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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1973

APRIL 1 THROUGH (IN PART) MAY 20, 1974

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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Errata

411 U. S. 989, line 3 from bottom: "order, *post,* p. 991" should be "orders, *post,* pp. 991, 992."

412 U. S. 924, No. 72–745, line 3: "946" should be "496."

413 U. S. III, line 1 under Officers of the Court: "Elliott" should be "Elliot."

414 U. S. 339, last line of syllabus: "356" should be "355."

415 U. S. 949, No. 73–5567, lines 3–4: "344 N. Y. S. 2d 1045" should be "337 N. Y. S. 2d 813."

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.

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WILLIAM B. SAXBE, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
EDWARD G. HUDON, Librarian.

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.)

TRIBUTE TO MR. JUSTICE DOUGLAS

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, APRIL 17, 1974

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:

Before we proceed with the arguments that we interrupted at the close of the session yesterday, I would like to make a very brief statement.

Today marks an event in the history of this Court that has never occurred before and may never occur again.

It is also a milestone in the unique judicial career of MR. JUSTICE DOUGLAS, who, on October 29, 1973, established a record of the longest service of any one of the 100 Justices who have served on this Court in the 184 years since the Court first sat on February 2, 1790.

It was precisely 35 years ago today that MR. JUSTICE DOUGLAS took his seat on this Court.

A great many people exceed the Biblical three-score-and-ten and go on to the eighties and the nineties and even beyond that, but few of them do so with the remarkable vigor and the full zest for life that MR. JUSTICE DOUGLAS exhibits. His curiosity and concern about the world we live in and all that is in it and his search to satisfy that curiosity seem to increase with each passing year.

This week he publishes his 17th book, an account of his early years in Minnesota, in the State of Washington, then back east to New York, and later at New Haven, and then in Washington, where he came to spend four or five months and has remained 40 years.

Anyone who thinks MR. JUSTICE DOUGLAS is nearing the end of his career overlooks the reality of his life and his temperament. There are many more mountains to climb, mountains of the law, mountains of life and of nature, and that will always be his pursuit.

On October 29 last year, when MR. JUSTICE DOUGLAS surpassed all the prior records of service, he made a statement that ought to be placed in the permanent records of this Court, and I will take this occasion to do so.

He said this:

"I think the heart of America is sound. I think the conscience of America is bright. I think the future of America is great. The thing that holds us all together is not the wording of the Constitution, but the mucilage of good will, and that is what we need at all times."

I know, MR. JUSTICE DOUGLAS—our Brother DOUGLAS—that I speak for all the Members of the Court as well as for our retired Brethren, Mr. Chief Justice Warren, Justices Reed and Clark, and former Members of the Court with whom you sat, when I say that we salute you on this occasion, and wish you good health and the continued vigor that has been your trademark for all these years.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1973

VILLAGE OF BELLE TERRE ET AL. *v.* BORAAS ET AL.

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

No. 73–191. Argued February 19–20, 1974—Decided April 1, 1974

A New York village ordinance restricted land use to one-family dwellings, defining the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit and expressly excluding from the term lodging, boarding, fraternity, or multiple-dwelling houses. After the owners of a house in the village, who had leased it to six unrelated college students, were cited for violating the ordinance, this action was brought to have the ordinance declared unconstitutional as violative of equal protection and the rights of association, travel, and privacy. The District Court held the ordinance constitutional, and the Court of Appeals reversed. *Held:*

1. Economic and social legislation with respect to which the legislature has drawn lines in the exercise of its discretion will be upheld if it is "reasonable, not arbitrary," and bears "a rational relationship to a [permissible] state objective," *Reed* v. *Reed,* 404 U. S. 71, 76, and here the ordinance—which is not aimed at transients and involves no procedural disparity inflicted on some but not on others or deprivation of any "fundamental" right—meets that constitutional standard and must be upheld as valid land-use legislation addressed to family needs. *Berman* v. *Parker,* 348 U. S. 26. Pp. 7–9.

2. The fact that the named tenant appellees have vacated the house does not moot this case as the challenged ordinance continues to affect the value of the property. Pp. 9–10.

476 F. 2d 806, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., *post,* p. 10, and MARSHALL, J., *post,* p. 12, filed dissenting opinions.

Bernard E. Gegan argued the cause for appellants. With him on the brief was *James J. von Oiste.*

Lawrence G. Sager argued the cause for appellees. With him on the brief were *Melvin L. Wulf* and *Burt Neuborne.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Belle Terre is a village on Long Island's north shore of about 220 homes inhabited by 700 people. Its total land area is less than one square mile. It has restricted land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word "family" as used in the ordinance means, "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Appellees the Dickmans are owners of a house in the village and leased it in December 1971 for a term of 18 months to Michael Truman. Later Bruce Boraas became a colessee. Then Anne Parish moved into the house along with three others. These six are students at nearby State University at Stony Brook and none is

related to the other by blood, adoption, or marriage. When the village served the Dickmans with an "Order to Remedy Violations" of the ordinance,[1] the owners plus three tenants[2] thereupon brought this action under 42 U. S. C. § 1983 for an injunction and a judgment declaring the ordinance unconstitutional. The District Court held the ordinance constitutional, 367 F. Supp. 136, and the Court of Appeals reversed, one judge dissenting, 476 F. 2d 806. The case is here by appeal, 28 U. S. C. § 1254 (2); and we noted probable jurisdiction, 414 U. S. 907.

This case brings to this Court a different phase of local zoning regulations from those we have previously reviewed. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, involved a zoning ordinance classifying land use in a given area into six categories. The Dickmans' tracts fell under three classifications: U–2, which included two-family dwellings; U–3, which included apartments, hotels, churches, schools, private clubs, hospitals, city hall and the like; and U–6, which included sewage disposal plants, incinerators, scrap storage, cemeteries, oil and gas storage and so on. Heights of buildings were prescribed for each zone; also, the size of land areas required for each kind of use was specified. The land in litigation was vacant and being held for industrial development; and evidence was introduced showing that under the restricted-use

[1] *Younger* v. *Harris*, 401 U. S. 37, is not involved here, as on August 2, 1972, when this federal suit was initiated, no state case had been started. The effect of the "Order to Remedy Violations" was to subject the occupants to liability commencing August 3, 1972. During the litigation the lease expired and it was extended. Anne Parish moved out. Thereafter the other five students left and the owners now hold the home out for sale or rent, including to student groups.

[2] Truman, Boraas, and Parish became appellees but not the other three.

ordinance the land would be greatly reduced in value. The claim was that the landowner was being deprived of liberty and property without due process within the meaning of the Fourteenth Amendment.

