioners should have been arraigned promptly after the alleged offense.

No. 72–5273. MYERS *v.* PINNOCK. Sup. Ct. Wash. Motion to consolidate with No. 72–5075 [*Myers* v. *Washington*] granted. Certiorari denied.

Rehearing Denied

No. 71–651. CALIFORNIA *v.* KRIVDA ET AL., *ante,* p. 33;

No. 72–42. DURST *v.* NATIONAL CASUALTY CO. ET AL., *ante,* p. 967;

No. 72–159. DURST *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL., *ante,* p. 947;

No. 72–160. DURST *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, *ante,* p. 946;

No. 72–324. CARTER *v.* UNITED STATES, *ante,* p. 984;

No. 72–5150. GARCIA-TURINO *v.* UNITED STATES, *ante,* p. 951; and

No. 72–5171. SIBONGA *v.* ADMINISTRATOR OF VETERANS AFFAIRS, *ante,* p. 952. Petitions for rehearing denied.

No. 72–5289. FRIERSON *v.* SPRUILL, JUDGE, ET AL., *ante,* p. 989. Petition for rehearing denied.

No. 71–5005. BROOKS *v.* FLORIDA ET AL., 404 U. S. 956;
No. 71–5075. BROOKS *v.* FLORIDA, 404 U. S. 956;
No. 71–5207. BROOKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, 404 U. S. 966; and
No. 71–5311. BROOKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, 404 U. S. 1020. Motions for leave to file petitions for rehearing denied.

No. 72–136. DURST *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL., *ante,* p. 946. Motion for leave to use record in No. 72–42 [*Durst* v. *National Casualty Co. et al.*] in support of rehearing granted. Petition for rehearing denied.

DECEMBER 18, 1972

Affirmed on Appeal

No. 72–421. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* DAVIS. Appeal from D. C. Conn. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment affirmed. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972). THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 342 F. Supp. 588.

No. 72–655. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* GRIFFIN ET AL. Appeal from D. C. Md. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment affirmed. THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 346 F. Supp. 1226.

No. 72–465. LANCE ROOFING CO., INC., ET AL. *v.* HODGSON, SECRETARY OF LABOR, ET AL. Affirmed on appeal from D. C. N. D. Ga. MR. JUSTICE STEWART would note probable jurisdiction and set case for oral argument. Reported below: 343 F. Supp. 685.

No. 72–466. FRANK IREY, JR., INC. *v.* HODGSON, SECRETARY OF LABOR, ET AL. Affirmed on appeal from D. C. N. D. W. Va. MR. JUSTICE STEWART would note probable jurisdiction and set case for oral argument. Reported below: 354 F. Supp. 20.

No. 72–610. ACE DORAN HAULING & RIGGING CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION. Affirmed on appeal from D. C. W. D. Pa. MR. JUSTICE DOUGLAS dissents from the affirmance. Reported below: 345 F. Supp. 743.

No. 72–615. GLENOVICH ET AL. *v.* NOERENBERG, COMMISSIONER OF FISH AND GAME, ET AL. Affirmed on appeal from D. C. Alaska. Reported below: 346 F. Supp. 1286.

No. 72–618. AMERICAN PARTY OF FLORIDA ET AL. *v.* ASKEW, GOVERNOR OF FLORIDA, ET AL. Affirmed on appeal from D. C. N. D. Fla.

No. 72–650. STERRETT, ADMINISTRATOR, DEPARTMENT OF PUBLIC WELFARE, ET AL. *v.* GAITHER ET AL. Appeal from D. C. N. D. Ind. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 346 F. Supp. 1095.

Appeals Dismissed

No. 71–6689. CLARK *v.* PAYNE. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereupon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 455 F. 2d 516.

No. 72–300. HUGGINS ET AL. *v.* DEMENT ET AL. Appeal from Sup. Ct. N. C. 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 would note probable jurisdiction and set case for oral argument. Reported below: 281 N. C. 314, 188 S. E. 2d 898.

No. 72–5170. SAYLES *v.* NUNZIO ET AL., JUDGES. Appeal from Ct. App. D. C. dismissed for want of substantial federal question.

No. 72–5549. HIGHT *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 1st Sup. Jud. Dist. dismissed for want of substantial federal question. Reported below: 473 S. W. 2d 348.

Vacated and Remanded on Appeal

No. 71–1261. COOK, DIRECTOR, DEPARTMENT OF LIQUOR CONTROL, ET AL. *v.* PETO, DBA LOOP CARRY OUT. Appeal from D. C. S. D. Ohio. Judgment vacated and case remanded for further consideration in light of *California* v. *LaRue, ante,* p. 109. Reported below: 339 F. Supp. 1300.

Other Summary Disposition

No. 72–178. STRUCK *v.* SECRETARY OF DEFENSE ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 947.] Judgment vacated and case remanded to consider issue of mootness in light of the position presently asserted by the Government. MR. JUSTICE STEWART would postpone issue of mootness to hearing of case on the merits.

*Miscellaneous Orders**

No. 72–5530. ARNOLD *v.* OLIVER, JUDGE. Motion for leave to file petition for writ of prohibition denied.

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*For reference to Court's order prescribing an amendment to the Federal Rules of Civil Procedure, see *post,* p. 1132.

No. A–565 (72–774). COOPER *v.* FLORIDA BOARD OF DENTISTRY. Sup. Ct. Fla. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: See 265 So. 2d 432.

No. A–598 (72–5800). DAWSON *v.* UNITED STATES. C. A. 8th Cir. Application for stay of execution and enforcement of mandate presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. Reported below: 467 F. 2d 668.

No. A–612. ENVIRONMENTAL DEFENSE FUND, INC., ET AL. *v.* FROEHLKE, SECRETARY OF THE ARMY, ET AL. C. A. 8th Cir. Application for injunction presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the injunction.

No. A–633. ENVIRONMENTAL DEFENSE FUND, INC., ET AL. *v.* CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL. C. A. 8th Cir. Application for injunction presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the injunction. Reported below: 470 F. 2d 289.

No. 71–685. LEHNHAUSEN, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS *v.* LAKE SHORE AUTO PARTS CO. ET AL.; and

No. 71–691. BARRETT, COUNTY CLERK OF COOK COUNTY, ILLINOIS, ET AL. *v.* SHAPIRO ET AL. Sup. Ct. Ill. [Certiorari granted, 405 U. S. 1039.] Motion for order respecting oral argument granted. It is ordered that the Attorney General of Illinois be allotted 20 minutes for oral argument on behalf of petitioner in No. 71–685; that the State's Attorney be allotted 10 minutes for oral argument on behalf of petitioners in No. 71–691; that counsel for Lake Shore Auto Parts Co. be allotted 20 minutes for oral argument on behalf of respondents

in No. 71–685; and that counsel for M. Weil & Sons, Inc., be allotted 10 minutes for oral argument on behalf of respondents in No. 71–691.

No. 71–1637. CITY OF BURBANK ET AL. *v.* LOCKHEED AIR TERMINAL, INC., ET AL. Appeal from C. A. 9th Cir. [Probable jurisdiction noted, *ante,* p. 840.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* in support of appellants granted and 15 minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument.

No. 72–730. MARKLE ET AL. *v.* ABELE ET AL. Appeal from D. C. Conn. Motion of appellants to expedite consideration denied.

No. 71–6778. WILLIAMS *v.* CALIFORNIA;

No. 72–5522. BLANKENSHIP *v.* MEACHAM ET AL.; and

No. 72–5527. SZIJARTO *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72–5593. ZENCHAK *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 72–535. UNITED STATES ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.; and

No. 72–562. ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL. Appeals from D. C. D. C. Motion of appellee SCRAP for leave to dispense with printing motion to dismiss or affirm granted. Probable jurisdiction noted. Cases consolidated and one hour allotted for oral argument. Motion

of Aberdeen & Rockfish Railroad Co. et al. to advance cases granted. MR. JUSTICE POWELL took no part in the consideration or decision of the motions and the jurisdictional statements. Reported below: 346 F. Supp. 189.

Certiorari Granted

No. 71–1417. BOOSTER LODGE No. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 71–1607. NATIONAL LABOR RELATIONS BOARD *v.* BOEING CO. ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of one and one-half hours allotted for oral argument. Reported below: 148 U. S. App. D. C. 119, 459 F. 2d 1143.

No. 72–624. UNITED STATES *v.* PENNSYLVANIA INDUSTRIAL CHEMICAL CORP. C. A. 3d Cir. Certiorari granted. Reported below: 461 F. 2d 468.

No. 72–630. HALL ET AL. *v.* COLE. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether a federal court in a Section 102 proceeding, reviewing an expulsion of a member by a union, finding his expulsion in violation of Section 101 (a)(2), and directing his restoration to membership, may also award the member's attorney reasonable counsel fees.

"2. Whether a federal court in a Section 102 proceeding, in restoring an expelled member to membership, may award reasonable counsel fees when it is found that the member sustained no damages by reason of the expulsion; additionally found that the union in good faith believed it had the right to discipline the member for his conduct; further found no motivation of malice by the union in its discipline of the member and does not find that the

member by his conduct acted in good faith, but instead concludes the member's conduct was motivated in part for personal political ambitions."

MR. JUSTICE MARSHALL took no part in the consideration or decision of the motion and petition. Reported below: 462 F. 2d 777.

Certiorari Denied. (See also Nos. 71–6689 and 72–300, *supra.*)

No. 71–1529. POFF, DBA 1ST KING *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–1563. BOEING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 148 U. S. App. D. C. 119, 459 F. 2d 1143.

No. 71–6928. VALENTINE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–185. BYRD *v.* DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD. Ct. App. D. C. Certiorari denied. Reported below: 289 A. 2d 877.

No. 72–195. COLEMAN, DBA CLUB HI DOLLY *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–279. KNOX *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 3 Ill. App. 3d 22, 278 N. E. 2d 252.

No. 72–441. WILLIAMS ET AL. *v.* BORNEMEIER ET AL.; and

No. 72–648. MORGAN *v.* BORNEMEIER ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–542. SLATKO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 1169.

No. 72–456. STAR INDUSTRIES, INC. *v.* UNITED STATES. C. C. P. A. Certiorari denied. Reported below: 59 C. C. P. A. (Cust.) 159, 462 F. 2d 557.

No. 72–502. IRONS *v.* COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied. Reported below: 151 U. S. App. D. C. 23, 465 F. 2d 608.

No. 72–523. PLANTATION PATTERNS, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 712.

No. 72–545. LIBERTY AMENDMENT COMMITTEE OF THE U. S. A. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–557. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 1129.

No. 72–567. BEAUCHAMP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 700.

No. 72–568. KRAUDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 37.

No. 72–575. SHAMEIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 464 F. 2d 629.

No. 72–578. BUBLICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–593. TRAVIS-EDWARDS, INC. *v.* HODGSON, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1050.

No. 72–604. NEW JERSEY ET AL. *v.* SMITH. C. A. 3d Cir. Certiorari denied. Reported below: 465 F. 2d 272.

No. 72–653. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* ANDERSON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 151 U. S. App. D. C. 112, 466 F. 2d 283.

No. 72–611. GOODSON ET AL. *v.* DAVIS ET AL.; and
No. 72–612. MAY, AS INTERVENOR ON BEHALF OF CUSTOM COMPONENT SWITCHES, INC. *v.* DAVIS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–613. CARPENTERS DISTRICT COUNCIL OF HOUSTON AND VICINITY ET AL. *v.* LINBECK CONSTRUCTION CORP. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 575.

No. 72–616. GULF OIL CORP. *v.* LEHRMAN. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 26.

No. 72–651. BERNDT ET AL. *v.* PAPILSKY. C. A. 2d Cir. Certiorari denied. Reported below: 466 F. 2d 251.

No. 72–659. OFFENBERG ET UX. *v.* CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–676. CRAIG *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 498 P. 2d 942.

No. 72–5117. CROWE ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 258 S. C. 258, 188 S. E. 2d 379.

No. 72–5183. DODSON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 195 N. W. 2d 684.

No. 72–5186. FAIR *v.* FLORIDA ET AL. C. A. 5th Cir. Certiorari denied.

No. 72–5200. THOMPSON *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 72–5253. MOON *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5254. VALDEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 83 N. M. 720, 497 P. 231.

No. 72–5265. PRESSEL *v.* OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 460 F. 2d 313.

No. 72–5275. FLINT *v.* HOWARD, WARDEN. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 291 A. 2d 625.

No. 72–5284. HILL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 480 S. W. 2d 200.

No. 72–5313. DUNK ET AL. *v.* MANUFACTURERS LIGHT & HEAT CO. Sup. Ct. Pa. Certiorari denied.

No. 72–5331. SIMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 512.

No. 72–5479. PRESTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 542.

No. 72–5499. WAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 462 F. 2d 1367.

No. 72–5500. CARDILLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–5505. STEED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 1310.

No. 72–5510. WILLIAMS *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 72–5519. SUTHERLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 641.

No. 72–5523. MCMULLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5555. MAGEE *v.* SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–5516. OCHOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 355.

No. 72–5524. MAGEE *v.* NELSON, WARDEN. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–5533. ARVIN *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5534. ALBERT *v.* WYOMING. C. A. 10th Cir. Certiorari denied.

No. 72–5544. KWITEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 2d 1222.

No. 72–5548. PORTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–5551. ANDREWS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 72–5554. CRATIC *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 72–5559. STAFFORD *v.* N. A. A. EMPLOYEES FEDERAL CREDIT UNION ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5577. PAYNE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 48 Ala. App. 401, 265 So. 2d 185.

No. 72–5579. BEKENY ET UX. *v.* WANDSCHNEIDER, EXECUTOR, ET AL. C. A. 2d Cir. Certiorari denied.

No. 72–5587. RITCH ET AL. *v.* TARRANT COUNTY HOSPITAL DISTRICT. Sup. Ct. Tex. Certiorari denied. Reported below: 480 S. W. 2d 622.

No. 72–254. NEIL, WARDEN *v.* VENABLE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 463 F. 2d 1167.

No. 72–521. IRISH NORTHERN AID COMMITTEE *v.* ATTORNEY GENERAL OF THE UNITED STATES. C. A. 2d Cir. Certiorari denied.

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

Petitioner is registered as a foreign agent under the Foreign Agents Registration Act of 1938, 52 Stat. 631, as amended, 22 U. S. C. § 611 *et seq.* The District Court ordered it to comply with the Act by filing, *inter alia,* a statement of contributions which included the names of contributors. The Court of Appeals for the Second Circuit affirmed in an unreported order.

I believe that the Foreign Agents Registration Act does not authorize the Attorney General to require lists of the names and addresses of contributors, as he has done in 28 CFR § 5.201 (e). Cf. *Kent* v. *Dulles,* 357 U. S. 116 (1958).

The Foreign Agents Registration Act sets out an extensive scheme to regulate the activities of foreign agents. But the scheme is not all-encompassing. Its purpose is to inform the American people of the activities of the agents of foreign principals so that the people may carefully "appraise them and the purposes for which they act." H. R. Rep. No. 1470, 89th Cong., 2d Sess., 2 (1966).

Congress has determined that we must know the extent to which a foreign agent is supported by his principal so that we may properly evaluate the agent's interest in the views he presents. To that end, the statute requires the agent to disclose "[t]he nature and amount of contributions, income, money, or thing of value, if any, that the registrant has received . . . from each such foreign principal . . . ." 22 U. S. C. § 612 (a) (5). Prior to its amendment in 1966, the statute did require the disclosure of the name and address of "any person who has . . . contributed or paid money or anything of

value to the registrant," § 2 (a)(7), 56 Stat. 252. This provision was omitted in 1966, leaving § 612 (a)(5) as essentially the only provision requiring disclosure of contributors.[1]

The amendments adopted in 1966 were intended to limit the scope of the previous act and thereby to make effective enforcement more likely. In language repeated in each subsequent Committee report on the proposed revision, the Senate Committee on Foreign Relations referred to its bill as "better focusing the act on those individuals performing political or semipolitical activities." S. Rep. No. 875, 88th Cong., 2d Sess., 1 (1964).[2] The Committee said, "Too broadly written for today's needs, the present act's disclosure provisions have through the years been too narrowly enforced with the emphasis placed on subversive or potentially subversive

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[1] Section 612 (a)(7) requires the disclosure of contributions from anyone other than the principal "for whom the registrant is acting . . . under such circumstances as require his registration hereunder." This provision is intended to prevent the foreign principal from acting through a facade or alter ego who would register and then simply act as a channel for funds to an unregistered person who would do all that the principal wanted done. H. R. Rep. No. 1470, 89th Cong., 2d Sess. (1966). The respondent argues that this section is a broad one. On its face, it is quite narrow. Respondent says, however, that the legislative history "makes it clear that Congress did not intend the provision to be read so narrowly." Brief for Respondent in Opposition 11. I confess that I cannot read the section to require anything more than disclosure of contributions "from each such person." That is, after all, just what the language of the section purports to require. The legislative history cited by respondent shows only that Congress intended to cover what the language of the section covers, the use of registered agents to convey money to unregistered third parties who would then disburse it within the United States. I find it hard to interpret this history as providing any guidance in deciding the case at hand. The only statutory basis for respondent's action that I can find is § 615.