The Court sustained the zoning ordinance under the police power of the State, saying that the line "which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." *Id.*, at 387. And the Court added: "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.*, at 388. The Court listed as considerations bearing on the constitutionality of zoning ordinances the danger of fire or collapse of buildings, the evils of overcrowding people, and the possibility that "offensive trades, industries, and structures" might "create nuisance" to residential sections. *Ibid.* But even those historic police power problems need not loom large or actually be existent in a given case. For the exclusion of "all industrial establishments" does not mean that "only offensive or dangerous industries will be excluded." *Ibid.* That fact does not invalidate the ordinance; the Court held:

> "The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." *Id.*, at 388–389.

The main thrust of the case in the mind of the Court was in the exclusion of industries and apartments, and as respects that it commented on the desire to keep residential areas free of "disturbing noises"; "increased traffic"; the hazard of "moving and parked automobiles"; the "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities." *Id.*, at 394. The ordinance was sanctioned because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary. *Id.*, at 388.

Our decision in *Berman* v. *Parker*, 348 U. S. 26, sustained a land-use project in the District of Columbia against a landowner's claim that the taking violated the Due Process Clause and the Just Compensation Clause of the Fifth Amendment. The essence of the argument against the law was, while taking property for ridding an area of slums was permissible, taking it "merely to develop a better balanced, more attractive community" was not, *id.*, at 31. We refused to limit the concept of public welfare that may be enhanced by zoning regulations.[3] We said:

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immo-

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[3] Vermont has enacted comprehensive statewide land-use controls which direct local boards to develop plans ordering the uses of local land, *inter alia*, to "create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, [and] reduce the wastes of financial and human resources which result from either excessive congestion or excessive scattering of population . . . ." Vt. Stat. Ann., Tit. 10, § 6042 (1973). Federal legislation has been proposed designed to assist States and localities in developing such broad objective land-use guidelines. See Senate Committee on Interior and Insular Affairs, Land Use Policy and Planning Assistance Act, S. Rep. No. 93–197 (1973).

> rality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.
>
> "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.,* at 32–33.

If the ordinance segregated one area only for one race, it would immediately be suspect under the reasoning of *Buchanan* v. *Warley,* 245 U. S. 60, where the Court invalidated a city ordinance barring a black from acquiring real property in a white residential area by reason of an 1866 Act of Congress, 14 Stat. 27, now 42 U. S. C. § 1982, and an 1870 Act, § 17, 16 Stat. 144, now 42 U. S. C. § 1981, both enforcing the Fourteenth Amendment. 245 U. S., at 78–82. See *Jones* v. *Mayer Co.,* 392 U. S. 409.

In *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, Seattle had a zoning ordinance that permitted a " 'philanthropic home for children or for old people' " in a particular district " 'when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.' " *Id.,* at 118. The Court held that provision of the ordinance unconstitutional, saying that the existing owners could "withhold consent for selfish reasons or arbitrarily and

may subject the trustee [owner] to their will or caprice." *Id.*, at 122. Unlike the billboard cases (*e. g., Cusack Co.* v. *City of Chicago,* 242 U. S. 526), the Court concluded that the Seattle ordinance was invalid since the proposed home for the aged poor was not shown by its maintenance and construction "to work any injury, inconvenience or annoyance to the community, the district or any person." 278 U. S., at 122.

The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a State; that it bars people who are uncongenial to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society.[4]

We find none of these reasons in the record before us. It is not aimed at transients. Cf. *Shapiro* v. *Thompson,* 394 U. S. 618. It involves no procedural disparity inflicted on some but not on others such as was presented by *Griffin* v. *Illinois,* 351 U. S. 12. It involves no "fundamental" right guaranteed by the Constitution, such as voting, *Harper* v. *Virginia Board,* 383 U. S. 663; the right of association, *NAACP* v. *Alabama,* 357 U. S. 449; the right of access to the courts, *NAACP* v. *Button,* 371 U. S. 415; or any rights of privacy, cf. *Griswold* v. *Connect-*

[4] Many references in the development of this thesis are made to F. Turner, The Frontier in American History (1920), with emphasis on his theory that "democracy [is] born of free land." *Id.,* at 32.

icut, 381 U. S. 479; *Eisenstadt* v. *Baird,* 405 U. S. 438, 453–454. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be " 'reasonable, not arbitrary' " (quoting *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415) and bears "a rational relationship to a [permissible] state objective." *Reed* v. *Reed,* 404 U. S. 71, 76.

It is said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included.[5] That exercise of discretion, however, is a legislative, not a judicial, function.

It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together.[6] There is no evidence to support it; and the provision of the ordinance bringing within the definition of a "family" two unmarried people belies the charge.

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[5] Mr. Justice Holmes made the point a half century ago.

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 41 (dissenting opinion).

[6] *Department of Agriculture* v. *Moreno,* 413 U. S. 528, is therefore inapt as there a household containing anyone unrelated to the rest was denied food stamps.

The ordinance places no ban on other forms of association, for a "family" may, so far as the ordinance is concerned, entertain whomever it likes.

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman* v. *Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

The suggestion that the case may be moot need not detain us. A zoning ordinance usually has an impact on the value of the property which it regulates. But in spite of the fact that the precise impact of the ordinance sustained in *Euclid* on a given piece of property was not known, 272 U. S., at 397, the Court, considering the matter a controversy in the realm of city planning, sustained the ordinance. Here we are a step closer to the impact of the ordinance on the value of the lessor's property. He has not only lost six tenants and acquired only two in their place; it is obvious that the scale of rental values rides on what we decide today. When *Berman* reached us it was not certain whether an entire tract would be taken or only the buildings on it and a scenic easement. 348 U. S., at 36. But that did not make the case any the less a controversy in the constitutional sense. When Mr. Justice Holmes said for the Court in *Block* v. *Hirsh,* 256 U. S. 135, 155, "property rights may be cut down, and to that extent taken, with-

out pay," he stated the issue here. As is true in most zoning cases, the precise impact on value may, at the threshold of litigation over validity, not yet be known.

Reversed.

MR. JUSTICE BRENNAN, dissenting.

The constitutional challenge to the village ordinance is premised *solely* on alleged infringement of associational and other constitutional rights of *tenants*. But the named tenant appellees have quit the house, thus raising a serious question whether there now exists a cognizable "case or controversy" that satisfies that indispensable requisite of Art. III of the Constitution. Existence of a case or controversy must, of course, appear at every stage of review, see, *e. g., Roe* v. *Wade,* 410 U. S. 113, 125 (1973); *Steffel* v. *Thompson,* 415 U. S. 452, 459 n. 10 (1974). In my view it does not appear at this stage of this case.