[2] See also S. Rep. No. 143, 89th Cong., 1st Sess., 1 (1965); H. R. Rep. No. 1470, 89th Cong., 2d Sess., 2 (1966).

agents." *Id.*, at 5.[3] Congress in 1966 deliberately narrowed the coverage of the statute. I would not read into it broad coverage, through a general authorization to the Attorney General, that is inconsistent with the thrust of the legislation taken as a whole.

The statute no longer requires, in terms, the disclosure of the names of all contributors.[4] But the registrant must keep "such books of account and other records with respect to all his activities, the disclosure of which is required under the provisions of this subchapter . . . as the Attorney General, having due regard for the national security and the public interest, may by regulation prescribe as necessary or appropriate for the enforcement of the provisions of this subchapter." 22 U. S. C. § 615. The Attorney General has apparently determined that the names and addresses of all contributors must be disclosed to insure full disclosure of contributions from the foreign principal. 28 CFR § 5.201 (e). This requirement, I believe, goes beyond the bounds of the statute.

First, the Attorney General is authorized to require that records be kept as to "all . . . activities, the disclosure of which is required under the provisions of this subchapter," 22 U. S. C. § 615. The predicate of a valid regulation, then, is that it relate to an activity that must be disclosed by the terms of the Act itself. As I have noted, nothing in the Act requires the disclosure of the names of all contributors.

The Act does require that the organization disclose the extent to which it is controlled financially by its principal. And disclosure of the names of all contributors would make it easier for Americans to learn the degree of control which the foreign principal has over

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[3] See also S. Rep. No. 143, *supra*, n. 2, at 5.

[4] It does require full disclosure of all expenditures. 22 U. S. C. § 612 (a) (8).

an organization which solicits their contributions. But the respondent in this case has given no reason to believe that the foreign principal in this case has contributed more to the Irish Northern Aid Committee than has already been disclosed. Indeed, the very nature of the organization and the principal makes that very unlikely. For all that appears, the Irish Northern Aid Committee is a shoestring operation, which raises money at dances and house parties and sends it to an organization in Northern Ireland which seems to have few resources of its own. It is not the well-financed agent of an established government that sends money to this country for extensive efforts to influence public opinion.

The case might be different if the Attorney General had shown some reason to believe that the Irish Northern Aid Committee had failed to disclose contributions it had received from its principal. Full disclosure then might be the only way to discover whether that suspicion had some basis in fact. Without such a showing, however, the Attorney General has not established that the predicate for a valid regulation exists.[5] The regulation he has promulgated, which does not require any showing of possible relevance to some disclosure required by the terms of the Act, is more than the Act permits.

Second, if we were to construe the Act as authorizing such a broad-ranging inquiry, I would be troubled by the possibility that Congress had authorized an inquiry which the First Amendment forbids. Membership in an organization is protected from disclosure when the Government's interest in disclosure is outweighed by the impact on association that disclosure causes. See *NAACP* v. *Alabama,* 357 U. S. 449, 462–464 (1958).

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[5] The case was submitted to the District Court on affidavits, none of which revealed any reason for respondent to believe that the petitioner was receiving undisclosed amounts from its principal.

This balancing can be done only after careful consideration is given to the competing interests. Here the Government's interest is said to be guaranteeing that the public knows the extent to which petitioner is supported by its foreign principal. The Committee has already registered as a foreign agent and is subject to a wide range of disclosure requirements that I do not question. It is hard to believe that the increment in public information provided by disclosure of the names and addresses of contributors would be great, especially in a case where the Attorney General has shown no reason to believe that disclosure would reveal hidden contributions from the foreign principal.

On the other side, petitioner claims that many of its contributors are properly fearful for the safety of their relatives who remain in the turbulent surroundings of Northern Ireland. On the record developed in the District Court, based solely on affidavits, we cannot, I think, make an informed judgment of the impact of such fears on potential contributors.

The constitutional argument is a difficult one. I would not assume that Congress had carefully considered it when enacting a statute which does not, in terms, pose the constitutional question. The statutory basis for the Attorney General's requirement that the names of contributors be disclosed, without any preliminary showing that such disclosure would advance the ends of the statute, is rather slender in the first instance. It is hardly construing the statute to avoid constitutional doubts to read into it authority for the Attorney General to adopt regulations that themselves raise constitutional questions.

I would grant the petition for writ of certiorari and set the case for oral argument.

No. 72–529. GREMILLION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 464 F. 2d 901.

No. 72–532. KEEVER *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to dispense with printing petition granted. Certiorari denied.

No. 72–594. MATHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 1035.

No. 72–625. SMITH *v.* FALCON SEABOARD, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 206.

No. 72–680. SCHRADER *v.* SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 76 OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 73.

No. 72–5146. JOHNSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 261 La. 620, 260 So. 2d 645.

No. 72–5199. PHILLIPS *v.* CARR ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5230. BOAG *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5239. LEROY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 30 Ohio St. 2d 138, 283 N. E. 2d 136.

No. 72–5508. ROSEMOND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5556. HOOVER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 467 F. 2d 516.

No. 72–633. COPELAND REFRIGERATION CORP. *v.* WARRINER HERMETICS, INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 463 F. 2d 1002.

No. 72–5497. CLIZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 464 F. 2d 121.

No. 72–644. D. C. TRANSIT SYSTEM, INC. *v.* WASHINGTON METROPOLITAN AREA TRANSIT COMM'N ET AL. C. A. D. C. Cir. Motion of respondent Black United Front for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 151 U. S. App. D. C. 223, 466 F. 2d 394.

No. 72–5506. JAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would grant certiorari. Reported below: 464 F. 2d 1228.

No. 72–5405. AL-KARAGHOLI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. D. C. Cir. Certiorari denied.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner, a nonimmigrant student, was admitted to the United States in January 1962, pursuant to § 101 (a) (15) of the Immigration and Nationality Act, 66 Stat. 167, as amended, 8 U. S. C. § 1101 (a)(15), with authorization to remain in the country in that status until

January 28, 1968. In June 1967, deportation proceedings were initiated against petitioner on the ground that he had failed to maintain his student status. These proceedings were apparently dropped.[1]

On January 5, 1968, prior to the date of the expiration of his visa, petitioner filed an application for an extension of time under the visa for the purpose of continuing his education. This application was denied by the Special Inquiry Officer on the ground that the petitioner's primary interest in remaining in the United States was to work as a street vendor and not to pursue his educational interests. Petitioner was granted until May 21, 1969, to leave the country. On May 13, 1969, his application for reconsideration, wherein he verified his admission to the Washington Technical Institute, was denied.

On March 4, 1970, a deportation hearing was held at which time petitioner was represented by counsel. The Special Inquiry Officer found petitioner deportable. On appeal, the Board of Immigration Appeals observed that the principal basis for petitioner's appeal—the denial of his request for an extension of his student visa—was not appealable or subject to review.

Title 8 CFR § 214.2 (f)(4), a rule promulgated by the Immigration and Naturalization Service, indicates that there is no review available of the decisions on applications for extensions of student visas. "The applicant shall be notified of the decision and, if the application is denied, of the reason therefor. No appeal shall lie from the decision." In light of this Court's decisions,

[1] At the hearing before the Special Inquiry Officer, it was determined that petitioner had discontinued his education and he was ordered deported. The Board of Immigration Appeals remanded the case with directions to the Special Inquiry Officer to reopen the hearing to consider evidence, which had not been before him, which verified petitioner's student status. No further hearing was held.

recognizing the fundamental rights involved in deportation, this regulation denies applicants due process of law.

As early as 1921 this Court recognized that fundamental rights were involved in observing that not only does deportation [2] deprive a person of his liberty, but, "[i]t may result also in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho* v. *White,* 259 U. S. 276, 284. Because of the nature of the deprivation, although deportation is not technically a criminal penalty, this Court has concluded that "*deportation is a penalty*—at times a most serious one . . . . Meticulous care must be exercised lest the procedure by which he [the alien] is deprived of that liberty not meet the essential standards of fairness." *Bridges* v. *Wixon,* 326 U. S. 135, 154. (Emphasis supplied.)

This Court has held that the denial of a motion to reopen by the Special Inquiry Officer is reviewable as a "final order of deportation." *Giova* v. *Rosenberg,* 379 U. S. 18; *Foti* v. *Immigration and Naturalization Service,* 375 U. S. 217. At least one federal court of appeals has interpreted these cases to authorize judicial review of a decision on an issue stemming from a deportation proceeding. *Rose* v. *Woolwine,* 344 F. 2d 993 (CA4).

Contrary to Regulation § 214.2 (f)(4), an order of the Special Inquiry Officer denying an application for an extension of time under a currently valid visa does operate as a final order and must be subject to judicial review.

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[2] That approach is as important in dealing with deportation of students as it is in other alien cases. These days students are often political targets of their home country. Both Iran and Taiwan have been notorious in seeking our aid in deporting students, so that the students can be executed on their return for their opposed political ideas. While cancellation of the student visa in these troubled days may be sought for that purpose, Iraq does not seem to be the force behind the scenes in the present case.

When the extension is denied, a deportation date is set. The alien is given no recourse to challenge this deportation other than to leave the country and attempt to regain entry or to stay in the United States illegally in hopes of obtaining review in a deportation proceeding. But, as in the instant case, that review is so limited as to be nonexistent, when the Board of Immigration Appeals feels compelled by Regulation § 214.2 (f)(4) not to give any consideration to the denial of the extension or the reasons thereunder.

Such a result would appear to be contrary to the provisions of the Administrative Procedure Act [3] (5 U. S. C. § 704) wherein "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. *A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.*" (Emphasis supplied.) It is asserted that petitioner was not seeking a true student status because his main purpose was to work here. That is a gross distortion of the record. Petitioner was and is a true student, whether brilliant or mediocre being not material. He is a penniless student and works his way through the schools here in the District of Columbia by being a vendor of articles in the parks and other places. He has no criminal record; his mastery of the English language is not superior, and he has problems understanding the requirements of our laws and the procedures before our bureaucracy, just as an American studying in Baghdad would have great difficulty in toeing the line of Arabic law as construed and applied by Iraqi officials.

I would grant the petition for certiorari and put the case down for oral argument.

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[3] See Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement 72 Col. L. Rev. 1293, 1348 *et seq.* (1972).

No. 72–5535. DYE *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 60 N. J. 518, 291 A. 2d 825.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner was convicted of bookmaking in violation of state law. The evidence from which the conviction resulted arose primarily from a wiretap of a telephone on the premises where petitioner was employed. Petitioner challenges the admissibility of the wiretap product on the grounds that the judicial authorization was not in conformity with the state statute authorizing wiretapping (N. J. Stat. Ann. § 2A:156A–1) and that the wiretap violated his Fourth Amendment rights.

Pursuant to judicial authorization, a wiretap was placed on the pay telephone located in the restaurant-bar-liquor store in which petitioner was employed. The affidavits supporting the request for authorization of the tap included the following information: That the police had been advised that the number of the telephone in question was listed many times on the toll receipt of another telephone which was located at a place where there was "good reason to believe," pursuant to a different investigation, that bookmaking operations were being conducted; that police stakeouts in the restaurant-bar-liquor store overheard both petitioner and an unidentified male make a call on the telephone in which betting information was passed; that petitioner was observed taking notes from the sports pages of a newspaper and having guarded conversations with customers; and that when a reliable informer was requested to call the telephone number and place a bet, petitioner refused to take the bet, leading the informer to believe that petitioner would not deal with strangers.

From the above facts, the law division judge concluded that sufficient exigent circumstances existed for

concluding that traditional investigative techniques would be unproductive, and issued a warrant which authorized the placing of a wiretap on the telephone between the hours of 10 a. m. and 3 p. m., Monday through Saturday for a 30-day period, with directions that the interception begin as soon as practicable. The order also directed that the wiretap be conducted in such a way as to minimize or eliminate the interception of communications other than the type described. Those communications subject to seizure were described as "communications of Bentley Dye [petitioner] relating to the offenses of Bookmaking and Conspiracy from telephone facility number 201–725–9743."

Pursuant to the order, the police placed a wiretap on the telephone which was operative for 22 days. Over 105 hours of conversations were tapped. A master tape of those conversations allegedly involving bookmaking and the conspiracy was made and it ran about 2½ hours. The recordings of nonrelated communications were sealed. (No reason is given as to why they were not destroyed.) On several days when petitioner was not at work the wiretap remained in effect, recording any calls made on the telephone.

In *Berger* v. *New York,* 388 U. S. 41, 63, this Court held that "[w]hile '[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement' . . . it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."

In *Berger,* the language of the New York statute authorizing the wiretap was held to be unconstitutionally broad because authorization thereunder operated as the issuance of an illegal general warrant. The authoriza-

tion in *Berger* allowed a wiretap to be placed on the defendant's business office phone for a period of 60 days. The authorization was issued on the basis of affidavits advising the judge that the bases for the suspicions of a conspiracy to bribe the Chairman of the New York State Liquor Authority were recorded interviews between a complainant and the petitioner.

In *Berger* the Court placed special emphasis on the Fourth Amendment requirements that there be probable cause for the belief that a particular offense has been or is being committed and that the "property" (conversations) to be seized be described with particularity. In addition, the Court found the authorization constitutionally infirm on the grounds that an authorization for a period of two months constitutes a series of intrusions pursuant to a single showing of probable cause and that the authorization did not establish an intermediate termination date once the conversation sought was intercepted.

These same concerns dictate a reversal in the instant case: Only the merest investigation had been undertaken to establish that a particular offense was being committed, and part of that investigation, the unsuccessful attempt by an informer to place a bet, itself negated the suspicion. Although the authorization order limited the conversations to be seized, the execution of the order included seizure of all conversations on the telephone over the period of the wiretap. Such an invasion of privacy is even more horrendous since it involves a pay telephone in a public place where the majority of users and conversations, as indicated by the 102½ hours of innocent conversations out of the 105 hours of seized conversations, will have no relationship to the alleged criminal activity. Authorization for a 30-day wiretap would not appear to be any less of a continuing search than authorization for 60 days, especially in

light of the absence of any establishment of an intermediate termination date once the conversation sought was intercepted.

It is alleged that the New Jersey statute under which this wiretap was authorized is for all practical purposes identical to the federal authorization for wiretapping contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.* If the authorization of the wiretap in the instant case, which is the equivalent of a general warrant, is allowed by either of these statutes, then it is difficult to declare them constitutional.

I would grant certiorari.

No. 72–5566. EGBERT *v.* MARTINEZ ET AL. C. A. 10th Cir. Application for extension of time to file petition *nunc pro tunc* presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 71–1497. BECK *v.* CONNECTICUT GENERAL LIFE INSURANCE CO., *ante,* p. 845;

No. 71–6500. DOHERTY *v.* UNITED STATES, *ante,* p. 888;

No. 71–6649. FAIR *v.* SEBESTA, *ante,* p. 978;

No. 71–6847. MARTIN *v.* UNITED STATES, *ante,* p. 870;

No. 72–240. HARPER *v.* UNITED STATES, *ante,* p. 973;

No. 72–319. KENNECOTT COPPER CORP. ET AL. *v.* STATE TAX COMMISSION OF UTAH, *ante,* p. 973;

No. 72–5014. CONNORS *v.* JOHNSON, WARDEN, *ante,* p. 1009; and

No. 72–5351. NEWELL *v.* UNITED STATES, *ante,* p. 1025. Petitions for rehearing denied.

No. 71–6540. GRENE *v.* UNITED STATES, *ante,* p. 856. Motion for leave to file petition for rehearing denied.

DECEMBER 21, 1972

Dismissals Under Rule 60

No. 72–457. RODRIGUEZ *v.* SEAMANS, SECRETARY OF THE AIR FORCE, ET AL. C. A. D. C. Cir. Certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 150 U. S. App. D. C. 1, 463 F. 2d 837.

No. 72–5302. PHILLIPS *v.* HOUSING AUTHORITY OF CITY OF PROVIDENCE. Appeal from Sup. Ct. R. I. dismissed under Rule 60 of the Rules of this Court. Reported below: 109 R. I. 612, 289 A. 2d 44.

JANUARY 8, 1973

Affirmed on Appeal

No. 72–579. MISSOURI PACIFIC RAILROAD CO. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. E. D. Mo. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 346 F. Supp. 1193.

No. 72–581. KANSAS CITY SOUTHERN RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 346 F. Supp. 1211.

No. 72–632. NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C.

No. 72–723. UNITED STATES *v.* STATE CORPORATION COMMISSION OF VIRGINIA ET AL. Affirmed on appeal from D. C. E. D. Va. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 345 F. Supp. 843.

No. 72–621. WELLS *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. Affirmed on appeal from D. C. M. D. La. Reported below: 347 F. Supp. 453.

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

The Louisiana constitutional provisions, which this Court today upholds against appellant's renewed constitutional attack, provide for the election of the State's Supreme Court Justices from election districts that are established without regard to population. Voters in five districts, composed of varying numbers of parishes, elect one justice each. A sixth district elects two justices. La. Const., Art. VII, § 9. The record before the District Court indicated that there was "considerable deviation between the population of some of the [election] districts," 347 F. Supp. 453, 454,[1] and that, therefore, the votes of some qualified voters, depending on the happenstance of residence, were of less value in electing justices than others cast elsewhere. But the District Court refused even to consider this evidence and, relying on a few isolated sentences in *Hadley* v. *Junior College District,* 397 U. S. 50 (1970), concluded that "the concept of one-man, one-vote apportionment does not apply to the judicial branch of the government." 347 F. Supp., at 454. Summary judgment was entered against appellant, who had attacked the Louisiana scheme under the Equal Protection Clause of the Fourteenth Amendment.

In *Hadley,* we held that the one-person, one-vote principle extended to the election of trustees for a consolidated junior college district. Mr. Justice Black, writing for the Court, stated broadly that, as a general rule, "whenever a state or local government

[1] The record indicates that in 1970 the election districts ranged in population from 369,485 to 682,072. The two-justice district had a total population of 1,007,449.

decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election." 397 U. S., at 56. The District Court in this case seized upon the phrase "persons . . . to perform governmental functions," and concluded that such persons were limited to "officials who performed legislative or executive type duties." 347 F. Supp., at 455.[2] I find no such limiting import in the phrase. Judges are not private citizens who are sought out by litigious neighbors to pass upon their disputes. They are state officials, vested with state powers and elected (or appointed) to carry out the state government's judicial functions. As such, they most certainly "perform

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[2] There is language in other district court opinions to the effect that the one-person, one-vote principle does not apply to the judiciary. See, *e. g., Holshouser* v. *Scott,* 335 F. Supp. 928 (MDNC 1971), aff'd, *ante,* p. 807; *Buchanan* v. *Rhodes,* 249 F. Supp. 860 (ND Ohio), appeal dismissed for want of jurisdiction, 385 U. S. 3 (1966); *Stokes* v. *Fortson,* 234 F. Supp. 575 (ND Ga. 1964). See also *New York Assn. of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148 (SDNY 1967). The statutory schemes involved in those cases, however, differ materially from the Louisiana provisions at issue here. For example, in *Holshouser* and *Stokes,* district judges were nominated through primaries in districts with varying populations; the judges were elected, however, on a statewide basis that conformed to the one-person, one-vote principle. In this context, the district courts rejected the claim that plaintiffs' primary votes were "diluted" by the general election. Cf. *Sailors* v. *Board of Education,* 387 U. S. 105 (1967); *Dusch* v. *Davis,* 387 U. S. 112 (1967). In *Buchanan,* plaintiffs claimed that the apportionment of trial judges in the State resulted in fewer judges per capita in urban districts than in rural districts. Plaintiffs challenged the apportionment on the ground that it denied them speedy justice, not on the ground that their vote in statewide elections was diluted.

See generally Note, The Equal-Population Principle: Does It Apply To Elected Judges?, 47 Notre Dame Law. 316 (1971).

governmental functions." Indeed, this Court held precisely that nearly a decade ago, in *Gray* v. *Sanders,* 372 U. S. 368 (1963), by invalidating Georgia's county unit system that had been used for counting Democratic Party primary votes for United States Senator, Governor, statehouse officers, justices of the Supreme Court, and judges of the Court of Appeals. Nowhere did we suggest that the county unit system was any less unconstitutional for the election of judges than for the election of governor. On the contrary, with the most direct language possible, the Court stated:

> "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions." *Id.,* at 379–380.

We have held that a State may dispense with certain elections altogether (see *Sailors* v. *Board of Education,* 387 U. S. 105 (1967); cf. *Fortson* v. *Morris,* 385 U. S. 231 (1966)) and we have suggested that not all persons must be permitted to vote on an issue that may affect only a discernible portion of the public, see *Kramer* v. *Union Free School District,* 395 U. S. 621, 632 (1969). What I had thought the apportionment decisions at least established is the simple constitutional principle that, subject to narrow exceptions,[3] once a State chooses to

[3] For example, in *Hadley,* Mr. Justice Black conceded the possibility "that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required." 397 U. S., at 56. See *Avery* v. *Midland County,* 390 U. S. 474, 483–484 (1968).

select officials by popular vote, each qualified voter must be treated with an equal hand and not be subjected to irrational discrimination based on his residence. See *Reynolds* v. *Sims,* 377 U. S. 533, 554–555 (1964). Nothing could be plainer from Mr. Justice Black's statement in *Hadley,* 397 U. S., at 54–55:

> "[W]hile the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor—these officials are elected by popular vote.
>
> "When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected."

The judgment of the District Court is questionable under a decade of this Court's decisions. It at least warrants plenary review here.

No. 72–660. DAVIS ET AL. *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. Affirmed on appeal from D. C. E. D. La. Reported below: 345 F. Supp. 1025.

Appeals Dismissed

No. 71–1577. REXRODE *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 72–695. KELLEMS ET AL. *v.* BROWN, TAX COMMISSIONER, ET AL. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question.

No. 72–179. WILKINSON *v.* WILKINSON. Appeal from Sup. Jud. Ct. Mass. Motion to dispense with printing jurisdictional statement and motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question.

No. 72–622. CUTRONE *v.* KELLY, ADMINISTRATIVE JUDGE, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 39 App. Div. 2d 725, 332 N. Y. S. 2d 413.

No. 72–670. MCLEAN TRUCKING CO. *v.* COUNTY OF FORSYTH ET AL. Appeal from Sup. Ct. N. 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: 281 N. C. 375, 189 S. E. 2d 194.

No. 72–640. OREGON STATE ELKS ASSN. ET AL. *v.* FALKENSTEIN ET AL. Appeal from D. C. Ore. dismissed for want of jurisdiction.

No. 72–5468. CARR *v.* TEXAS. Appeal from Ct. Crim. App. Tex. 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 would note probable jurisdiction and set case for oral argument. Reported below: 475 S. W. 2d 755.

Certiorari Granted—Vacated and Remanded

No. 72–308. FITZHARRIS, WARDEN *v.* LOVE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded with directions to dismiss case as moot. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL would deny certiorari. Reported below: 460 F. 2d 382.

Miscellaneous Orders

No. A–557. ENDERS, DISTRICT ATTORNEY OF ONEIDA COUNTY, NEW YORK, ET AL. *v.* ESQUIRE THEATERS OF AMERICA, INC. D. C. N. D. N. Y. Application for stay of execution of judgment in case No. 72–CV–450 presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending disposition of case in the United States Court of Appeals for the Second Circuit.

No. A–605. HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. *v.* FITZGERALD ET AL. C. A. D. C. Cir. Motion of the Solicitor General to dissolve stay granted. [See *ante,* p. 1055.]

No. D–1. IN RE DISBARMENT OF KAHN. It having been reported to this Court that Frances Kahn of New York, New York, has been disbarred from the practice of law in all of the courts of the State of New York, and this Court by order of November 6, 1972 (*ante,* p. 974), having suspended the said Frances Kahn from the practice of law in this Court and directed that a rule issue requiring her to show cause why she 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 has expired;

IT IS ORDERED that the said Frances Kahn be, and she is hereby, disbarred from the practice of law in this Court and that her name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. A–665. KINGSTON ET AL., JUSTICES *v.* MCLAUGHLIN, JUSTICE, ET AL. D. C. Mass. Application for stay of judgment presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 359 F. Supp. 25.

No. D–2. IN RE DISBARMENT OF ABRAMS. It having been reported to this Court that Hyman Abrams of New York, New York, has been disbarred from the practice of law in all of the courts of the State of New York, and this Court by order of November 6, 1972 (*ante,* p. 974), having suspended the said Hyman Abrams 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 has expired;

IT IS ORDERED that the said Hyman Abrams 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. D–4. IN RE DISBARMENT OF BROUNER. It having been reported to this Court that Samuel B. Brouner of New York, New York, has been disbarred from the practice of law in all of the courts of the State of New York, and this Court by order of November 6, 1972 (*ante,* p. 974), having suspended the said Samuel B. Brouner 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 issued and served upon the respondent and that the time within which to file a return has expired;

IT IS ORDERED that the said Samuel B. Brouner 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. D–8. In re Disbarment of Pavsner. It having been reported to this Court that Emanuel H. Pavsner of New York, New York, has been suspended from the practice of law by the Supreme Court of New York, Appellate Division, First Judicial Department, for a period of three years effective March 27, 1972, and until further order of that court, and such order was duly entered March 30, 1972, and this Court by order of November 6, 1972 (*ante,* p. 975), having suspended the said Emanuel H. Pavsner 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 a response has been filed,

It Is Ordered that the said Emanuel H. Pavsner 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. 27, Orig. Ohio *v.* Kentucky. Motion of Ed W. Hancock, Attorney General of Kentucky, for leave to permit John M. Famularo, Esquire, to argue *pro hac vice* granted. [For earlier orders herein, see, *e. g.,* 406 U. S. 915.]

No. 71–1598. Hodgson, Secretary of Labor *v.* Arnheim & Neely, Inc., et al. C. A. 3d Cir. [Certiorari granted, *ante,* p. 840.] Motion of Institute of Real Estate Management for leave to participate in oral argument granted and five minutes of respondents' time allotted for that purpose.

No. 50, Orig. VERMONT *v.* NEW YORK ET AL. Motion of the United States for leave to intervene referred to Special Master. [For earlier orders herein, see, *e. g.*, 408 U. S. 917.]

No. 71–685. LEHNHAUSEN, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS *v.* LAKE SHORE AUTO PARTS CO. ET AL.; and

No. 71–691. BARRETT, COUNTY CLERK OF COOK COUNTY, ILLINOIS, ET AL. *v.* SHAPIRO ET AL. Sup. Ct. Ill. [Certiorari granted, 405 U. S. 1039.] Motion of Proviso Township High School District No. 209 et al. for reconsideration of their motion for leave to participate in oral argument as *amici curiae* denied.

No. 71–1021. EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. *v.* DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. C. A. 8th Cir. [Certiorari granted, 405 U. S. 1016.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioners granted and 15 minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 71–1069. ASSOCIATED ENTERPRISES, INC., ET AL. *v.* TOLTEC WATERSHED IMPROVEMENT DISTRICT. Appeal from Sup. Ct. Wyo. [Probable jurisdiction noted, 407 U. S. 908.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 71–6078. LINDA R. S. *v.* RICHARD D. ET AL. Appeal from D. C. N. D. Tex. [Probable jurisdiction postponed, 405 U. S. 1064.] Motion of appellant for appointment of counsel granted. It is ordered that Windle Turley, Esquire, of Dallas, Texas, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for appellant in this case.

No. 71–1456. SALYER LAND CO. ET AL. *v.* TULARE LAKE BASIN WATER STORAGE DISTRICT. Appeal from D. C. E. D. Cal. [Probable jurisdiction noted, 408 U. S. 920.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 71–1192. GOLDSTEIN ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. [Certiorari granted, 406 U. S. 956.] Motion of respondent for leave to file supplemental brief after argument granted.

No. 71–1637. CITY OF BURBANK ET AL. *v.* LOCKHEED AIR TERMINAL, INC., ET AL. Appeal from C. A. 9th Cir. [Probable jurisdiction noted, *ante,* p. 840.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of appellants granted and 15 minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument.

No. 72–146. HUNTER, DBA COURIER *v.* UNITED STATES, *ante,* p. 934. Respondent requested to file response to motion for leave to file petition for rehearing within 30 days.

No. 72–552. SATIACUM *v.* WASHINGTON. Sup. Ct. Wash. The Solicitor General is invited to file a brief expressing the views of the United States in this case. Reported below: 80 Wash. 2d 492, 495 P. 2d 1035.

No. 72–679. UNITED MINE WORKERS OF AMERICA ET AL. *v.* YABLONSKI ET AL. C. A. D. C. Cir. Motion of Paul R. Connolly, Esquire, and Earl C. Dudley, Jr., Esquire, of Washington, D. C., members of the Bar of this Court, for leave to withdraw as counsel for petitioners granted. Reported below: 151 U. S. App. D. C. 253, 466 F. 2d 424.

No. 72–671. ESPINOZA ET VIR *v.* FARAH MANUFACTURING CO., INC. C. A. 5th Cir. The Solicitor General is invited to file a brief expressing the views of the United States in this case. Reported below: 462 F. 2d 1331.

No. 72–5655. HILL *v.* HENDERSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 72–5304. BRADLEY *v.* SUPREME COURT OF INDIANA;

No. 72–5568. DAVIS *v.* NEAHER, U. S. DISTRICT JUDGE, ET AL.;

No. 72–5671. OLDEN *v.* CHAMBERS, U. S. CIRCUIT JUDGE, ET AL.; and

No. 72–5672. MUNCASTER *v.* UNITED STATES. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 72–658. CITY OF KENOSHA ET AL. *v.* BRUNO ET AL. Appeal from D. C. E. D. Wis. Probable jurisdiction noted. Reported below: 346 F. Supp. 43.

Certiorari Granted

No. 72–394. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* HYNSON, WESTCOTT & DUNNING, INC.;

No. 72–414. HYNSON, WESTCOTT & DUNNING, INC. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.;

No. 72–555. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* BENTEX PHARMACEUTICALS, INC., ET AL.;

No. 72–666. USV PHARMACEUTICAL CORP. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 4th Cir.; and

No. 72–528. CIBA CORP. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 3d Cir. Reported below: Nos. 72–394 and 72–414, 461 F. 2d

215; No. 72–555, 463 F. 2d 363; No. 72–666, 461 F. 2d 223; and No. 72–528, 463 F. 2d 225. Motion of American Public Health Assn. et al. for leave to file a brief as *amici curiae* in No. 72–394 granted. Certiorari granted. Cases consolidated and a total of three hours allotted for oral argument.

No. 72–656. LOGUE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 459 F. 2d 408 and 463 F. 2d 1340.

No. 72–5521. STRUNK, AKA WAGNER *v.* UNITED STATES. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 467 F. 2d 969.

Certiorari Denied. (See also Nos. 72–622, 72–670, and 72–5468, *supra.*)

No. 71–1528. SPEARS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 257 So. 2d 876.

No. 71–6449. ELLINGBURG *v.* GOODSON, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied.

No. 71–6800. D'AMBRA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 72–292. MARRERO LAND & IMPROVEMENT ASSN., LTD. *v.* JEFFERSON PARISH SCHOOL BOARD. Sup. Ct. La. Certiorari denied. Reported below: 261 La. 1054, 262 So. 2d 39.

No. 72–338. CARROLL, SHERIFF, ET AL. *v.* MCDANIEL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 457 F. 2d 968.

No. 72–348. HUTTER ET AL. *v.* TANCK ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–351. MARAMAN *v.* HARDISTER ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 72–366. VILLAGE OF WALTHILL, NEBRASKA, ET AL. *v.* OMAHA TRIBE OF NEBRASKA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 460 F. 2d 1327.

No. 72–392. CRAMER ET UX. *v.* DIRECTOR OF REVENUE. Sup. Ct. Del. Certiorari denied.

No. 72–393. UNITED TRANSPORTATION UNION *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 301.

No. 72–444. MISSOURI PACIFIC RAILROAD CO. *v.* WILLIAM A. SMITH CONTRACTING CO., INC. Ct. App. Mo., Kansas City District. Certiorari denied. Reported below: 481 S. W. 2d 580.

No. 72–448. DASHER *v.* BLACKMON, COMMISSIONER, DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 229 Ga. 289, 191 S. E. 2d 82.

No. 72–474. SCHATTMAN *v.* TEXAS EMPLOYMENT COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 32.

No. 72–483. SALAZAR *v.* UNITED STATES;
No. 72–485. NORMAN *v.* UNITED STATES;
No. 72–525. COOPER *v.* UNITED STATES;
No. 72–5454. COOPER *v.* UNITED STATES; and
No. 72–5563. COOPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 464 F. 2d 648.

No. 72–609. KOKAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 567.

No. 72–595. MOTT ET AL., EXECUTORS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 199 Ct. Cl. 127, 462 F. 2d 512.

No. 72–628. MOORE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 514.

No. 72–636. LOMBARDOZZI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 160.

No. 72–642. MAYHUE'S SUPER LIQUOR STORES, INC., ET AL. *v.* HODGSON, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 1196.

No. 72–645. BRIOLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 465 F. 2d 1018.

No. 72–646. OREE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 465 F. 2d 1405.

No. 72–657. LOCAL UNION 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 465 F. 2d 327.

No. 72–661. LEDES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 30 N. Y. 2d 816, 286 N. E. 2d 282.

No. 72–662. BATA *v.* BATA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 448 Pa. 355, 293 A. 2d 343.