Plainly there is no case or controversy as to the named tenant appellees since, having moved out, they no longer have an interest, associational, economic or otherwise, to be vindicated by invalidation of the ordinance. Whether there is a cognizable case or controversy must therefore turn on whether the lessor appellees may attack the ordinance on the basis of the constitutional rights of their tenants.

The general "weighty" rule of practice is "that a litigant may only assert his own constitutional rights or immunities," *United States* v. *Raines,* 362 U. S. 17, 22 (1960). A pertinent exception, however, ordinarily limits a litigant to the assertion of the alleged denial of another's constitutional rights to situations in which there is: (1) evidence that as a direct consequence of the denial of constitutional rights of the others, the litigant faces substantial economic injury, *Pierce* v. *Society of*

Sisters, 268 U. S. 510, 535–536 (1925); *Barrows* v. *Jackson,* 346 U. S. 249, 255–256 (1953), or criminal prosecution, *Griswold* v. *Connecticut,* 381 U. S. 479, 481 (1965); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972), and (2) a showing that the litigant's and the others' interests intertwine and unless the litigant may assert the constitutional rights of the others, those rights cannot effectively be vindicated. *Griswold* v. *Connecticut, supra; Eisenstadt* v. *Baird, supra;* see also *NAACP* v. *Alabama,* 357 U. S. 449 (1958).

In my view, lessor appellees do not, on the present record, satisfy either requirement of the exception. Their own brief negates any claim that they face economic loss. The brief states that "there is nothing in the record to support the contention that in a middle class, suburban residential community like Belle Terre, traditional families are willing to pay more or less than students with limited means like the Appellees." Brief for Appellees 54–55. And whether they face criminal prosecution for violations of the ordinance is at least unclear. The criminal summons served on them on July 19, 1972, was withdrawn because not preceded, as required by the village's procedure, by an order requiring discontinuance of violations within 48 hours. An order to discontinue violation was served thereafter on July 31, but was not followed by service of a criminal summons when the violation was not discontinued within 48 hours.*

The Court argues that, because a zoning ordinance "has an impact on the value of the property which it regulates," there is a cognizable case or controversy. But

*In these circumstances, I agree with the Court that no criminal action was "pending" when this suit was brought and that therefore the District Court correctly declined to apply the principles of *Younger* v. *Harris,* 401 U. S. 37 (1971).

even if lessor appellees for that reason have a personal stake, and we were to concede that landlord and tenant interests intertwine in respect of the ordinance, I cannot see, on the present record, how it can be concluded that "it would be difficult if not impossible," *Barrows* v. *Jackson, supra,* at 257, for present or prospective unrelated tenant groups of more than two to assert their own rights before the courts, since the departed tenant appellees had no difficulty in doing so. Thus, the second requirement of the exception would not presently appear to be satisfied. Accordingly it is irrelevant that the house was let, as we are now informed, to other unrelated tenants on a month-to-month basis after the tenant appellees moved out. None of the new tenants has sought to intervene in this suit. Indeed, for all that appears, they too may have moved out and the house may be vacant.

I dissent and would vacate the judgment of the Court of Appeals and remand to the District Court for further proceedings. If the District Court determines that a cognizable case or controversy no longer exists, the complaint should be dismissed. *Golden* v. *Zwickler,* 394 U. S. 103 (1969).

MR. JUSTICE MARSHALL, dissenting.

This case draws into question the constitutionality of a zoning ordinance of the incorporated village of Belle Terre, New York, which prohibits groups of more than two unrelated persons, as distinguished from groups consisting of any number of persons related by blood, adoption, or marriage, from occupying a residence within the confines of the township.[1] Lessor-appellees, the two owners of a Belle Terre residence, and three unrelated student tenants challenged the ordinance on the ground that it establishes a classification between households of

[1] The text of the ordinance is reprinted in part, *ante,* at 2.

related and unrelated individuals, which deprives them of equal protection of the laws. In my view, the disputed classification burdens the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments. Because the application of strict equal protection scrutiny is therefore required, I am at odds with my Brethren's conclusion that the ordinance may be sustained on a showing that it bears a rational relationship to the accomplishment of legitimate governmental objectives.

I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926), that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained. Our role is not and should not be to sit as a zoning board of appeals.

I would also agree with the majority that local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly

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confined. See *Berman* v. *Parker,* 348 U. S. 26 (1954). And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes. But deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights.

When separate but equal was still accepted constitutional dogma, this Court struck down a racially restrictive zoning ordinance. *Buchanan* v. *Warley,* 245 U. S. 60 (1917). I am sure the Court would not be hesitant to invalidate that ordinance today. The lower federal courts have considered procedural aspects of zoning,[2] and acted to insure that land-use controls are not used as means of confining minorities and the poor to the ghettos of our central cities.[3] These are limited but necessary intrusions on the discretion of zoning authorities. By the same token, I think it clear that the First Amendment provides some limitation on zoning laws. It is inconceivable to me that we would allow the exercise of the zoning power to burden First Amendment freedoms, as by ordinances that restrict occupancy to individuals adhering to particular religious, political, or scientific beliefs. Zoning officials properly con-

[2] See *Citizens Assn. of Georgetown* v. *Zoning Comm'n,* 155 U. S. App. D. C. 233, 477 F. 2d 402 (1973).

[3] See *Kennedy Park Homes Assn.* v. *Lackawanna,* 436 F. 2d 108 (CA2 1970); *Dailey* v. *City of Lawton,* 425 F. 2d 1037 (CA10 1970); cf. *Gautreaux* v. *City of Chicago,* 480 F. 2d 210 (CA7 1973); *Crow* v. *Brown,* 457 F. 2d 788 (CA5 1972); *Southern Alameda Spanish Speaking Organization* v. *Union City,* 424 F. 2d 291 (CA9 1970). See generally Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan. L. Rev. 767 (1969); Note, Exclusionary Zoning and Equal Protection, 84 Harv. L. Rev. 1645 (1971); Note, The Responsibility of Local Zoning Authorities to Nonresident Indigents, 23 Stan. L. Rev. 774 (1971).

cern themselves with the uses of land—with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.

My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees' First Amendment freedom of association and their constitutionally guaranteed right to privacy. Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one's associates. *NAACP* v. *Button,* 371 U. S. 415, 430 (1963). Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members. *Id.,* at 430–431; *Brotherhood of Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964). See *United Transportation Union* v. *State Bar of Michigan,* 401 U. S. 576 (1971); *Mine Workers* v. *Illinois State Bar Assn.,* 389 U. S. 217 (1967). The selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.

The freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy. The right to "establish a home" is an essential part of the liberty guaranteed by the Fourteenth Amendment. *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923); *Griswold* v. *Connecticut,* 381 U. S. 479, 495 (1965) (Goldberg, J., concurring). And the Constitution secures to an individual a freedom "to satisfy his intellectual and emotional needs in the privacy of his own home." *Stan-*

ley v. *Georgia,* 394 U. S. 557, 565 (1969); see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 66–67 (1973). Constitutionally protected privacy is, in Mr. Justice Brandeis' words, "as against the Government, the right to be let alone . . . the right most valued by civilized man." *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (dissenting opinion). The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution. See *Roe* v. *Wade,* 410 U. S. 113, 153 (1973); *Eisenstadt* v. *Baird,* 405 U. S. 438, 453 (1972); *Stanley* v. *Georgia, supra,* at 564–565; *Griswold* v. *Connecticut, supra,* at 483, 486; *Olmstead* v. *United States, supra,* at 478 (Brandeis, J., dissenting); *Moreno* v. *Department of Agriculture,* 345 F. Supp. 310, 315 (DC 1972), aff'd, 413 U. S. 528 (1973).

The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community.[4] The village has, in

[4] "Perhaps in an ideal world, planning and zoning would be done on a *regional* basis, so that a given community would have apart-

effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.[5]

This is not a case where the Court is being asked to nullify a township's sincere efforts to maintain its residential character by preventing the operation of rooming houses, fraternity houses, or other commercial or high-density residental uses. Unquestionably, a town is free to restrict such uses. Moreover, as a general proposition, I see no constitutional infirmity in a town's limiting the density of use in residential areas by zoning regulations which do not discriminate on the basis of constitutionally suspect criteria.[6] This ordinance, however, limits the density of occupancy of only those homes occupied by unrelated persons. It thus reaches beyond control of the use of land or the density of population, and undertakes to regulate the way people choose to associate with each other within the privacy of their own homes.

It is no answer to say, as does the majority, that associational interests are not infringed because Belle Terre residents may entertain whomever they choose. Only last Term MR. JUSTICE DOUGLAS indicated in concurrence that he saw the right of association protected by the First Amendment as involving far more than the right to entertain visitors. He found that right infringed by a restriction on food stamp assistance, penalizing

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ments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city." *Appeal of Girsh,* 437 Pa. 237, 245 n. 4, 263 A. 2d 395, 399 n. 4 (1970).

[5] See generally Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N. Y. U. L. Rev. 670, 740–750 (1973).

[6] See *Palo Alto Tenants' Union* v. *Morgan,* 487 F. 2d 883 (CA9 1973).

households of "unrelated persons." As MR. JUSTICE DOUGLAS there said, freedom of association encompasses the "right to invite the stranger into one's home" not only for "entertainment" but to join the household as well. *Department of Agriculture* v. *Moreno,* 413 U. S. 528, 538–545 (1973) (concurring opinion). I am still persuaded that the choice of those who will form one's household implicates constitutionally protected rights.

Because I believe that this zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest, *Shapiro* v. *Thompson,* 394 U. S. 618, 634 (1969). And, once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden. See *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250 (1974); *Speiser* v. *Randall,* 357 U. S. 513, 525–526 (1958).

A variety of justifications have been proffered in support of the village's ordinance. It is claimed that the ordinance controls population density, prevents noise, traffic and parking problems, and preserves the rent structure of the community and its attractiveness to families. As I noted earlier, these are all legitimate and substantial interests of government. But I think it clear that the means chosen to accomplish these purposes are both overinclusive and underinclusive, and that the asserted goals could be as effectively achieved by means of an ordinance that did not discriminate on the basis of constitutionally protected choices of lifestyle. The ordinance imposes no restriction whatsoever on the number

of persons who may live in a house, as long as they are related by marital or sanguinary bonds—presumably no matter how distant their relationship. Nor does the ordinance restrict the number of income earners who may contribute to rent in such a household, or the number of automobiles that may be maintained by its occupants. In that sense the ordinance is underinclusive. On the other hand, the statute restricts the number of unrelated persons who may live in a home to no more than two. It would therefore prevent three unrelated people from occupying a dwelling even if among them they had but one income and no vehicles. While an extended family of a dozen or more might live in a small bungalow, three elderly and retired persons could not occupy the large manor house next door. Thus the statute is also grossly overinclusive to accomplish its intended purposes.

There are some 220 residences in Belle Terre occupied by about 700 persons. The density is therefore just above three per household. The village is justifiably concerned with density of population and the related problems of noise, traffic, and the like. It could deal with those problems by limiting each household to a specified number of adults, two or three perhaps, without limitation on the number of dependent children.[7] The burden of such an ordinance would fall equally upon all segments of the community. It would surely be better tailored to the goals asserted by the village than the ordinance before us today, for it would more realistically

[7] By providing an exception for dependent children, the village would avoid any doubts that might otherwise be posed by the constitutional protection afforded the choice of whether to bear a child. See *Molino* v. *Mayor & Council of Glassboro,* 116 N. J. Super. 195, 281 A. 2d 401 (1971); cf. *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974).

restrict population density and growth and their attendant environmental costs. Various other statutory mechanisms also suggest themselves as solutions to Belle Terre's problems—rent control, limits on the number of vehicles per household, and so forth, but, of course, such schemes are matters of legislative judgment and not for this Court. Appellants also refer to the necessity of maintaining the family character of the village. There is not a shred of evidence in the record indicating that if Belle Terre permitted a limited number of unrelated persons to live together, the residential, familial character of the community would be fundamentally affected.

By limiting unrelated households to two persons while placing no limitation on households of related individuals, the village has embarked upon its commendable course in a constitutionally faulty vessel. Cf. *Marshall* v. *United States,* 414 U. S. 417, 430 (1974) (dissenting opinion). I would find the challenged ordinance unconstitutional. But I would not ask the village to abandon its goal of providing quiet streets, little traffic, and a pleasant and reasonably priced environment in which families might raise their children. Rather, I would commend the village to continue to pursue those purposes but by means of more carefully drawn and even-handed legislation.

I respectfully dissent.

CALIFORNIA BANKERS ASSN. *v.* SHULTZ, SECRETARY OF THE TREASURY, ET AL.