No. 72–663. TURNPIKE REALTY CO., INC. *v.* TOWN OF DEDHAM. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 284 N. E. 2d 891.

No. 72–664. BECKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 886.

No. 72–672. POGUE *v.* RETAIL CREDIT CO. C. A. 4th Cir. Certiorari denied. Reported below: 453 F. 2d 336.

No. 72–674. BALDWIN-LIMA-HAMILTON CORP. *v.* AETNA CASUALTY & SURETY CO. ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 163 Conn. 331, 307 A. 2d 169.

No. 72–678. FORD, DBA FORD RECORDS *v.* FORD MOTOR CO. C. C. P. A. Certiorari denied. Reported below: 59 C. C. P. A. (Pat.) 1124, 462 F. 2d 1405.

No. 72–697. JEMCO, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 465 F. 2d 1148.

No. 72–706. E. A. MCQUADE TOURS, INC. *v.* CONSOLIDATED AIR TOUR MANUAL COMMITTEE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 178.

No. 70–709. RIALTO THEATRE CO. ET AL. *v.* CITY OF WILMINGTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 460 F. 2d 281.

No. 72–711. GERNETH ET AL. *v.* CITY OF DETROIT. C. A. 6th Cir. Certiorari denied. Reported below: 465 F. 2d 784.

No. 72–714. CALIFORNIA *v.* MUNICIPAL COURT FOR THE SACRAMENTO MUNICIPAL COURT DISTRICT OF SACRAMENTO COUNTY ET AL. (ALFORD, REAL PARTY IN INTEREST). Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 26 Cal. App. 3d 244, 102 Cal. Rptr. 667.

No. 72–728. BERGENTHAL *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 635.

No. 72–732. LANCASTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 39 App. Div. 2d 776, 332 N. Y. S. 2d 735.

No. 72–735. FILTROL CORP. ET AL. *v.* KELLEHER, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 242.

No. 72–762. REYES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 31 N. Y. 2d 668, 288 N. E. 2d 806.

No. 72–5126. HYDE *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–5226. BASKERVILLE *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–5257. SHANK *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 461 F. 2d 61.

No. 72–5303. BIRNBAUM *v.* NEW JERSEY. Middlesex County Ct. N. J. Certiorari denied.

No. 72–5310. MATTHEWS *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied.

No. 72–5320. GARDNER *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 72–5349. VALDIVIA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5359. PARKER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 55 Wis. 2d 131, 197 N. W. 2d 742.

No. 72–5390. HERRERA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 84 N. M. 46, 499 P. 2d 364.

No. 72–5520. FROMMHAGEN *v.* HODGSON, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied.

No. 72–5536. JANOSKO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–5541. ALLISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5552. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 1118.

No. 72–5553. MOORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 466 F. 2d 547.

No. 72–5557. ZWEIG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 2d 1217.

No. 72–5558. WILSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5561. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 466 F. 2d 537.

No. 72–5562. MEDINA *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 72–5564. SMITH *v.* SALINE COUNTY DISTRICT COURT. Sup. Ct. Kan. Certiorari denied.

No. 72–5569. SCHNEIDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5570. TRIPP *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5571. RUSSEK *v.* GOVERNOR OF MARYLAND ET AL. Ct. App. Md. Certiorari denied. Reported below: 266 Md. 431, 293 A. 2d 817.

No. 72–5573. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 466 F. 2d 1206.

No. 72–5574. BRYANT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 153 U. S. App. D. C. 72, 471 F. 2d 1040.

No. 72–5575. HESTER *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 72–5578. VITORATOS *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–5580. O'BRIEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 517.

No. 72–5583. ESCOFIL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 464 F. 2d 358.

No. 72–5584. IN RE NIX. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 377.

No. 72–5585. LASWELL *v.* UNITED STATES; and
No. 72–5598. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5586. CASSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–5588. MCCRAY *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 72–5589. KELLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1406.

No. 72–5590. ALVAREZ *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1136.

No. 72–5594. TOOMEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–5595. CHAVEZ *v.* GIBBONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–5599. WRENN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1136.

No. 72–5601. MINER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 72–5602. ROSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5603. MCCOY *v.* EGELER, ACTING WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–5606. OCHOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 488.

No. 72–5608. HEINDL *v.* WASHINGTON TERMINAL CO. Ct. App. D. C. Certiorari denied.

No. 72–5610. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 1348.

No. 72–5611. MINOR *v.* CUPP, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 2d 1369.

No. 72–5613. KEANE *v.* SMITH. Sup. Ct. Conn. Certiorari denied.

No. 72–5614. CHAMPAGNE ET AL. *v.* PENROD DRILLING CO. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 2d 1042 and 462 F. 2d 1372.

No. 72–5615. HOUSER *v.* GEARY, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 193.

No. 72–5616. CHIODI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 72–5620. BAILEY *v.* TODD. Ct. App. Ga. Certiorari denied. Reported below: 126 Ga. App. 731, 191 S. E. 2d 547.

No. 72–5619. BEECH *v.* MELANCON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 465 F. 2d 425.

No. 72–5621. LUCAS *v.* WISCONSIN ELECTRIC POWER CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 638.

No. 72–5623. BRIGHT *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 72–5628. BERNSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5631. MEANS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5633. REILLY *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–5635. ALLEN *v.* THOMAS. C. A. 4th Cir. Certiorari denied.

No. 72–5637. SZABO *v.* WESTMORELAND COUNTY AUTHORITIES ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–5638. IN RE SWOPE. C. A. 7th Cir. Certiorari denied. Reported below: 466 F. 2d 936.

No. 72–5646. DABNEY *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 72–5647. EVANS *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5649. MILSTEAD ET AL. *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–5650. CAMPBELL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 72–5696. PLATSIS *v.* MICHIGAN ET AL. Ct. App. Mich. Certiorari denied.

No. 72–5653. TAYLOR *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5663. AUSBY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 72–5667. JONES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 72–5675. DAVIS *v.* GOMES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–5690. BRYANT *v.* BAILEY. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 560.

No. 72–5700. LOTT *v.* NEW YORK. Sup. Ct. N. Y., New York County. Certiorari denied.

No. 71–1510. ROSS, ADMINISTRATIVE JUDGE, ET AL. *v.* RADICH. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 459 F. 2d 745.

No. 72–1. BASKIN ET AL. *v.* CITY OF MIAMI BEACH. Cir. Ct. Fla., Dade County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–298. COOLEY ET AL. *v.* ENDICTOR ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 458 F. 2d 513.

No. 72–364. DIRECTOR GENERAL, INDIA SUPPLY MISSION *v.* THE MARU ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 1370.

No. 72–451. KENNEDY ET AL. *v.* BUREAU OF NARCOTICS AND DANGEROUS DRUGS, UNITED STATES DEPARTMENT OF JUSTICE, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 415.

No. 72–580. AMERICAN CIVIL LIBERTIES UNION ET AL. *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 499.

No. 72–584. MARTINO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 1032.

No. 72–601. COREY *v.* AVCO-LYCOMING DIVISION, AVCO CORP. Sup. Ct. Conn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 163 Conn. 309, 307 A. 2d 155.

No. 72–715. UNITED STATES *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 301.

No. 72–716. WILBANKS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 48 Ala. App. 754, 266 So. 2d 637.

No. 72–5184. LYNCH *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 197 N. W. 2d 186.

No. 72–5244. RIGDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 459 F. 2d 379.

No. 72–5279. HILLEN *v.* HAWAII STATE PRISON SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5389. JOHNSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 213 Va. 102, 189 S. E. 2d 678.

No. 72–5526. MASSIMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 463 F. 2d 1171.

No. 72–5540. KYLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 152 U. S. App. D. C. 141, 469 F. 2d 547.

No. 72–5560. MENDEZ-RUIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5567. HENDERSON *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, ET AL. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 448 Pa. 411, 293 A. 2d 64.

No. 72–5654. DOTSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 48 Ala. App. 381, 265 So. 2d 164.

No. 72–5664. MURRAY *v.* OWENS, RECEPTION CENTER SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 289.

No. 72–243. CLEAN AIR COORDINATING COMMITTEE *v.* ROTH ADAM FUEL CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would grant certiorari. Reported below: 465 F. 2d 323.

No. 72–250. GOLDSBERRY ET AL. *v.* HIEBER, JUDGE. Sup. Ct. Ohio. Motions to dispense with printing petition and respondent's brief granted. Certiorari denied.

No. 72–5604. MCDONALD *v.* METRO TRAFFIC AND PARKING COMMISSION ET AL. C. A. 6th Cir. Certiorari and other relief denied.

No. 72–598. FOURNIER *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 952.

No. 72–665. HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 464 F. 2d 1358.

No. 72–684. STEPHENS, INC. *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: 464 F. 2d 53.

No. 72–698. HOUSE *v.* HOUSE. Ct. App. Cal., 4th App. Dist. Motion of respondent to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

Rehearing Denied

No. 71–1509. UNITED STATES *v.* JIM ET AL., *ante,* p. 80;

No. 71–1612. UTAH ET AL. *v.* JIM ET AL., *ante,* p. 80;

No. 71–6690. KEENY *v.* SWENSON, WARDEN, *ante,* p. 1027;

No. 71–6751. DAWN, DBA GAME CO. *v.* STERLING DRUG, INC., ET AL., *ante,* p. 865;

No. 72–246. INTERSTATE COMMERCE COMMISSION *v.* IML SEATRANSIT, LTD., ET AL., *ante,* p. 1003;

No. 72–266. STONE *v.* STONE ET AL., *ante,* p. 1000;

No. 72–299. PILGRIM EQUIPMENT COMPANY OF HOUSTON *v.* TEXAS ET AL., *ante,* p. 982;

No. 72–337. ROSS *v.* UNITED STATES ET AL., *ante,* p. 984; and

No. 72–365. REILLEY *v.* REILLEY, *ante,* p. 1003. Petitions for rehearing denied.

No. 72–370. MARCUS ET AL. *v.* NEW YORK, *ante,* p. 1027;

No. 72–373. TEXAS EASTERN TRANSMISSION CORP. *v.* BENSON, COMMISSIONER OF REVENUE, *ante,* p. 1003;

No. 72–374. SWARTHOUT *v.* OLUND, *ante,* p. 1008;

No. 72–381. BASYAP, INC., ET AL. *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY ET AL., *ante,* p. 1008;

No. 72–447. HUTTER ET UX. *v.* CITY OF CHICAGO, *ante,* p. 1024;

No. 72–5064. REILLY *v.* CAULDWELL-WINGATE CO., INC., ET AL., *ante,* p. 882;

No. 72–5097. RICHERSON *v.* UNITED STATES, *ante,* p. 883;

No. 72–5337. NIX *v.* UNITED STATES, *ante,* p. 1013;

No. 72–5342. HOUP *v.* UNITED STATES, *ante,* p. 1011; and

No. 72–5394. HITCHCOCK *v.* GOMES, WARDEN, *ante,* p. 1026. Petitions for rehearing denied.

No. 71–1235. CRAIG, COMMISSIONER OF SOCIAL SERVICES, ET AL. *v.* GILLIARD ET AL., *ante,* p. 807;

No. 71–6719. BROWN *v.* UNITED STATES, *ante,* p. 864;

No. 72–55. MURCH ET AL. *v.* MOTTRAM, *ante,* p. 41; and

No. 72–5043. WARRINER *v.* WISEHEART ET AL., *ante,* p. 881. Motions for leave to file petitions for rehearing denied.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit beginning April 16, 1973, and ending April 20, 1973, and for such further time as may be re-

quired to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit beginning June 11, 1973, and ending June 15, 1973, 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.

JANUARY 9, 1973

Dismissal Under Rule 60

No. 71–715. FONTHAM ET AL. *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. Appeal from D. C. E. D. La. dismissed under Rule 60 of the Rules of this Court. Reported below: 336 F. Supp. 153.

JANUARY 15, 1973

Affirmed on Appeal

No. 72–537. GEORGES ET AL. *v.* MCCLELLAN ET AL. Appeal from D. C. R. I. Motions of appellees for leave to proceed *in forma pauperis,* and of Rhode Island Consumers' Council for leave to file a brief as *amicus curiae,* granted. Judgment affirmed. Reported below: 350 F. Supp. 1013.

No. 72–669. SMITH'S TRANSFER CORP. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. W. D. Va. MR. JUSTICE DOUGLAS and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument.

No. 72–687. McLean Trucking Co. *v.* United States et al. Affirmed on appeal from D. C. M. D. N. C. Mr. Justice Douglas and Mr. Justice Rehnquist would note probable jurisdiction and set case for oral argument. Reported below: 346 F. Supp. 349.

Vacated and Remanded on Appeal. (See No. 72–603, *ante,* p. 464, and No. 72–691, *ante,* p. 467.)

Appeals Dismissed

No. 72–446. Tomasino *v.* 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. 72–833. William E. Goetz & Sons et al. *v.* Board of Regents, State Senior Colleges, et al. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 465 F. 2d 432.

No. 72–5612. Bodisco *v.* Nixon, President of the United States, et al. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–749. Sunset Amusement Co. et al. *v.* Board of Police Commissioners of the City of Los Angeles. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 7 Cal. 3d 64, 496 P. 2d 840.

No. 72–5471. Fuchs *v.* Silvester. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 31 N. Y. 2d 154, 286 N. E. 2d 717.

Certiorari Granted—Remanded

No. 72–5293. CARTER *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied. Motion for leave to proceed *in forma pauperis* granted. Treating the papers submitted as a petition for writ of certiorari, certiorari granted and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of the memorandum for respondent filed by the Solicitor General in this Court on December 19, 1972.

Certiorari Granted—Vacated and Remanded

No. 72–5391. JACKSON *v.* GEORGIA. Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated insofar as it leaves undisturbed the death penalty imposed, and case remanded for further consideration in light of *Stewart* v. *Massachusetts,* 408 U. S. 845 (1972). Reported below: 229 Ga. 191, 190 S. E. 2d 530.

Miscellaneous Orders

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL., 407 U. S. 206. Supplemental report of Special Master received and ordered filed. Exceptions, with supporting briefs, may be filed within 30 days.

No. 71–1031. TONASKET *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash. [Probable jurisdiction noted, 407 U. S. 908.] Motion of appellant for order requiring briefs upon issue of jurisdiction denied.

No. 71–1553. GILLIGAN, GOVERNOR OF OHIO, ET AL. *v.* MORGAN ET AL. C. A. 6th Cir. [Certiorari granted, *ante,* p. 947.] Motion of Law Revision Center for leave to file a brief as *amicus curiae* granted.

No. 70–35. AUSTIN ET AL. *v.* MEYER ET AL. Appeal from D. C. M. D. Fla. Motion of appellants to reinstate stay heretofore vacated by order of this Court on June 26, 1972 [408 U. S. 919], denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 71–1694. FRONTIERO ET VIR *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. Appeal from D. C. M. D. Ala. [Probable jurisdiction noted, *ante,* p. 840.] Motion of appellants to divide oral argument granted.

No. 71–6732. CHAFFIN *v.* STYNCHCOMBE, SHERIFF. C. A. 5th Cir. [Certiorari granted, *ante,* p. 912.] Motion of petitioner for appointment of counsel granted. It is ordered that Glenn Zell, Esquire, of Atlanta, Georgia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 72–5410. BLACK *v.* UNITED STATES, *ante,* p. 1027. Respondent requested to file response to motion for leave to file petition for rehearing within 30 days.

No. 72–5372. LUCAS *v.* WYOMING ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Postponed

No. 72–792. NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES ET AL. *v.* DUBLINO ET AL.; and

No. 72–802. ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. *v.* DUBLINO ET AL. Appeals from D. C. W. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of cases on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 348 F. Supp. 290.

Certiorari Granted

No. 71–1182. MATTZ *v.* ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME. Ct. App. Cal., 1st App. Dist. Certiorari granted. Reported below: 20 Cal. App. 3d 729, 97 Cal. Rptr. 894.

No. 72–549. SCHOOL BOARD OF CITY OF RICHMOND, VIRGINIA, ET AL. *v.* STATE BOARD OF EDUCATION OF VIRGINIA ET AL.; and

No. 72–550. BRADLEY ET AL. *v.* STATE BOARD OF EDUCATION OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 462 F. 2d 1058.

No. 72–606. OKLAHOMA *v.* MASON, ADMINISTRATOR, ET AL.; and

No. 72–654. UNITED STATES *v.* MASON, ADMINISTRATOR, ET AL. Ct. Cl. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 198 Ct. Cl. 599, 461 F. 2d 1364.

No. 72–804. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. Motions to file briefs as *amici curiae* filed by Utah Power & Light Co., Chamber of Commerce of the United States, American Mining Congress, and the State of Arizona et al., granted. Certiorari granted.

Certiorari Denied. (See also Nos. 72–446, 72–833, and 72–5612, *supra.*)

No. 72–560. FIRST NATIONAL BANK OF FAIRBANKS *v.* CAMP, COMPTROLLER OF THE CURRENCY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 151 U. S. App. D. C. 1, 465 F. 2d 586.

No. 72–627. Brezina Construction Co., Inc., et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 464 F. 2d 1141.

No. 72–641. Western International Hotels Co. *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 1000.

No. 72–673. Getty Oil Co. (Eastern Operations), Inc. *v.* Ruckelshaus, Administrator, Environmental Protection Agency, et al. C. A. 3d Cir. Certiorari denied. Reported below: 467 F. 2d 349.

No. 72–685. Flannery *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 201.

No. 72–696. Bosley et ux. *v.* Atlantic Seaboard Corp. C. A. 4th Cir. Certiorari denied.

No. 72–712. Jones et ux. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 466 F. 2d 131.

No. 72–727. Cervantes *v.* Time, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 464 F. 2d 986.

No. 72–729. Frankel *v.* New Jersey. Super. Ct. N. J. Certiorari denied. Reported below: 119 N. J. Super. 579, 293 A. 2d 196.

No. 72–733. Michigan National Bank *v.* Superior Court of California, County of Contra Costa (Kell, Real Party in Interest). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–742. First National Bank at Lubbock, Trustee *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 716.

No. 72–754. DANNING, TRUSTEE IN BANKRUPTCY, ET AL. *v.* BRUNSWICK CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 2d 1010.

No. 72–760. KNOLL ET AL. *v.* PHOENIX STEEL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 465 F. 2d 1128.

No. 72–765. MILLER *v.* BOARD OF LAW EXAMINERS OF TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 72–778. WILKIN *v.* SUNBEAM CORP. C. A. 10th Cir. Certiorari denied. Reported below: 466 F. 2d 714.

No. 72–5195. SMITH *v.* SUPREME COURT OF OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 72–5283. PARKER *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 459 F. 2d 164.

No. 72–5311. BROWN *v.* WYMARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–5322. HINOJOS *v.* BLACK, CONSERVATION CENTER SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 621.

No. 72–5371. WILEY *v.* STONE, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 72–5426. KAHINU *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. Reported below: 53 Haw. 536, 498 P. 2d 635.

No. 72–5441. BRYANT *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1095.

No. 72–5470. CASTANEDA *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 72–5501. BURKHEART *v.* GOMES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 462 F. 2d 1335.

No. 72–5582. DRIVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 2d 496.

No. 72–5597. POLLARD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 466 F. 2d 1.

No. 72–5605. DURANT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 292 A. 2d 157.

No. 72–5624. BAUGUESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–5626. LEFTWICH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 465 F. 2d 1405.

No. 72–5627. KELLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–5634. AYALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 2d 464.

No. 72–5636. BOYD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 2d 1370.

No. 72–5644. SIDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 1158.

No. 72–5651. BORELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–5656. PETERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 456 F. 2d 1157.

No. 72–5658. CANTU *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–5660. KOCHEL *v.* MCKELDIN ET AL. C. A. 4th Cir. Certiorari denied.

No. 72–5666. OTTOMANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 468 F. 2d 269.

No. 72–5674. AGNEW *v.* DAMNER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5678. FERRELL *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 72–5679. JACKSON *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 1406.

No. 72–5680. QUINONES-ALVARADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 2d 12.

No. 72–5701. BROUSSARD *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 72–5710. SANDERS ET AL. *v.* WYMAN, COMMISSIONER, NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 2d 488.

No. 72–5716. BENNETT *v.* DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 468 F. 2d 584.

No. 72–5722. CARTER *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 72–5723. FORD *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 108 Ariz. 404, 499 P. 2d 699.

No. 72–5731. LINGHAM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 72–5735. STENGEL *v.* CITY OF ANAHEIM ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 72–5736. SMITH *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 285 N. E. 2d 275.

No. 71–6893. GILSON *v.* MACKLIN, SHERIFF. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–410. BROOKS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 125 Ga. App. 867, 189 S. E. 2d 448.

No. 72–737. WEISS *v.* WALSH ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5467. KLIER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 464 F. 2d 1245.

No. 72–5617. JORDAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 466 F. 2d 99.

No. 72–5643. WREN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 460 F. 2d 988.

No. 72–386. GERBERDING *v.* SWENSON, WARDEN. C. A. 8th Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5669. TAYLOR *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 848.

No. 72–5694. GRAHAM ET AL. *v.* JONES ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–5743. HALE ET AL. *v.* SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 465 F. 2d 65.

No. 72–5746. MABEY ET AL. *v.* REAGAN ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 467 F. 2d 953.

No. 72–699. HAYAKAWA ET AL. *v.* WONG ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 464 F. 2d 1282.

No. 72–790. ALABAMA ET AL. *v.* BRINKS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted Certiorari denied. Reported below: 465 F. 2d 446.

No. 72–703. HAY ET VIR *v.* HOLLIS ET AL. C. A. 5th Cir. Motion to dispense with printing petition and motion of respondent Hollis to dispense with printing brief granted. Certiorari denied. Reported below: 463 F. 2d 1136.

No. 72–5099. DUBOSE *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari, vacate judgment of the Court of Appeals, and remand case to the United States District

Court for the Southern District of California to hold a hearing on petitioner's claim.

No. 72–5724. RHODES *v.* NEBRASKA ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 72–239. CHILDS *v.* UNITED STATES, *ante,* p. 966;

No. 72–5020. GAY *v.* LICENSE BRANCH, REAL ESTATE COMMISSION OF THE DISTRICT OF COLUMBIA, *ante,* p. 1024;

No. 72–5082. WOCHER *v.* LOS ANGELES CITY SCHOOL DISTRICT ET AL., *ante,* p. 1042;

No. 72–5350. DAPPER *v.* O'CONNOR ET AL., *ante,* p. 1025;

No. 72–5415. WILSON *v.* SCOTT, DISTRICT ATTORNEY OF KENOSHA COUNTY, ET AL., *ante,* p. 1043; and

No. 72–5495. DALTON *v.* UNITED STATES, *ante,* p. 1062. Petitions for rehearing denied.

No. 71–1478. FALKNER ET UX. *v.* PASTRANO ET UX., *ante,* p. 1020; and

No. 72–463. SILVER *v.* CASTLE MEMORIAL HOSPITAL ET AL., *ante,* p. 1048. Motions to dispense with printing petitions granted. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Customs and Patent Appeals for the period January 8 and 9, 1973, 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.

REPORTER'S NOTE

Rules of Evidence for United States Courts and Magistrates (together with related amendments to the Federal Rules of Civil Procedure* and the Federal Rules of Criminal Procedure) were prescribed by order of the Court on November 20, 1972, pursuant to 18 U. S. C. §§ 3402, 3771, and 3772, and 28 U. S. C. §§ 2072 and 2075, and were reported to Congress at the beginning of its next regular session by THE CHIEF JUSTICE on January 4, 1973, and resubmitted on February 5, 1973.

The rules and amendments were to have become effective July 1, 1973, as provided in the Court's orders. However, by the Act of Mar. 30, 1973, Pub. L. 93–12, 87 Stat. 9, the foregoing rules and amendments are to have no force or effect except to the extent, and with such amendments, as may be expressly approved by Act of Congress.

MR. JUSTICE DOUGLAS filed a dissenting opinion, set forth below, to the Court's order of November 20, 1972.

MR. JUSTICE DOUGLAS, dissenting.

There are those who think that fashioning of rules of evidence is a task for the legislature, not for the judiciary. Wigmore thought the task was essentially a judicial one, 1 J. Wigmore, Evidence 251 *et seq.* (3d ed. 1940); and I share that view, leaving the problem for case-by-case development by the courts or by Congress.

But my concern with these Rules of Evidence is twofold. First, I doubt if rules of evidence are within the purview of the statute under which we are authorized to submit proposed Rules to Congress. The Act provides

*A further amendment to Fed. Rule Civ. Proc. 43 was prescribed by the Court's order of December 18, 1972.

that the Supreme Court shall have the power "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers." 28 U. S. C. § 2072.

I can find no legislative history that rules of evidence were to be included in "practice and procedure" as used in § 2072. The Committee Reports on the original Act throw no light on the question. H. R. Rep. No. 1829, 73d Cong., 2d Sess.; S. Rep. No. 1049, 73d Cong., 2d Sess. The words "practice and procedure" in the setting of the Act seem to me to exclude rules of evidence. They seem to me to be words of art that describe pretrial procedures, pleadings, and procedures for preserving objections and taking appeals.

Second, this Court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit. Those who write the Rules are members of a Committee named by the Judicial Conference. The members are eminent; but they are the sole judges of the merits of the proposed Rules, our approval being merely perfunctory. In other words, we are merely the conduit to Congress. Yet the public assumes that our imprimatur is on the Rules, as of course it is.

We are so far removed from the trial arena that we have no special insight, no meaningful oversight to contribute. The Rules of Evidence—if there are to be some—should be channeled through the Judicial Conference whose members are much more qualified than we to appraise their merits when applied in actual practice.

I also dissent, for reasons set forth by Mr. Justice Black and me on prior occasions, from the amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. 374 U. S. 865; 368 U. S. 1012; 346 U. S. 946.

Reporter's Note

The next page is purposely numbered 1201. The numbers between 1134 and 1201 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

COUSINS ET AL. *v.* WIGODA

ON APPLICATION FOR STAY

No. A–1. Decided July 1, 1972

Respondent sought in state court a declaratory judgment that he had been duly elected as a delegate to the Democratic National Convention scheduled to convene on July 10, 1972, and an injunction prohibiting applicants from interfering. Applicants obtained a United States District Court injunction against the injunctive aspect of the state court action, but that injunction was vacated by the Court of Appeals. *Held:* The state courts being available to applicants for vindication of their constitutional claims, the application for a stay of the Court of Appeals order is denied.

See: 463 F. 2d 603.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants have applied to me as Circuit Justice to stay an order entered by the Court of Appeals for the Seventh Circuit on Thursday, June 29, 1972. A divided panel of that court vacated an injunction issued at applicants' behest by the District Court for the Northern District of Illinois and further ordered that its mandate issue immediately. Because applicants' application raised what seemed to me to be significant legal issues of importance not only to them but to the public as a whole, I heard oral argument of counsel on the application.

In April 1972, following the Illinois primary election, respondent Wigoda brought an action in the circuit court of Cook County, Illinois, requesting a declaratory judgment that he and others had been duly elected as delegates to the Democratic National Convention in accordance with Illinois law, and seeking an injunction against applicants to prohibit them from interfering with or impeding the functioning of respondent as a duly elected delegate.

Applicants removed this action to the United States District Court, from which it was then remanded to the state court. Applicants then brought a separate action in the District Court, alleging that the pendency of the state court action infringed their associational rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. In reliance on 42 U. S. C. § 1983, they sought an injunction against further prosecution of the state court action. The District Court heard evidence and enjoined the prosecution of so much of the state court action as sought injunctive relief against the applicants, leaving the state court free to proceed with the declaratory judgment aspect of respondent's action. Respondent appealed from the order of the District Court granting injunctive relief, and the Court of Appeals then entered the order described above vacating the injunction of the District Court.

Both the state and federal court actions arise out of disputes between the parties as to what group of delegates from Illinois shall be seated at the Democratic National Convention to be held in Miami Beach, Florida, beginning July 10. Respondent contends that he and the others whom he seeks to represent were delegates elected to the convention in accordance with Illinois law at the Illinois primary election. Applicants contend that the Illinois delegate selection process does not conform to standards established by the national Democratic Party, and that, therefore, they and others associated with them, rather than respondent, should be seated by the Democratic National Convention.

Since the Court of Appeals entered its order of June 29, two additional events have supervened. On June 30, the circuit court of Cook County in which respondent's original action was pending entered a temporary restraining order enjoining applicants from "submitting or causing to be submitted to the National Democratic Party, the

Democratic National Committee or the Credentials Committee thereof, the name, or names, of any person, or persons, as prospective delegates to the 1972 Democratic National Convention" from various Illinois districts. That order also provided that "except as herein before ordered" nothing in the order should prevent the applicants from "speaking on behalf of their challenge before the Credentials Committee, holding meetings or engaging in other activities commensurate with their rights of free speech and association under the First and Fourteenth Amendments to the United States Constitution." The circuit court further ordered that the matter be set for hearing on the motion of respondent for a preliminary injunction at 11 a. m. on Wednesday, July 5, in that court.

On June 30, the Credentials Committee of the Democratic National Convention voted to sustain the challenge made by applicants and others to respondent and the delegates associated with him, and to recommend to the convention that applicants and other delegates associated with them be seated by the Democratic National Convention. It is my understanding that this action on the part of the Credentials Committee is subject to review by the convention at its meeting in Miami Beach.

At the outset I am faced with a problem which, if not technically one of authority, is at the very least one of the scope of my discretion in acting on the application. The authority of a Circuit Justice to grant a stay in cases such as this stems from the provisions of 28 U. S. C. § 2101 (f), which reads in pertinent part as follows:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

> The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . ."

While this case is one in which the judgment of the Court of Appeals is undoubtedly "subject to review by the Supreme Court on writ of certiorari," as a practical matter it will become moot upon the adjournment of the Democratic National Convention, which customarily takes place in the latter part of the week in which the convention opens. On June 29, this Court adjourned until the first Monday in October, as is its annual custom. There will therefore be no possibility of this Court's convening and granting a writ of certiorari to review the judgment below unless THE CHIEF JUSTICE should determine that a Special Term of Court be convened in order to hear this case. Such Special Terms have, to my knowledge, been held only four times in the recent history of the Court: In 1942 the Court was convened to consider whether the President had authority in time of war to exclude enemy aliens from access to civilian courts, and to order them tried before military tribunals for acts of sabotage. *Ex parte Quirin,* 317 U. S. 1 (1942). A Special Term was convened in 1953 to hear the Government's motion to vacate a stay of execution of a death sentence against the Rosenbergs for espionage, after exhaustive appellate review of their conviction. *Rosenberg* v. *United States,* 346 U. S. 273 (1953). See also *id.,* at 271. In 1958 a Special Term was held to review the Little Rock school desegregation case in time for implementation in the fall school term. *Cooper* v. *Aaron,* 358 U. S. 1 (1958).

Without in any way disparaging the importance of this case not only to the parties involved in it, but to the political processes of the country, I simply do not believe that it is the same type of case which has caused the Court to convene in Special Term on previous occasions.

Both the presumptive availability of the Illinois courts to redress any deprivation of applicants' constitutional rights, which I discuss in more detail below, and the necessarily highly speculative nature of any connection between the outstanding order of the state court and the choice of a presidential candidate by the Democratic National Convention lead me to conclude that this case is not comparable to those. I therefore conclude that this is not a case in which I would be warranted in requesting THE CHIEF JUSTICE to convene a special session of this Court. See the opinion of Mr. Justice Harlan in chambers in *Travia* v. *Lomenzo,* 86 S. Ct. 7, 15 L. Ed. 2d 46 (1965).

Having so concluded, I must recognize the fact that were I to grant the stay requested by applicants, the result would be a determination on the merits of the federal litigation in their favor without any prospect of review of my action by the full membership of this Court. While I think that the provisions of 28 U. S. C. § 2101 (f) confer upon me the technical authority to grant a stay in these circumstances, I would be moved to use that authority only if I were satisfied that the judgment under review represented the most egregious departure from wholly settled principles of law established by the decisions of this Court.

The majority of the panel of the Court of Appeals, in its opinion released yesterday, relied on the principles of comity between federal and state courts as enunciated by this Court's decisions in *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Mitchum* v. *Foster,* 407 U. S. 225 (1972). While *Younger* and its companion cases involved state criminal prosecutions, the principles of federal comity upon which it was based are enunciated in earlier decisions of this Court dealing with civil as well as criminal matters. See the cases cited in *Mitchum, supra,* at 243. The Court in *Mitchum,* after holding that 42 U. S. C.

§ 1983, under which petitioners brought this action in the District Court, was an exception to the provisions of the Anti-Injunction Act, 28 U. S. C. § 2283, went on to say:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Ibid.*

While the test to be applied may be less stringent in civil cases than in criminal, the cases cited in *Mitchum* make clear that the federal courts will not casually enjoin the conduct of pending state court proceedings of either type. Applicants make out what must be described as at least a plausible case that a portion of the decree issued by the circuit court of Cook County does abridge their associational rights guaranteed by the First and Fourteenth Amendments. But the teaching of *Younger, supra,* and *Mitchum, supra,* as I understand them, is that a plausible claim of constitutional infringement does not automatically entitle one to avail himself of the injunctive processes of the federal courts in order to prevent the conduct of pending litigation in the state courts. The opinion issued by the Court of Appeals majority specifically alluded to applicants' failure to allege that they could not adequately vindicate their constitutional claims in the Illinois state courts, and I must conclude that those courts are available to applicants for this purpose.