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

No. 72–985. Argued January 16, 1974—Decided April 1, 1974*

The Bank Secrecy Act of 1970, which was enacted following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in illegal activities, authorizes the Secretary of the Treasury to prescribe by regulation certain bank recordkeeping and reporting requirements, the Act's penalties attaching only upon violation of the regulations thus prescribed. (Unless otherwise indicated, references below to the Act also include the accompanying regulations.) The Act is designed to obtain financial information having "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Title I of the Act requires financial institutions to maintain records of their customers' identities, to make microfilm copies of checks and similar instruments, and to keep records of certain other items. Title II requires the reporting to the Federal Government of certain foreign and domestic financial transactions. Title II, § 231, requires reports of the transportation of currency and specified instruments exceeding $5,000 into or out of the country, exception being made, *inter alia,* for banks and security dealers. Section 241 requires individuals with bank accounts or other relationships with foreign banks to provide specified information on a tax return form. Section 221 delegates to the Secretary of the Treasury the authority to require reports of transactions "if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify . . . ," § 222 providing that he may require such reports from the domestic financial institution involved, the parties to the transaction, or both, and § 223 providing that he may designate financial institu-

*Together with No. 72–1073, *Shultz, Secretary of the Treasury, et al.* v. *California Bankers Assn. et al.;* and No. 72–1196, *Stark et al.* v. *Shultz, Secretary of the Treasury, et al.,* also on appeal from the same court.

tions to receive the reports. Under the implementing regulations only financial institutions must file reports with the Internal Revenue Service (IRS), and then only where the transaction involves the deposit, withdrawal, exchange, or other payment of currency exceeding $10,000. The regulations provide that the Secretary may grant exemptions from the requirements of the regulations. Suits were brought by various plaintiffs challenging the constitutionality of the Act, principally on the ground that it violated the Fourth Amendment, because when the bank makes and keeps records under compulsion of the Secretary's regulations it acts as a Government agent and thereby engages in a "seizure" of its customer's records. A three-judge District Court, though upholding the recordkeeping requirements of Title I of the Act and the foreign transaction reporting requirements of Title II, concluded that the domestic reporting provisions of Title II, §§ 221–223, contravened the Fourth Amendment, and enjoined their enforcement. Three separate appeals were taken. In No. 72–985, the California Bankers Association, a plaintiff below, asserts that Title I's recordkeeping provisions violate (1) due process, because there is no rational relationship between the Act's objectives and the required recordkeeping and because the Act is unduly burdensome, and (2) rights of privacy. In No. 72–1196, a bank plaintiff, certain plaintiff depositors, and the American Civil Liberties Union (ACLU), also a plaintiff, as a depositor in a bank subject to the recordkeeping requirements and as a representative of its bank customer members, attack both the Title I recordkeeping requirements and the Title II foreign financial transaction reporting requirements on Fourth Amendment grounds; on Fifth Amendment grounds, as violating the privilege against compulsory self-incrimination; and on First Amendment grounds, as violating free speech and free association rights. In No. 72–1073, the Secretary asserts that the District Court erred in holding Title II's domestic financial transaction reporting requirements facially invalid without considering the actual implementation of the statute by the regulations. *Held:*

1. Title I's recordkeeping requirements, which are a proper exercise of Congress' power to deal with the problem of crime in interstate and foreign commerce, do not deprive the bank plaintiffs of due process of law. Pp. 45–52.

(a) There is a sufficient nexus between the evil Congress sought to address and the recordkeeping procedure to meet the requirements of the Due Process Clause of the Fifth Amendment,

and the fact that banks are not mere bystanders in transactions involving negotiable instruments but have a substantial stake in their availability and acceptance and are the most easily identifiable party to the instruments, makes it appropriate for the banks rather than others to do the recordkeeping. *United States* v. *Darby,* 312 U. S. 100; *Shapiro* v. *United States,* 335 U. S. 1. Pp. 45–49.

(b) The cost burdens on the banks of the recordkeeping requirements are not unreasonable. P. 50.

(c) The bank plaintiffs' claim that the recordkeeping requirements undermine the right of a depositor effectively to challenge an IRS third-party summons is premature, absent the issuance of such process involving a depositor's transactions. Pp. 51–52.

2. Title I's recordkeeping provisions do not violate the Fourth Amendment rights of either the bank or depositor plaintiffs, the mere maintenance by the bank of records without any requirement that they be disclosed to the Government (which can secure access only by existing legal process) constituting no illegal search and seizure. Pp. 52–54.

3. Title I's recordkeeping provisions do not violate the Fifth Amendment rights of either the bank or depositor plaintiffs. P. 55.

(a) The bank plaintiffs, being corporations, have no constitutional privilege against compulsory self-incrimination by virtue of the Fifth Amendment. *Hale* v. *Henkel,* 201 U. S. 43, 74–75. P. 55.

(b) A depositor plaintiff incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights. *Johnson* v. *United States,* 228 U. S. 457, 458; *Couch* v. *United States,* 409 U. S. 322, 328. P. 55.

4. The ACLU's claim that Title I's recordkeeping requirements violate its members' First Amendment rights since the challenged provisions could possibly be used to identify its members and contributors (cf. *NAACP* v. *Alabama,* 357 U. S. 449), is premature, the Government having sought no such disclosure here. Pp. 55–57.

5. The reporting requirements in Title II applicable to foreign financial dealings, which single out transactions with the greatest potential for avoiding enforcement of federal laws and which involve substantial sums, do not abridge plaintiffs' Fourth Amendment rights and are well within Congress' powers to legislate with respect to foreign commerce. *Carroll* v. *United States,* 267 U. S. 132, 154; *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 272. Pp. 59–63.

6. The regulations for the reporting by financial institutions of domestic financial transactions are reasonable and abridge no Fourth Amendment rights of such institutions, which are themselves parties to the transactions involved, since neither "incorporated nor unincorporated associations [have] an unqualified right to conduct their affairs in secret," *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652. Pp. 63–67.

7. The depositor plaintiffs, who do not allege engaging in the type of $10,000 domestic currency transaction requiring reporting, lack standing to challenge the domestic reporting regulations. It is therefore unnecessary to consider contentions made by the bank and depositor plaintiffs that the regulations are constitutionally defective because they do not require the financial institution to notify the customer that a report will be filed concerning the domestic currency transaction. Pp. 67–70.

8. The depositor plaintiffs who are parties in this litigation are premature in challenging the foreign and domestic reporting provisions under the Fifth Amendment. Pp. 72–75.