Mindful, therefore, of the principles of comity enjoined by our federal system, of the deference due to the judgment of the Court of Appeals (see *Breswick & Co.* v. *United States,* 75 S. Ct. 912, 100 L. Ed. 1510 (1955) (Harlan, J., in chambers)), and of the extraordinary burden which falls upon applicants when they seek a stay from a single Justice which would in effect dispose of the litigation on its merits, I conclude that they have failed to meet that burden. An order will therefore be entered denying the application for a stay of the order and mandate of the Court of Appeals.

ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.

ON APPLICATION FOR STAY

No. A–72. Decided July 19, 1972*

SCRAP, a student environmental association, secured from a three-judge District Court an injunction against the authorization by the Interstate Commerce Commission (ICC) of a temporary 2.5% freight surcharge to be imposed across the board by most of the Nation's railroads. The ground for the injunction was that by adding the surcharge to the cost of transporting recyclable goods, fewer such goods would be transported, the need would be met by increased use of natural resources, and there would therefore be an adverse impact on the environment; hence the National Environmental Policy Act required that the ICC prepare an "impact statement" on the surcharge. The District Court considered the applications for stay of the injunction pending appeal but, concluding that danger to the environment outweighed the loss of income and consequent financial threat to the railroads, the court denied the application. *Held:* Since it cannot be said that the District Court's factual evaluation of the necessity for a stay constituted an abuse of discretion, the applications for stay must be denied.

See: 346 F. Supp. 189.

MR. CHIEF JUSTICE BURGER, Circuit Justice.

These applications request me, as Circuit Justice for the District of Columbia Circuit, to stay a preliminary injunction entered by a three-judge United States District Court for the District of Columbia. The applicants are the Interstate Commerce Commission and a long list of railroad companies composing most of the rail transport in the Nation. Opposing the applications are the plaintiffs below, Students Challenging Regula-

*Together with No. A–73, *Interstate Commerce Commission* v. *Students Challenging Regulatory Agency Procedures (SCRAP) et al.*, also on application for stay.

tory Agency Procedures, who describe themselves as "SCRAP," [1] and a coalition of organizations dedicated to the protection of environmental resources. The applicants say that they intend to seek prompt review in this Court on the merits of the preliminary injunction entered below.

(1)

The Interstate Commerce Act, 49 U. S. C. § 1 *et seq.*, permits increases in railroad freight rates to become effective without prior approval of the Interstate Commerce Commission. A carrier may file a proposed tariff and, after 30 days unless the Commission shortens the period, the new rate becomes effective as a carrier-made rate. 49 U. S. C. § 6 (3). The Commission may, however, choose to suspend the effectiveness of newly filed rates for as much as seven months, in order to investigate the lawfulness of the rates. 49 U. S. C. § 15 (7). At the end of seven months, the carrier-proposed rates go into effect by operation of law unless the Commission has completed its investigation and affirmatively disapproved the new rates. *Ibid.* Prior decisions of this Court confirm the Commission's broad discretion in the exercise of its power of suspension; judicial review of suspension action or inaction is most severely limited, if not foreclosed. *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963); *Board of Railroad Comm'rs* v. *Great Northern R. Co.*, 281 U. S. 412, 429 (1930).

Against this legal background and prodded by an increasingly precarious financial condition, the railroads, on December 13, 1971, asked the Commission for leave to file on short notice a 2.5% surcharge on nearly

[1] SCRAP's complaint alleged that it is "an unincorporated association formed by five law students from the [George Washington University] National Law Center . . . in September 1971" whose "primary purpose is to enhance the quality of the human environment for its members, and for all citizens . . . ."

all freight rates. The railroads asked that the surcharge be effective as of January 1, 1972. The surcharge was conceived as an interim emergency means of increasing railroad revenues by some $246 million per year, a sum the railroads describe as slightly less than one-sixth of the increased expenses incurred annually since the last general ratemaking proceedings. Selective increases on a more permanent basis would follow.

By order dated December 21, 1971, the Commision denied the railroads' request to make the 2.5% surcharge effective as of January 1, 1972. The Commission stated that it was aware of the carriers' need for additional revenues, but concluded that publication of the interim surcharge on short notice "would preclude the public from effective participation" in proceedings to evaluate the surcharge. 340 I. C. C. 358, 361. The Commission did, however, rule that the railroads might refile their proposed surcharge on January 5, 1972, to be effective no earlier than February 5, 1972.

On January 5, 1972, the railroads filed tariffs to put the 2.5% surcharge into effect on February 5. SCRAP and other environmental groups asked the Commission to suspend the surcharge for the statutory seven-month period. They opposed the across-the-board surcharge on the ground that the present railroad rate structure discourages the movement of "recyclable" [2] goods in commerce and that every across-the-board increase would

[2] At the time of filing these stay applications, there was disagreement between the parties over the meaning of the term "recyclable," as it pertains to this lawsuit. The railroads apparently understood the term "in the sense of processing of goods to obtain either a product of the same kind or a previous state of the product." Supplemental Memo of Applicants, filed July 14, 1972, p. 2. SCRAP's list of recyclable products, the railroads say, includes products that are "not recyclable in any sense that the railroads understand that term, but merely involve the familiar circumstances by which one usable product is derived from another." *Id.*, at 3. See *infra*, at 1216.

further increase disincentives to recycling. The environmental groups contended that added disincentives to recycling would result in the increased degradation of the natural environment by discarded, unrecycled goods and in the increased exploitation of scarce natural resources. At a minimum, SCRAP objected to the Commission's failure to issue an "impact statement" evaluating the effect of the 2.5% surcharge on the shipment and use of recyclable materials. SCRAP contended that such a statement was required by the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4321 *et seq.* Section 102 (2)(C) of NEPA, 83 Stat. 853, requires an impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . . ." 42 U. S. C. § 4332 (2)(C).[3]

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[3] Section 102 of NEPA provides, in pertinent part:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

. . . . . .

"(C) include in every recommendation or report on proposals for legislation and other 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."

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal

The railroads took the position that interim application of the across-the-board surcharge would not "significantly affect the quality of the human environment" within the meaning of NEPA. The railroads pointed out that the 2.5% surcharge would apply equally to all products; that past experience indicated little likelihood of reduced shipments of recyclable materials as a result of the across-the-board rate revision; that the increase was small relative to the normal increase approved in general freight rate revision cases; and that the increase would be short-lived.

By order dated February 1, 1972, the Commission announced that it would not suspend the 2.5% surcharge. It would, in effect, allow the surcharge to go into effect on February 5 and terminate on June 5, 1972. The order specifically stated the Commission's view that the surcharge would "have no significant adverse effect on the movement of traffic by railway or on the quality of the human environment within the meaning of the Environmental Policy Act of 1969." The Commission's order of February 1 further provided that the Commission would not resume the investigation begun by its December 21 order until the railroads asked to file the promised selective 4.1% rate increase. After that tariff was filed, on April 24, the Commission suspended the 4.1% selective increase for the statutory seven-month period until November 30, 1972. Since the original June 5 expiration date for the surcharge had assumed that selective increases would become effec-

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agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . ."

tive by that time, the Commission's order suspending the 4.1% selective increase eliminated the June 5 surcharge expiration date. The railroads then modified the temporary surcharge tariffs so that the 2.5% surcharge will expire on November 30, 1972, unless the 4.1% selective increase is approved prior to that time. The Commission's study of the proposed selective rate increase is still in progress and will include an environmental impact statement.

(2)

SCRAP filed suit on May 12, 1972, in the United States District Court for the District of Columbia, seeking, among other relief requested, a preliminary injunction to require the Commission to prevent the railroads from further collecting the 2.5% surcharge.[4] Other environmental groups and the railroads were allowed to intervene as a matter of right. The primary thrust of SCRAP's suit was that the Commission's orders, permitting and then extending the 2.5% surcharge, constituted "major Federal action significantly affecting the quality of the human environment." The plaintiffs argued that the Commission's action was unlawful because the Commission had not issued an environmental impact statement as required by NEPA. On July 10, 1972, the District Court issued a preliminary injunction enjoining the railroads from collecting the 2.5% surcharge on shipments originating after July 15, 1972, "insofar as that surcharge relates to goods being transported for purposes of recycling, pending further order of this court." In its opinion, the District Court rejected the Government's contention that SCRAP and its fellow plaintiffs lacked standing under this Court's decision in *Sierra Club* v. *Morton,* 405 U. S. 727 (1972).

[4] A three-judge court was convened to hear the case. See 28 U. S. C. §§ 2325, 2284.

The court's opinion noted that the SCRAP plaintiffs had alleged "that its members use the forests, streams, mountains, and other resources in the Washington [D. C.] area for camping, hiking, fishing and sightseeing, and that this use is disturbed by the adverse environmental impact caused by nonuse of recyclable goods." 346 F. Supp. 189, 195 (1972). This allegation, said the District Court, removed this case from the ambit of *Sierra Club,* "where the Sierra Club failed to allege 'that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.' " 405 U. S., at 735.

Having thus dealt with our decision in *Sierra Club,* the District Court focused on *Arrow Transportation, supra,* and related cases [5] drastically curtailing the jurisdiction of the federal courts to review the suspension power of the Interstate Commerce Commission. "The thrust of the doctrine," reasoned the District Court, "seems to be that judicial review is available only when the rates in question are Commission-made rather than carrier-made." 346 F. Supp., at 196. The District Court noted that the present case was not one "where the Commission merely stands silently by and allows carrier-made rates to take effect without suspension." *Ibid.* The Commission had found the surcharge rates just and reasonable, and it had authored a detailed set of conditions on approval of the rates without suspension. The District Court concluded that "[a] suspension decision which

[5] *E. g., Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (DC 1969), and *Atlantic City Electric Co.* v. *United States,* 306 F. Supp. 338 (SDNY 1969), both aff'd by an equally divided court, 400 U. S. 73 (1970); *Electronics Industries Assn.* v. *United States,* 310 F. Supp. 1286 (DC 1970), aff'd, 401 U. S. 967 (1971); *Florida Citrus Comm'n* v. *United States,* 144 F. Supp. 517 (ND Fla. 1956), aff'd, 352 U. S. 1021 (1957); *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (ED Va. 1935).

effectively blackmails the carriers into submitting agency-authored rates is functionally indistinguishable from an agency order setting those rates . . . . [S]uch orders are, of course, judicially reviewable." *Id.*, at 197.

Yet the District Court found it unnecessary to decide the degree of Commission involvement in effectuating the 2.5% surcharge. The court held that "NEPA implicitly confers authority on the federal courts to enjoin *any* federal action taken in violation of NEPA's procedural requirements, even if jurisdiction to review this action is otherwise lacking." *Ibid.* The federal courts would have jurisdiction to review, and to enjoin, "even a mere failure to suspend rates which are wholly carrier-made so long as the review is confined to a determination as to whether the procedural requisites of NEPA have been followed." *Id.*, at 197 n. 11. Recognition of this jurisdiction would not undermine the *Arrow* decision, because "judicial insistence on compliance with the non-discretionary procedural requirements of NEPA in no way interferes with the Commission's substantive discretion," *id.*, at 198, to suspend rates pending investigation and final action.

Turning to the merits, the court held that the Commission's decision not to suspend was a "major federal action" within the meaning of NEPA. An impact statement would be required whenever an action "*arguably* will have an adverse environmental impact." *Id.*, at 201. (Emphasis in original.) The Commission could not escape preparation of a statement by "so transparent a ruse" as its "single sentence" affirmation that the 2.5% surcharge would have no significant adverse environmental effect. This finding is "no more than glorified boilerplate," *id.*, at 201 n. 17, and the Commission has failed to prove its truth.

Finally, the District Court concluded that the balance of equities in this case tipped in favor of preliminary

relief. Any damage to the environment would likely be irreparable. But "the damage done the railroads by granting the injunction, while clearly nonfrivolous, is not overwhelming." *Id.*, at 201–202. Without opinion, the District Court declined to stay its preliminary injunction pending appeal.

(3)

It is likely that the questions to be presented by this appeal "are of such significance and difficulty that there is a substantial prospect that they will command four votes for review" when the full Court reconvenes for the October 1972 Term. *Organized Village of Kake* v. *Egan,* 80 S. Ct. 33, 35, 4 L. Ed. 2d 34, 37 (1959) (BRENNAN, J., in chambers). The decision below may present a serious question of standing to sue for the protection of environmental interests. *Sierra Club.* v. *Morton, supra.* The decision may be read as undermining our *Arrow* decision and in that respect may conflict with the reasoning of the Second Circuit in *Port of New York Authority* v. *United States,* 451 F. 2d 783 (CA2 1971). Most important, the decision may have the practical effect of requiring the Commission to file an impact statement whenever it exercises its statutory suspension powers. This requirement is significant because it would likely apply to each of the cluster of federal agencies presently exercising suspension powers comparable to that of the Interstate Commerce Commission.[6]

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[6] Among suspension provisions enacted by Congress since 49 U. S. C. § 15 (7) are 49 U. S. C. §§ 316 (g), 318 (c) (Motor Carrier Act, 1935); 49 U. S. C. §§ 907 (g), (i) (Water Carriers Act); 49 U. S. C. § 1006 (e) (Freight Forwarders Act); 47 U. S. C. § 204 (Federal Communications Act of 1934); 16 U. S. C. § 824d (e) (Federal Power Act); 15 U. S. C. § 717c (e) (Natural Gas Act); and 49 U. S. C. § 1482 (g) (Federal Aviation Act of 1958). See *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U. S. 658, 666 n. 13 (1963).

For these reasons, I would not be prepared to conclude that the Court would dispose summarily of the dispute underlying these stay applications. I must, therefore, consider whether allowing or staying the preliminary injunction is most likely to insure fair treatment for the interests of the parties and the public until the full Court acts. On the allegations of the parties some injury will occur whichever course is taken. Those opposing the stay naturally point to the large weight to be given to the District Court's evaluation or "balancing" of the equities.

The harm to the railroads, and to the overall public interest in maintaining an efficient transportation network, is immediate and direct. Badly needed revenues will be lost at once, and there is little likelihood that they can be recouped. The railroads originally estimated the loss at $500,000 per month, but they have revised that estimate upwards by several times since advised by SCRAP that it attaches an unexpectedly broad interpretation to the District Court's injunction. Unlike the District Court, I find it difficult to dismiss this certain loss of at least one and perhaps several millions of dollars simply because it is "not overwhelming" relative to the total revenues to be derived from the surcharge. Nor is it sufficient to discount the lost revenues because they might have to be disgorged if found unreasonable by the Commission at a later date. The chances of such a ruling are, again, only speculative. As a general premise for evaluation, the possibility of rebate suggests equally that shippers would not regard the surcharge as a significant additional cost.

On the other hand, the District Court was convinced that harm to the environment might result from allowing the railroads to collect the 2.5% surcharge on recyclable goods pending disposition of their appeal in this Court. The District Court concluded that any such harm would likely be irreparable, since, as the court explained, "once

raw materials are unnecessarily extracted from the ground and used, they cannot be returned from whence they came."[7] 346 F. Supp., at 201. This eventuality is premised on the following projected chain of events:

> (a) The railroads will collect the 2.5 percent surcharge on recyclable, as well as all other materials.
>
> (b) Because recyclable materials are already discriminated against in freight rates, the surcharge further increases rate disparities and, in any event, raises the absolute cost of transporting recyclable materials, often a high proportion of their total cost.
>
> (c) This increase in cost will result in decreased demand for recyclable materials.
>
> (d) This decrease in demand will be counterbalanced by an increased demand for new or unrecycled materials.
>
> (e) This increased demand for new materials will result in extraction of natural resources not otherwise planned.

There is evidence in the record arguably supporting this forecast of the consequences of increasing freight rates on recyclable goods in common with others.

Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted.

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[7] In evaluating the possibility of irreparable harm to the environment, the District Court did not mention the danger of increased disposal of recyclable materials. The District Court had adverted to this problem earlier in its opinion. Since the lower court did not premise its action on this possibility, it apparently concluded that any short-range harm to the environment caused by increased disposal would not be irreparable.

The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task.

A District Court of three judges has considered this application for a stay pending appeal and has concluded that the stay should be denied. The criteria for granting a stay of the judgment of such a district court are stringent, at least when the necessity for a stay turns upon a refined factual evaluation of its effect. "An order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion." *United Fuel Gas Co.* v. *Public Service Comm'n,* 278 U. S. 322, 326 (1929); *Railway Express Agency* v. *United States,* 82 S. Ct. 466, 7 L. Ed. 2d 432 (1962) (Harlan, J., in chambers). I cannot say the District Court's action can be equated with an abuse of discretion because it decided that there was danger to the environment outweighing the loss of income and consequent financial threat to the railroads. Notwithstanding my doubts of the correctness of the action of the three-judge District Court, as Circuit Justice, acting alone, I incline toward deferring to their collective evaluation and balancing of the equities.

Reluctantly, I conclude that the applications for stay pending appeal should be denied.