(a) Since those plaintiffs merely allege that they intend to engage in foreign currency transactions with foreign banks and make no additional allegation that any of the information required by the Secretary will tend to incriminate them, their challenge to the foreign reporting requirements cannot be considered at this time. *Communist Party* v. *SACB*, 367 U. S. 1, 105–110, followed; *Albertson* v. *SACB*, 382 U. S. 70, distinguished. Pp. 72–74.

(b) The depositor plaintiffs' challenge to the domestic reporting requirements are similarly premature, since there is no allegation that any depositor engaged in a $10,000 domestic transaction with a bank that the latter was required to report and no allegation that any bank report would contain information incriminating any depositor. *Marchetti* v. *United States*, 390 U. S. 39; *Grosso* v. *United States*, 390 U. S. 62; and *Haynes* v. *United States*, 390 U. S. 85, distinguished. P. 75.

9. The bank plaintiffs cannot vicariously assert Fifth Amendment claims on behalf of their depositors under the circumstances present here, since the depositors cannot assert those claims themselves at this time. See ¶ 8, *supra*. Pp. 71–72.

10. The contentions of the ACLU that the reporting requirements with respect to foreign and domestic transactions invade its First Amendment associational interests are too speculative and hypothetical to warrant consideration, in view of the fact that the ACLU alleged only that it maintains accounts at a San

Francisco bank but not that it regularly engages in abnormally large domestic currency transactions, transports or receives monetary instruments from foreign commercial channels, or maintains foreign bank accounts. Pp. 75–76.

347 F. Supp. 1242, affirmed in part, reversed in part, and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 78. DOUGLAS, J., filed a dissenting opinion, in Parts I and II–A of which BRENNAN, J., joined, *post*, p. 79. BRENNAN, J., *post*, p. 91, and MARSHALL, J., *post*, p. 93, filed dissenting opinions.

John H. Anderson argued the cause for the California Bankers Assn., appellant in No. 72–985 and appellee in No. 72–1073. With him on the briefs was *Frederick M. Pownall.*

Charles C. Marson argued the cause for Stark et al., appellants in No. 72–1196 and appellees in No. 72–1073. With him on the briefs were *Joseph Remcho, Neil Horton, Anthony G. Amsterdam, Melvin L. Wulf, Burt Neuborne,* and *Hope Eastman.*

Deputy Solicitor General Wallace argued the cause for Shultz et al., appellants in No. 72–1073 and appellees in Nos. 72–985 and 72–1196. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Crampton, Edward R. Korman,* and *Leonard J. Henzke, Jr.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

These appeals present questions concerning the constitutionality of the so-called Bank Secrecy Act of 1970 (Act), and the implementing regulations promulgated thereunder by the Secretary of the Treasury. The Act, Pub. L. 91–508, 84 Stat. 1114, 12 U. S. C. §§ 1730d, 1829b,

1951–1959, and 31 U. S. C. §§ 1051–1062, 1081–1083, 1101–1105, 1121–1122, was enacted by Congress in 1970 following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability. Under the Act, the Secretary of the Treasury is authorized to prescribe by regulation certain recordkeeping and reporting requirements for banks and other financial institutions in this country. Because it has a bearing on our treatment of some of the issues raised by the parties, we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone.

The express purpose of the Act is to require the maintenance of records, and the making of certain reports, which "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. §§ 1829b (a)(2), 1951; 31 U. S. C. § 1051. Congress was apparently concerned with two major problems in connection with the enforcement of the regulatory, tax, and criminal laws of the United States.[1]

First, there was a need to insure that domestic banks and financial institutions continue to maintain adequate records of their financial transactions with their customers. Congress found that the recent growth of financial institutions in the United States had been paralleled by an increase in criminal activity which made use of

[1] See generally S. Rep. No. 91–1139 (1970); H. R. Rep. No. 91–975 (1970); Hearings on Foreign Bank Secrecy and Bank Records (H. R. 15073) before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess. (1969–1970); Hearings on Foreign Bank Secrecy (S. 3678 and H. R. 15073) before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. (1970).

these institutions. While many of the records which the Secretary by regulation ultimately required to be kept had been traditionally maintained by the voluntary action of many domestic financial institutions, Congress noted that in recent years some larger banks had abolished or limited the practice of photocopying checks, drafts, and similar instruments drawn on them and presented for payment. The absence of such records, whether through failure to make them in the first instance or through failure to retain them, was thought to seriously impair the ability of the Federal Government to enforce the myriad criminal, tax, and regulatory provisions of laws which Congress had enacted. At the same time, it was recognized by Congress that such required records would "not be made automatically available for law enforcement purposes [but could] only be obtained through existing legal process." H. R. Rep. No. 91–975, p. 10 (1970); see S. Rep. No. 91–1139, p. 5 (1970).

In addition, Congress felt that there were situations where the deposit and withdrawal of large amounts of currency or of monetary instruments which were the equivalent of currency should be actually reported to the Government. While reports of this nature had been required by previous regulations issued by the Treasury Department, it was felt that more precise and detailed reporting requirements were needed. The Secretary was therefore authorized to require the reporting of what may be described as large domestic financial transactions in currency or its equivalent.

Second, Congress was concerned about a serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax, and regulatory enactments. The House

Report on the bill, No. 91–975, *supra,* at 12–13, described the situation in these words:

> "Considerable testimony was received by the Committee from the Justice Department, the United States Attorney for the Southern District of New York, the Treasury Department, the Internal Revenue Service, the Securities and Exchange Commission, the Defense Department and the Agency for International Development about serious and widespread use of foreign financial facilities located in secrecy jurisdictions for the purpose of violating American law. Secret foreign bank accounts and secret foreign financial institutions have permitted proliferation of 'white collar' crime; have served as the financial underpinning of organized criminal operations in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions, mergers and takeovers; have covered conspiracies to steal from the U. S. defense and foreign aid funds; and have served as the cleansing agent for 'hot' or illegally obtained monies.
>
> . . . . .
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> "The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost. Unwarranted and unwanted credit is being pumped into

our markets. There have been some cases of corporation directors, officers and employees who, through deceit and violation of law, enriched themselves or endangered the financial soundness of their companies to the detriment of their stockholders. Criminals engaged in illegal gambling, skimming, and narcotics traffic are operating their financial affairs with an impunity that approaches statutory exemption.

"When law enforcement personnel are confronted with the secret foreign bank account or the secret financial institution they are placed in an impossible position. In order to receive evidence and testimony regarding activities in the secrecy jurisdiction they must subject themselves to a time consuming and ofttimes fruitless foreign legal process. Even when procedural obstacles are overcome, the foreign jurisdictions rigidly enforce their secrecy laws against their own domestic institutions and employees.

"One of the most damaging effects of an American's use of secret foreign financial facilities is its undermining of the fairness of our tax laws. Secret foreign financial facilities, particularly in Switzerland, are available only to the wealthy. To open a secret Swiss account normally requires a substantial deposit, but such an account offers a convenient means of evading U. S. taxes. In these days when the citizens of this country are crying out for tax reform and relief, it is grossly unfair to leave the secret foreign bank account open as a convenient avenue of tax evasion. The former U. S. Attorney for the Southern District of New York has characterized the secret foreign bank account as the largest single tax loophole permitted by American law."

While most of the recordkeeping requirements imposed

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by the Secretary under the Act merely require the banks to keep records which most of them had in the past voluntarily kept and retained, and while much of the required reporting of domestic transactions had been required by earlier Treasury regulations in effect for nearly 30 years,[2] there is no denying the impressive sweep of the authority conferred upon the Secretary by the Bank Secrecy Act of 1970. While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolate, cheese, and watches as a symbol of the Swiss economy. Nor did they live to see the heavy utilization of our domestic banking system by the minions of organized crime as well as by millions of legitimate businessmen. The challenges made here to the Bank Secrecy Act are directed not to any want of legislative authority in Congress to treat the subject, but instead to the Act's asserted violation of specific constitutional prohibitions.

I

Title I of the Act, and the implementing regulations promulgated thereunder by the Secretary of the Treasury, require financial institutions to maintain records of the identities of their customers, to make microfilm copies of certain checks drawn on them, and to keep records of certain other items. Title II of the Act and its implementing regulations require reports of certain domestic and foreign currency transactions.

A. Title I—The Recordkeeping Requirements

Title I of the Act contains the general recordkeeping requirements for banks and other financial

[2] See n. 11, *infra*.

institutions, as provided by the Secretary by regulation. Section 101 of the Act, 12 U. S. C. § 1829b, applies by its terms only to federally insured banks. It contains congressional findings "that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." The major requirements of the section are that insured banks record the identities of persons having accounts with them and of persons having signature authority thereover, in such form as the Secretary may require. To the extent that the Secretary determines by regulation that such records would have the requisite "high degree of usefulness," the banks must make and maintain microfilm or other reproductions of each check, draft, or other instrument drawn on it and presented to it for payment, and must maintain a record of each check, draft, or other instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected. Section 101 further authorizes the Secretary to require insured banks to maintain a record of the identity of all individuals who engage in transactions which are reportable by the bank under Title II of the Act, and authorizes the Secretary to prescribe the required retention period for such records. Section 102, 12 U. S. C. § 1730d, amends the National Housing Act to authorize the Secretary to apply similar recordkeeping requirements to institutions insured thereunder. Sections 122–123 of the Act, 12 U. S. C. §§ 1952–1953, authorize the Secretary to issue regulations applying similar recordkeeping requirements to additional domestic financial institutions.[3]

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[3] Under § 123 (b), 12 U. S. C. § 1953 (b), the authority of the Secretary extends to any person engaging in the business of:

"(1) Issuing or redeeming checks, money orders, travelers' checks,

Although an initial draft of Title I, see H. R. 15073, 91st Cong., 1st Sess., would have compelled the Secretary to promulgate regulations requiring banks to maintain copies of all items received for collection or presented for payment, the Act as finally passed required the maintenance only of such records and microfilm copies as the Secretary determined to have a "high degree of usefulness." [4] Upon passage of the Act, the Treasury Department established a task force which consulted with representatives from financial institutions, trade associations, and governmental agencies to determine the type of records which should be maintained. Whereas the original regulations promulgated by the Secretary had required the copying of all checks, the task force decided, and the regulations were accordingly amended, to require check copying only as to checks in excess of $100.[5] The regulations also require the copying of

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or similar instruments, except as an incident to the conduct of its own nonfinancial business.

"(2) Transferring funds or credits domestically or internationally.

"(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

"(4) Operating a credit card system.

"(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations."

Section 122 of the Act, 12 U. S. C. § 1952, authorizes the Secretary to require reports with respect to the ownership, control, and management of uninsured domestic financial institutions.

[4] See House Hearings, *supra,* n. 1, at 60–61, 80, 146, 162, 314, 316, 321, 333; S. Rep. No. 91–1139, *supra,* at 18–19 (supplemental views).

[5] For a summary of the task force study, see Hearings to amend the Bank Secrecy Act (S. 3814 and S. 3828) before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., 60–64 (1972). The Secretary initially issued regulations on April 5, 1972, implementing the provisions of the Act. See 31 CFR pt. 103 (37 Fed.

only "on us" checks: checks drawn on the bank or issued and payable by it. 31 CFR § 103.34 (b)(3). The regulations exempt from the copying requirements certain "on us" checks such as dividend, payroll, and employee benefit checks, provided they are drawn on an account expected to average at least one hundred checks per month.[6] The regulations also require banks to maintain records of the identity and taxpayer identification number of each person maintaining a financial interest in each deposit or share account opened after June 30, 1972, and to microfilm various other financial documents. 31 CFR § 103.34.[7] In addition, the

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Reg. 6912). The Treasury Department task force found that law enforcement would not be greatly impaired by limiting the check-copying requirement to checks in excess of $100. An Assistant Secretary of the Treasury estimated that this exclusion would eliminate 90% of all personal checks from the microfilming requirement. Senate Hearings on S. 3814, *supra,* at 42, 44, 57–58. The regulations were thus amended shortly after their promulgation to exclude the copying of checks drawn for $100 or less. 31 CFR § 103.34 (b)(3), as amended, 37 Fed. Reg. 23114 (1972), 38 Fed. Reg. 2174 (1973), effective Jan. 17, 1973.

[6] Exempted by 31 CFR § 103.34 (b)(3) are dividend checks, payroll checks, employee benefit checks, insurance claim checks, medical benefit checks, checks drawn on governmental agency accounts, checks drawn by brokers or dealers in securities, checks drawn on fiduciary accounts, checks drawn on other financial institutions, and pension or annuity checks, provided they are drawn on an account expected to average at least one hundred checks per month.