RUSSO ET AL. *v.* BYRNE, U. S. DISTRICT JUDGE

ON APPLICATION FOR STAY

No. A–150. Decided July 29, 1972

The District Court in an *in camera* proceeding ruled that intercepted conversations of applicants' counsel were not relevant to issues in their federal criminal trial, and the Court of Appeals in affirming held that the applicants had no standing to raise the question of relevancy. *Held:* The issue of relevancy, the resolution of which determined the issue of standing, required an adversary hearing, and a stay of the criminal trial is appropriate pending the filing of a petition for a writ of certiorari in this Court and the Court's action thereon.

MR. JUSTICE DOUGLAS, Circuit Justice.

The question raised by this application for stay presents a profoundly important constitutional question not squarely decided by the Supreme Court but ruled upon by the District Court and by the Court of Appeals in a way that is seemingly out of harmony with the import of our decisions.

The electronic surveillance used by the Government was represented to me on oral argument as being in the "foreign" field. No warrant, as required by the Fourth Amendment and by our decisions, was obtained, only the authorization by the Attorney General. Such authorization was held insufficient in our recent decision in *United States* v. *United States District Court,* 407 U. S. 297 (1972). It is argued that that case involved "domestic" surveillance, but the Fourth Amendment and our prior decisions, to date at least, draw no distinction between "foreign" and "domestic" surveillance. Whether such a distinction will eventually be made is for the Court, not for me, to make. Moreover, in light of the casual way in which "foreign" as distinguished from "domestic"

surveillance was used on oral argument it may be that we are dealing only with a question of semantics. Defendants' telephonic communications, it seems, were not tapped, nor were those of their attorney or consultants. But a conversation or several conversations of counsel for defendants were intercepted.

The District Court in an *in camera* proceeding ruled that those conversations were not relevant to any issues in the present trial. The Court of Appeals, as I read its opinion, ruled that the defendants—*i. e.,* applicants who make this application—have no "standing" to raise the question. If, however, the interceptions were "relevant" to the trial, it would seem they would have "standing."

Therefore it would seem to follow from the reasoning of the Court of Appeals that whether or not there was "standing" would turn on the merits. The case, viewed in that posture, would seem to require an adversary hearing on the issue of relevancy. We held, in *Alderman* v. *United States,* 394 U. S. 165, 182 (1969), that the issue of relevancy should not be resolved *in camera,* but in an adversary proceeding. *Alderman* would be greatly undercut if the issue of relevancy could be resolved *in camera,* and if the trial court ruled against the defendants on the merits and then determined they had no "standing" to complain.

I seriously doubt if the ruling of the Court of Appeals on "standing" accurately states the law. In modern times the "standing" of persons or parties to raise issues has been greatly liberalized. Our Court has not squarely ruled on the precise issue here involved. But it did rule in *Flast* v. *Cohen,* 392 U. S. 83, 103 (1968), that one who complains of a violation of a First Amendment right has "standing." On oral argument *Flast* was distinguished from the present case on the ground that under the Fourth Amendment only those whose premises have been in-

vaded or whose conversations have been intercepted have standing to complain of unconstitutional searches and seizures. That contention, however, does not dispose of this case.

The constitutional right earnestly pressed here is the right to counsel guaranteed by the Sixth Amendment. That guarantee obviously involves the right to keep the confidences of the client from the ear of the Government, which these days seeks to learn more and more of the affairs of men. The constitutional right of the client, of course, extends only to his case, not to the other concerns of his attorney. But unless he can be granted "standing" to determine whether his confidences have been disclosed to the powerful electronic ear of the Government, the constitutional fences protective of privacy are broken down.

My authority is to grant or deny a stay, not to determine whether the Court of Appeals is right or wrong on the merits. If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions, or questions of transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted.

I am exceedingly reluctant to grant a stay where the case in a federal court is barely under way. But conscientious regard for basic constitutional rights guaranteed by the Fourth and Sixth Amendments makes it my duty to do so. I, therefore, order that the trial be stayed for 30 days pending application to this Court for a writ of certiorari and thereafter stayed pending the determination of the petition.

If the law under which we live and which controls every federal trial in the land is the Constitution and the Bill of Rights, the prosecution, as well as the accused, must submit to that law.

REPUBLICAN STATE CENTRAL COMMITTEE OF ARIZONA ET AL. *v.* THE RIPON SOCIETY INC. ET AL.

ON APPLICATION FOR STAY

No. A–179. Decided August 16, 1972

District Court's injunction prohibiting the 1972 Republican National Convention from allocating six "bonus" delegates to its 1976 convention to each State casting its electoral votes for the Republican presidential nominee in 1972, or electing a Republican senator, governor, or majority of its congressional delegation at any election within four years previous to 1976 stayed in light of criteria set forth in *O'Brien* v. *Brown, ante,* p. 1, and to preserve the issues for judicial review.

See: 343 F. Supp. 168.

MR. JUSTICE REHNQUIST, Circuit Justice.

I am asked to stay the effect of an injunction entered by the United States District Court for the District of Columbia, which prohibited the Republican National Party's 1972 Convention from adopting a certain mode of allocating delegates to that party's convention in 1976. On August 11, 1972, MR. JUSTICE DOUGLAS denied a stay, and that application has been renewed to me.

Since 1948 the Republican National Party has adopted at each presidential nominating convention a formula for allocating among the States delegates to the next convention. This formula has included a "bonus" of six delegates awarded to each State that cast its electoral college votes for the Republican presidential nominee in the previous presidential election, or has elected a Republican senator, governor, or majority of its congressional delegation at any election within the previous four years. Respondents filed suit in the United States District Court for the District of Columbia, asking for a declaratory judgment that such a

"bonus" system of allocating delegates was unconstitutional, and asking that the Republican National Party be enjoined from adopting such a formula at its 1972 nominating convention. The District Court, in reliance upon *Georgia* v. *National Democratic Party,* 145 U. S. App. D. C. 102, 447 F. 2d 1271 (1971), cert. denied, 404 U. S. 858 (1971), and *Bode* v. *National Democratic Party,* 146 U. S. App. D. C. 373, 452 F. 2d 1302 (1971), cert. denied, 404 U. S. 1019 (1972), held that allocation of delegates was state action, and that the complaint before it was justiciable. Agreeing with the Republican National Party that, for a system that elects Presidents by casting a State's electoral votes in a bloc, a bonus system of delegate allocation is reasonable to encourage Republican victories within each State, the District Court nonetheless held the allocation of six delegates without regard to the size of the State or its electoral college votes, to be a denial of equal protection. It therefore entered the following injunction:

> "That Defendants are hereby enjoined from adopting at the 1972 Republican National Convention a formula for apportionment of delegates to the 1976 Convention which would allocate a uniform number of bonus delegates to states qualifying for them, with no relation to the state's electoral college votes, Republican votes cast in certain specified elections, or some combination of these factors."

After an appeal was perfected these applicants moved the United States Court of Appeals for the District of Columbia Circuit for leave to intervene and for a stay of the District Court's injunction. Intervention was granted, but a divided panel of the District of Columbia Circuit, on August 3, denied a stay without opinion. Respondents do not now challenge the right of the applicants, state central committees of the Republican National Party, to seek a stay from this Court. With the

Republican National Convention scheduled to commence August 21, prompt action is requested on the ground that an unreviewed court injunction threatens direct intervention with the conduct of the convention, in a manner similar to that confronting this Court in *O'Brien* v. *Brown, ante,* p. 1.

As we said in *O'Brien, supra,* an application for a stay calls "for a weighing of three basic factors: (a) whether irreparable injury may occur absent a stay; (b) the probability that the [District Court] was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the [injunction]." Applicants contend that to leave the injunction in effect will work irreparable injury because the Republican National Party has always allocated delegates to its next convention at the current convention, and has no machinery for amending that formula. Therefore, they say, the injunction will permanently preclude the adoption of a "bonus" formula, regardless of whether the District Court is reversed. Respondents allege that no irreparable injury will occur, because the convention can either provide amendatory procedures for use in the event that the bonus formula is not vindicated on appeal, or it can adopt a contingent delegate allocation plan, to take into account the pending federal court proceedings. But to allow the injunction to stand would have at least some impact on the deliberations and decisions of the Republican National Convention akin if not identical to that we found in *O'Brien, supra:*

> "Absent a stay, the mandate of the Court of Appeals denies to the Democratic National Convention its traditional power to pass on the credentials of the California delegates in question. The grant of a stay, on the other hand, will not foreclose the Con-

> vention's giving the respective litigants in both cases the relief they sought in federal courts." *Id.,* at 3.

In the case at bar, of course, we deal with a delegate-allocation dispute that retains importance until 1976, rather than a credentials dispute such as was involved in *O'Brien* v. *Brown,* which would mean nothing after the close of the 1972 Democratic National Convention. If the injunction of the District Court were to compel the 1972 Republican National Convention to eschew a bonus-allocation formula which it would otherwise have chosen, this case would be moot. There would be no controversy left to review. On the other hand, to stay the injunction pending review will permit the respondents to make their case before the convention, and assuming the bonus formula is adopted, will preserve to applicants judicial review of the District Court's order declaring the bonus formula unconstitutional. If that order should be affirmed, I have no doubt that appropriate remedies are available to insure that the Republican National Party delegate allocation is in conformity with the order, or that the party would take whatever steps are necessary to bring its allocation formula into conformity with the order. The fact that a stay here, instead of precluding any judicial review of the final action of the Republican National Convention, as could have been the result of the action taken in *O'Brien, supra,* preserves these issues for review in a manner conducive to careful study and consideration is itself a reason to stay the injunction which was not present in *O'Brien.*

A second reason for staying the effect of the District Court's injunction is drawn from the probability of error in the result below. The District Court did not have the benefit of this Court's writing in *O'Brien, supra,* at

the time it entered its order and injunction There we said:

> "No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy that are essentially political in nature. Cf. *Luther* v. *Borden,* 7 How. 1 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F. 2d 119 (CA8 1968), affirming 287 F. Supp. 794 (Minn. 1968), and cases cited; *Lynch* v. *Torquato,* 343 F. 2d 370 (CA3 1965); *Smith* v. *State Exec. Comm. of Dem. Party of Ga.,* 288 F. Supp. 371 (ND Ga. 1968). Cf. *Ray* v. *Blair,* 343 U. S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for de-

liberation, we entertain grave doubts as to the action taken by the Court of Appeals." *Id.*, at 4–5.

While I have authority to grant a stay in this case, 28 U. S. C. § 1651 (a), *Johnson* v. *Stevenson,* 335 U. S. 801 (1948), the fact that such relief has been successively denied by the District Court, the Court of Appeals, and MR. JUSTICE DOUGLAS counsels circumspection notwithstanding the foregoing observations. See, *e. g., Ex parte Stickney,* 82 S. Ct. 465, 7 L. Ed. 2d 435 (1962) (DOUGLAS, J., in chambers). Weighing these competing and frequently imponderable factors as best I can, I have concluded that this case follows so closely on the heels of *O'Brien* and resembles it in so many relevant particulars that the injunctive aspect of the District Court order should be stayed. Accordingly, I have this day entered an order staying that portion of the order of the District Court that enjoins the 1972 Republican National Convention from adopting this "bonus" formula for allocating delegates to the 1976 convention.

DRUMMOND ET AL. *v.* ACREE ET AL.

ON REAPPLICATION FOR STAY

No. A–250 (72–167). Decided September 1, 1972

Where the lower courts held that an order for the transportation of students was entered to accomplish desegregation of the elementary school system of Augusta, Georgia, an application for stay premised solely on that portion of § 803 of the Education Amendments of 1972 prohibiting effectuation of an order for student busing to achieve a racial balance among students until all appeals have been exhausted is denied.

See: 458 F. 2d 486.

MR. JUSTICE POWELL, Circuit Justice.

This application, filed by parent-intervenors in this school desegregation case from Richmond County (Augusta), Georgia, seeks a stay of a judgment of the Court of Appeals for the Fifth Circuit. That court, on March 31, 1972, affirmed an order of the United States District Court for the Southern District of Georgia adopting a plan for the desegregation of 29 elementary schools in Augusta. *Acree* v. *County Board of Education of Richmond County,* 458 F. 2d 486 (1972). After the Fifth Circuit's affirmance, I denied a stay because that relief had not been requested from the appropriate Court of Appeals as ordinarily required by Rule 27 of the Supreme Court Rules. Applicants immediately sought a stay from the Fifth Circuit, which was denied.[1] Applicants have now reapplied to me.

This reapplication is premised solely on the contention that a stay is required under § 803 of the Education Amendments of 1972. That section reads in pertinent part as follows:

> "[I]n the case of any order on the part of any United States district court which requires the transfer or

[1] A stay was also denied by the United States District Court for the Southern District of Georgia on August 18, 1972.

> transportation of any student . . . *for the purposes of achieving a balance among students with respect to race* . . . , the effectiveness of such order shall be postponed until all appeals . . . have been exhausted . . . ." Education Amendments of 1972, Pub. L. 92–318, Tit. VIII, § 803, 86 Stat. 372, 20 U. S. C. § 1653 (1970 ed., Supp. II) (emphasis added).

By those terms, the statute requires that the effectiveness of a district court order be postponed pending appeal only if the order requires the "transfer or transportation" of students "for the purposes of achieving a balance among students with respect to race." It does not purport to block all desegregation orders which require the transportation of students. If Congress had desired to stay all such orders it could have used clear and explicit language appropriate to that result.

In § 802, which precedes § 803, Congress prohibited the use of federal funds to aid in any program for the transportation of students if the design of the program is to "overcome racial imbalance" or to *"carry out a plan of racial desegregation."* Education Amendments of 1972, § 802 (a), 20 U. S. C. § 1652 (a) (1970 ed., Supp. II) (emphasis added). It is clear from the juxtaposition and the language of these two sections that Congress intended to proscribe the use of federal funds for the transportation of students under *any* desegregation plan but limited the stay provisions of § 803 to desegregation plans that seek to achieve racial balance.

In light of this Court's holding in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), it could hardly be contended that Congress was unaware of the legal significance of its "racial balance" language. In that case the school authorities argued that § 407 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000c–6 (a), restricted the power of federal courts in prescribing a

method for correcting state-imposed segregation. THE CHIEF JUSTICE'S interpretation of § 407 (a), which applies only to orders "seeking to achieve a racial balance," is controlling here:

> "The proviso in [§ 407 (a)] is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." 402 U. S., at 17–18 (emphasis in original).

In short, as employed in § 407 (a), the phrase "achieve a racial balance" was used in the context of eliminating "de facto segregation." The Court went on to caution lower federal courts that, in the exercise of their broad remedial powers, their focus must be on dismantling dual school systems rather than on achieving perfect racial balance: "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U. S., at 24. This was said not in condemnation of existing techniques but in disapproval of the wooden resort to racial quotas or racial balance. Nothing in the instant statute or in the legislative history suggests that Congress used these words in a new and broader sense. At most, Congress may have intended to postpone the effectiveness of transportation orders in "de facto" cases and in cases in which district court judges have misused their remedial powers.

The question, therefore, must be whether the lower court order in this case was for the purpose of achieving a racial balance as that phrase was used in *Swann.* This question was resolved in the negative by the Court of Appeals. Applicants claimed on their appeal that the District Court order called for " 'forced busing' to achieve racial balance." 458 F. 2d, at 487. The court rejected that contention, citing the holding in *Swann* that bus transportation is one of the permissible techniques in effecting school desegregation.[2]

For the purpose of acting on this application, I accept the holding of the courts below that the order was entered to accomplish desegregation of a school system in accordance with the mandate of *Swann* and not for the purpose of achieving a racial balance. The stay application must, therefore, be denied.

It is so ordered.

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[2] For a complete history of this litigation see the most recent opinion of the District Court. *Acree* v. *Drummond,* 336 F. Supp. 1275 (SD Ga. 1972).

TIERNEY *v.* UNITED STATES

ON APPLICATION FOR BAIL

No. A–49. Decided September 12, 1972*

Applicants had been granted "use" immunity and were testifying before a grand jury when court-approved electronic surveillance of a telephone resulted in interception of a conversation of their attorney. Their refusal thereafter to answer certain questions propounded by the grand jury resulted in commitment for civil contempt. The applicants, claiming deprivation of their right to counsel, appealed the commitment and applied for bail pending disposition of the appeals. The Government responded that since the applicants had been granted all the immunity to which they were constitutionally entitled, there was no longer an attorney-client privilege to be protected. *Held:* Bail should be granted under the standard applicable under 28 U. S. C. § 1826 (b), since the issues are not frivolous and the appeals are not taken for delay.

MR. JUSTICE DOUGLAS, Circuit Justice.

These are applications for bail which raise the questions comparable to those presented in *In re Beverly,* A–231, in which I granted bail.

In the present cases there was electronic surveillance of a telephone which a court had approved pursuant to 18 U. S. C. § 2518. During that surveillance a conversation of applicants' attorney was intercepted.

Applicants were testifying before a grand jury, having been granted immunity under 18 U. S. C. § 6002 and § 6003. On refusing to answer certain questions propounded, they were committed for civil contempt.

The standard for bail in civil contempt proceedings is set forth in 28 U. S. C. § 1826 (b) which specifies that

*Together with No. A–80, *Reilly et al.* v. *United States,* also on application for bail.

bail shall be granted if the issues are not frivolous and if the appeal is not taken for delay. Here the immunity granted the applicants was a so-called "use" immunity as distinguished from the "transactional" immunity which some of us thought was required when the issue was before us last Term in *Kastigar* v. *United States,* 406 U. S. 441.

It is now argued that applicants have obtained all the immunity to which they were constitutionally entitled and that there is no longer an attorney-client privilege to be protected. Hence it is argued that the Sixth Amendment right to counsel which weighed heavily with me in *Russo* v. *Byrne, ante,* p. 1219 (in which I granted a stay on July 29, 1972), is not relevant here.

I accept, of course, the Court's decision that only "use" immunity, not "transactional" immunity, is the constitutional standard under the Fifth Amendment. The fact remains, however, that the "leads" obtained from testimony given after "use" immunity has been granted can be used to indict and convict the applicants. It seems to me therefore that the attorney-client privilege does continue and indeed may be much more vital to the applicants than it would have been had "transactional" immunity been the standard adopted by the Court.

The question remains whether a search warrant issued for electronic surveillance under the Fourth Amendment can invade the domain of the Sixth Amendment and destroy the attorney-client relation. That is an exceedingly serious question on which this Court has not spoken.

Beyond those two questions there is a further one—whether on the issue of relevance an *in camera* proceeding is adequate or whether an adversary hearing is required. That is the question central both to the *Russo*-

Ellsberg case, to *In re Beverly*, and to the present two cases.

Hence in spite of the fact that my Brother POWELL has heretofore denied bail in these cases, I have reluctantly concluded that the requisite for bail in civil contempt cases, 28 U. S. C. § 1826 (b), has been satisfied here.

COMMUNIST PARTY OF INDIANA ET AL. *v.* WHITCOMB, GOVERNOR OF INDIANA, ET AL.

ON APPLICATION FOR STAY

No. A–378. Decided October 6, 1972

Motion denominated an application for stay but intended to secure a partial summary reversal of the District Court's order denied, since the applicants' right to such relief is not indisputably clear.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants have filed a motion denominated an "Application for Stay of Order of United States District Court of the Northern District of Indiana, Hammond Division," which order was entered following a hearing on their complaint alleging that the oath required by Indiana law in order for a party to be placed on the ballot was unconstitutional. An examination of the application, however, shows that applicants do not seek a stay of that order, but instead a partial summary reversal of the District Court order entered on October 4, 1972. While a Circuit Justice of this Court apparently has authority under Supreme Court Rule 51 to grant such relief in the form of a mandatory injunction, usage and practice suggest that this extraordinary remedy be employed only in the most unusual case. In order that it be available, the applicants' right to relief must be indisputably clear. Applicants do not present such a case, and their application is therefore denied.

WESTERMANN ET AL. *v.* NELSON, ATTORNEY GENERAL OF ARIZONA

ON MOTION FOR INJUNCTION

No. A–412. Decided October 20, 1972

The motion for injunction pending appeal of candidates who failed to secure ballot placement for the November 7, 1972, election in Arizona is denied because orderly election processes would likely be disrupted by granting so tardy an application.

MR. JUSTICE DOUGLAS, Circuit Justice.

Petitioners are candidates of the American Independent Party who complain of their inability to get on the ballot in Arizona for the November 7, 1972, election.

They brought suit in the District Court but their complaint was dismissed. They desire to appeal to the Court of Appeals but were denied a preliminary injunction by a judge of that court. They now apply to me as Circuit Justice.

The complaint may have merit. But the time element is now short and the ponderous Arizona election machinery is already under way, printing the ballots. Absentee ballots have indeed already been sent out and some have been returned. The costs of reprinting all the ballots will be substantial and it may well be that no decision on the merits can be reached by the Court of Appeals in time to reprint the ballots excluding petitioners, should they lose on the merits.

I have been unable to hear oral argument and have only the papers of the parties before me.

On the basis of these papers I have concluded that in fairness to the parties I must deny the injunction, not because the cause lacks merit but because orderly elec-

tion processes would likely be disrupted by so late an action. The time element has plagued many of these election cases; but one in my position cannot give relief in a responsible way when the application is as tardy as this one.

So I deny the injunction.

IN RE BERG ET AL.

ON APPLICATION FOR STAY AND BAIL PENDING APPEAL

No. A–460. Decided November 2, 1972

Applicants, who were found in civil contempt after refusing to testify before a grand jury, have applied for a stay, contending that they and their attorneys were subjected to illegal electronic surveillance. The Government denied such surveillance with respect to the applicants and asserted its unawareness thereof with respect to the attorneys but did not show that diligent inquiry had been made. *Held:* A stay is granted until the matter can be presented to, and acted on by, the full Court.

MR. JUSTICE DOUGLAS, Circuit Justice.

The Court of Appeals granted a stay in this case until 5:30 p. m. (P. s. t.) today. While the application was filed here October 28, 1972, I did not desire to act until the Solicitor General had time to respond. His response came in yesterday afternoon.

My conclusion is that the case is analogous to the *Ellsberg* case (*Russo* v. *Byrne,* No. 72–307, O. T. 1972) now before the Court; but is more particularly related to *Black* v. *United States,* 385 U. S. 26, and *O'Brien* v. *United States,* 386 U. S. 345.

The issue of electronic surveillance in the present case raises questions under the Sixth as well as the Fourth Amendment. Central is the question whether the unawareness of the prosecution is sufficient to bring to an end the judicial inquiry or whether some diligent search of the prosecution is necessary.* In *Black* a new

*While the prosecution filed affidavits that none of applicants' conversations was "bugged," there had been no search for any conversations of their attorneys. It would seem that a client is an "aggrieved" person within the meaning of 18 U. S. C. §§ 2510 (11) and 3504 (a) (1) when and if the conversations of his attorney are "bugged" and used against him.

trial was ordered even though the prosecutor did not know he had in his possession attorney-client conversations and even though none of them was used.

I have concluded to grant a stay, good until the matter can be presented to the full Court and until the Court acts on it.

O'BRIEN ET AL. *v.* SKINNER, SHERIFF, ET AL.

ON APPLICATION FOR STAY

No. A–484. Decided November 6, 1972

Applicants, who are imprisoned after misdemeanor convictions or while awaiting trial (groups not disfranchised under New York law), challenge the constitutionality of an absentee voting statute applicable to those whose confinement in state institutions is because of physical disability, but not to persons in applicants' situation. The claim of applicants, which the New York Court of Appeals rejected, may have merit and *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802, on which the State relies, is distinguishable. However, applicants' delays in submitting their registration statements to election officials and in filing their application for stay, together with the absence of information as to whether a state court stay was sought, compel denial of the application.

MR. JUSTICE MARSHALL, Circuit Justice.

Applicants, 72 prisoners in County Jail in Monroe County, New York, applied to me in my capacity as a Circuit Justice for a stay of a New York Court of Appeals judgment entered November 3, 1972.

The applicants are either convicted misdemeanants or persons who have been convicted of no crime but are awaiting trial. New York law makes no provision for the disfranchisement of these groups. Nonetheless, applicants allege that they have been prevented from registering to vote because correctional and election officials have refused to provide them with absentee ballots, refused to establish mobile voting and registration equipment at the prison, and refused to transport them to the polls. Applicants argue that these restrictions on their right of franchise are not supported by the sort of "compelling state interest" that this Court has in the past

required. See, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330 (1972). They challenge the constitutionality of the New York statute that permits absentee voting by persons confined to state institutions by reason of physical disability but makes no provision for absentee voting by persons confined to state prisons after misdemeanor convictions or while awaiting trial.

In response, respondents rely on this Court's decision in *McDonald* v. *Board of Election Comm'rs,* 394 U. S. 802 (1969). In *McDonald* we held that, under the circumstances of that case, the mere allegation that Illinois had denied absentee ballots to unsentenced inmates awaiting trial in the Cook County jail did not make out a constitutional claim. I am not persuaded, however, that *McDonald* governs this case. Cf. *Goosby* v. *Osser,* 452 F. 2d 39 (CA3 1971), cert. granted, 408 U. S. 922 (1972). In *McDonald* there was "nothing in the record to indicate that the Illinois statutory scheme [had] an impact on appellants' ability to exercise the fundamental right to vote." 394 U. S., at 807. We pointed out that the record was "barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.,* at 808 n. 6. Here, in contrast, it seems clear that the State has rejected alternative means by which applicants might exercise their right to vote. Deprivation of absentee ballots is therefore tantamount to deprivation of the franchise itself, and it is axiomatic that courts must "strictly scrutinize" the discriminatory withdrawal of voting rights. See, *e. g., Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 670 (1966).

Compelling practical considerations nonetheless lead me to the conclusion that this application must be denied. Applicants waited until the last day of registration before submitting their registration statements to election officials, and they filed this application a scant four days before the election.

Moreover, neither party submitted to me the Court of Appeals opinion denying relief until 4 o'clock this afternoon, and I still do not have before me any written indication as to whether applicants have applied to the state court for a stay or as to the state court's disposition of any such application.

Even if it were possible to arrange for absentee ballots at this late date, election officials can hardly be expected to process the registration statements in the remaining time before the election. It is entirely possible that some of the applicants are disqualified from voting for other reasons or that, while qualified to vote somewhere in the State, they are not qualified to cast ballots in Monroe County. The States are, of course, entitled to a reasonable period within which to investigate the qualifications of voters. See *Dunn* v. *Blumstein, supra,* at 348.

Voting rights are fundamental, and alleged disfranchisement of even a small group of potential voters is not to be taken lightly. But the very importance of the rights at stake militates against hasty or ill-considered action. This Court cannot operate in the dark, and it cannot require state officials to do the impossible. With the case in this posture, I conclude that effective relief cannot be provided at this late date. I must therefore deny the application.

FARR *v.* PITCHESS, SHERIFF OF LOS ANGELES COUNTY, CALIFORNIA

ON APPLICATION FOR RELEASE ON OWN RECOGNIZANCE OR BAIL PENDING APPEAL IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. A–705. Decided January 11, 1973

Commitment for civil contempt of applicant, a reporter who, despite an order of trial judge barring litigants or their attorneys from giving certain information to the press, published news story based on information obtained from attorneys and one other person and who refused post-trial disclosure to trial judge of informants' names, involves substantial issues not settled by *Branzburg* v. *Hayes*, 408 U. S. 665, or otherwise, and applicant's release pending Court of Appeals' decision of applicant's habeas corpus petition is therefore warranted.

See: 22 Cal. App. 3d 60, 99 Cal. Rptr. 342.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant Farr was a reporter for the Los Angeles Herald Examiner and published stories about the *Manson* trial, which were greatly publicized during the trial. The trial judge in the case had issued orders barring the litigants and their lawyers from giving certain information to the press. When the *Manson* trial was ended, the trial judge summoned Farr and asked him what the sources of his information were. Farr acknowledged that he had received the news story from two of the six attorneys of record in the *Manson* case and some of it from another individual who was subject to the order concerning publicity but who was not an attorney. Farr refused to disclose the names and was committed to prison for civil contempt. He obtained no relief in the

state courts[1] and then brought federal habeas corpus which the District Court denied and, pending his appeal to the Court of Appeals for the Ninth Circuit, he has applied to me for bail or release on personal recognizance.

Like the three cases decided in *Branzburg* v. *Hayes,* 408 U. S. 665, the present case involves civil, not criminal, contempt. *Branzburg,* however, involved refusal of a reporter to testify before a grand jury and reveal the sources of his news stories. The federal rule is that just as the power of Congress to commit a recalcitrant witness for civil contempt ends with the adjournment of that Congress, *Anderson* v. *Dunn,* 6 Wheat. 204, 231, so does the power of the grand jury end when the grand jury's term expires. *Shillitani* v. *United States,* 384 U. S. 364, 370–372.

What rule obtains in California is not clear; but it is intimated that theoretically at least imprisonment for civil contempt could be for life.

The commitment is defended on the ground that the trial court, armed with power to keep the trial free from prejudicial publicity, *Sheppard* v. *Maxwell,* 384 U. S. 333, has authority to discipline those who violated its order barring release of publicity. The necessity to make Farr talk was therefore held to be compelling.

California has a statute protecting a newsman from disclosing his sources of news and barring a court from holding him in contempt for refusal to disclose.[2] The

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[1] The opinion of the California Court of Appeal, Second Appellate District, is reported in 22 Cal. App. 3d 60, 99 Cal. Rptr. 342. The Supreme Court of California denied a hearing on March 27, 1972. This Court denied certiorari on November 13, 1972. *Ante,* p. 1011.

[2] Calif. Evid. Code § 1070 (Supp. 1972) provides:

"A publisher, editor, reporter, or other person connected with or employed upon a newspaper, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a court, the Legislature, or any ad-

Court of Appeal noted that while Farr had been a newsman at the time he wrote the story, he had left that employment when he was questioned by the trial judges. The Court of Appeal assertedly did not reach the issue as to whether Farr was covered by the section, holding instead that to construe the statute as granting immunity to Farr, in the face of the facts "would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings."

It is argued, in return, that the remedy of criminal contempt against those subject to the trial court's publicity order is now out of reach because of the running of the statute of limitations on criminal contempt [3] and therefore that the present civil contempt proceedings against Farr serve no legitimate state interest. I have received a response from respondent which says that this is "purely a matter of state concern"—that "there is no statute of limitations" in California for civil contempts. Whether this means that Farr could be imprisoned for life is not clear.

What the merits of the case may be is not in my province at this stage. The only question is whether the issue presented is a substantial one. Our *Branzburg*

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ministrative body, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper.

"Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television."

[3] Calif. Penal Code § 166 provides that willful disobedience of a lawfully issued court order is a misdemeanor. Calif. Penal Code § 801 provides a one-year period of limitation from the commission of the crime to the filing of the indictment, information, or complaint.

decision plainly does not cover it. Our denial of certiorari imparts no implication or inference concerning the Court's view of the merits, as Mr. Justice Frankfurter made clear in *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 919.

The question, so far as I can tell, is not covered by any of our prior decisions. The case is a recurring one where the interests of a fair trial sometimes collide with the requirements of a free press. A fair trial requires that a jury be insulated from the barrage of prejudicial news stories that is sometimes laid down on the courtroom. It is said that in the present case the *Manson* jury was sequestered and so not subject to the kind of influence we condemned in *Sheppard* v. *Maxwell.*

The issue is not free from doubt. Yet since the precise question is a new one not covered by our prior decisions, I have concluded in the interest of justice to release Farr on his personal recognizance pending decision of his habeas corpus case by the Court of Appeals.

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JUDICIAL REVIEW—Continued.

still another voluntariness hearing in the state court. Swenson v. Stidham, p. 224.

5. *Republican Convention—Allocation of delegates.*—District Court's injunction prohibiting the 1972 Republican National Convention from allocating six "bonus" delegates to its 1976 convention to each State casting its electoral votes for the Republican presidential nominee in 1972, or electing a Republican senator, governor, or majority of its congressional delegation at any election within four years previous to 1976 stayed in light of criteria set forth in *O'Brien* v. *Brown, ante,* p. 1, and to preserve the issues for judicial review. Republican Committee v. Ripon Society (REHNQUIST, J., in chambers), p. 1222.

6. *State prisoner's appeal—Affirmance by equally divided Court—Federal habeas corpus proceeding.*—This Court's equally divided affirmance of respondent's state court conviction does not, under 28 U. S. C. § 2244 (c), bar further federal relief by habeas corpus, since such an affirmance merely ends the process of direct review but settles no issue of law. Neil v. Biggers, p. 188.

7. *Transportation of recyclable goods—Temporary freight surcharge—Adverse environmental impact.*—Where District Court enjoined railroads' temporary across-the-board freight surcharge since Interstate Commerce Commission had not prepared an "impact statement" as required by § 102 (2)(C) of the National Environmental Policy Act, and determined that the certain damage to the environment outweighed the probable damage to the railroads so that its injunction ought not be stayed, since it cannot be said that the District Court's factual evaluation of the necessity for a stay constituted an abuse of discretion, the application for stay must be denied. Aberdeen & Rockfish R. Co. v. SCRAP (BURGER, C. J., in chambers), p. 1207.

JURIES. See **Constitutional Law,** IV, 3; XI, 2; **Perjury; Trials,** 1, 3.

JURISDICTION. See also **Abstention; Administrative Procedure,** 1–2; **Admiralty,** 1, 3; **Antitrust Acts,** 1–2; **Appeals,** 1; **Civil Rights; Expediting Act,** 1–2; **Judicial Review,** 1–2; **Procedure,** 1–4.

1. *Aircraft crash in navigable waters—Lack of significant relationship to traditional maritime activity.*—Federal admiralty jurisdiction does not extend to aviation tort claims arising from flights like the one involved here between points within the continental United States. Executive Jet Aviation v. City of Cleveland, p. 249.

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