[7] Title 31 CFR § 103.34 (b) requires that each bank retain either the original or a microfilm or other copy or reproduction of (1) documents granting signature authority over accounts; (2) statements or ledger cards showing transactions in each account; (3) each item involving more than $10,000 remitted or transferred to a person, account, or place outside the United States; (4) a record of each remittance or transaction of funds, currency, monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States; (5) each check

Secretary's regulations require all financial institutions to maintain a microfilm or other copy of each extension of credit in an amount exceeding $5,000 except those secured by interest in real property, and to microfilm each advice, request, or instruction given or received regarding the transfer of funds, currency, or other money or credit in amounts exceeding $10,000 to a person, account, or place outside the United States. 31 CFR § 103.33.

Reiterating the stated intent of the Congress, see, *e. g.*, H. R. Rep. No. 91–975, *supra*, at 10; S. Rep. No. 91–1139, *supra*, at 5, the regulations provide that inspection, review, or access to the records required by the Act to be maintained is governed by existing legal process. 31 CFR § 103.51.[8] Finally, §§ 125–127 of the Act provide

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or draft in an amount exceeding $10,000 drawn on or issued by a foreign bank which the domestic bank has paid or presented to a nonbank drawee for payment; (6) each item of more than $10,000 received directly from a bank, broker, or dealer in foreign exchange outside the United States; (7) a record of each receipt of currency, monetary instruments, checks, or investment securities, and each transfer of funds or credit in amounts exceeding $10,000 received directly from a bank, broker, or dealer in foreign exchange outside the United States; (8) records needed to reconstruct a demand deposit account and to trace checks in excess of $100 deposited in such account.

Title 31 CFR § 103.35 requires brokers and dealers in securities to maintain similar information with respect to their brokerage accounts.

The prescribed retention period for all records under the regulations is five years, except for the records required for reconstructing a demand deposit account, which must be retained for only two years. 31 CFR § 103.36 (c).

[8] Title 31 CFR § 103.51 provides:

"Except as provided in §§ 103.34 (a)(1) and 103.35 (a)(1), and except for the purpose of assuring compliance with the record-keeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review

for civil and criminal penalties for willful violations of the recordkeeping requirements. 12 U. S. C. §§ 1955–1957.

B. Title II—Foreign Financial Transaction Reporting Requirements

Chapter 3 of Title II of the Act and the regulations promulgated thereunder generally require persons to report the transportation of monetary instruments into or out of the United States, or receipts of such instruments in the United States from places outside the United States, if the transportation or receipt involves instruments of a value greater than $5,000. Chapter 4 of Title II of the Act and the implementing regulations generally require United States citizens, residents, and businessmen to file reports of their relationships with foreign financial institutions. The legislative history of the foreign-transaction reporting provisions indicates that the Congress was concerned with the circumvention of United States regulatory, tax, and criminal laws which United States citizens and residents were accomplishing through the medium of secret foreign bank transactions. S. Rep. No. 91–1139, *supra,* at 7; H. R. Rep. No. 91–975, *supra,* at 13.

Section 231 of the Act, 31 U. S. C. § 1101, requires anyone connected with the transaction to report, in the manner prescribed by the Secretary, the transportation into or out of the country of monetary instruments [9] exceeding $5,000 on any one occasion. As

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the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law."

This regulation became effective January 17, 1973. 37 Fed. Reg. 23114 (1972); 38 Fed. Reg. 2174 (1973).

[9] "Monetary instrument" is defined by § 203 (l) of the Act as "coin and currency of the United States, and in addition, such

provided by the Secretary's regulations, the report must include information as to the amount of the instrument, the date of receipt, the form of instrument, and the person from whom it was received. See 31 CFR §§ 103.23, 103.25.[10] The regulations exempt various classes of persons from this reporting requirement, including banks, brokers or other dealers in securities, common carriers, and others engaged in the business of transporting currency for banks. 31 CFR § 103.23 (c). Monetary instruments which are transported without the filing of a required report, or with a materially erroneous report, are subject to forfeiture under § 232 of the Act, 31 U. S. C. § 1102; a person who has failed to file the required report or who has filed a false report is subject to civil penalties under §§ 207 and 233, 31 U. S. C. §§ 1056 and 1103, as well as criminal penalties under §§ 209 and 210, 31 U. S. C. §§ 1058 and 1059.

Section 241 of the Act, 31 U. S. C. § 1121, authorizes the Secretary to prescribe regulations requiring residents and citizens of the United States, as well as nonresidents in the United States and doing business therein, to maintain records and file reports with respect to their trans-

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foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates." 31 U. S. C. § 1052 (*l*).

[10] The form provided by the Treasury Department for the reporting of these transactions is Form 4790 (Report of International Transportation of Currency or Monetary Instruments). See Motion to Affirm on behalf of the United States in No. 72–985, App. C, pp. 29–30. The report must identify the person required to file the report, his capacity, and the identity of persons for whom he acts, and must specify the amounts and types of monetary instruments, the method of transportation, and, if applicable, the name of the person from whom the shipment was received.

actions and relationships with foreign financial agencies. Pursuant to this authority, the regulations require each person subject to the jurisdiction of the United States to make a report on yearly tax returns of any "financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country." 31 CFR § 103.24. Violations of the reporting requirement of § 241 as implemented by the regulations are also subject to civil and criminal penalties under §§ 207, 209, and 210 of the Act, 31 U. S. C. §§ 1056, 1058, and 1059.

C. Title II—Domestic Financial Transaction Reporting Requirements

In addition to the foreign transaction reporting requirements discussed above, Title II of the Act provides for certain reports of domestic transactions where such reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. Prior to the enactment of the Act, financial institutions had been providing reports of their customers' large currency transactions pursuant to regulations promulgated by the Secretary of Treasury [11] which had required reports of all currency transactions that, in the judgment of the institution, exceeded those "commensurate with the customary conduct of the business, industry or profession of the person or organization concerned." [12] In passing the

[11] In issuing these regulations, the Secretary relied upon the authority of two statutory provisions: (1) the Trading with the Enemy Act, 40 Stat. 411, as amended by § 2, Act of Mar. 9, 1933, 48 Stat. 1, and by § 301, First War Powers Act, 1941, 55 Stat. 839, see 12 U. S. C. § 95a (1940 ed., Supp. V); and (2) § 251 of the Revised Statutes, 31 U. S. C. § 427.

[12] The previous regulations promulgated by the Secretary, see 31 CFR § 102.1 (1949), 10 Fed. Reg. 6556, originally mentioned transactions involving $1,000 or more in denominations of $50 or

Act, Congress recognized that the use of financial institutions, both domestic and foreign, in furtherance of activities designed to evade the regulatory mechanisms of the United States, had markedly increased. H. R. Rep. No. 91–975, *supra,* at 10; S. Rep. No. 91–1139, *supra,* at 2–3. Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for requiring such reports. H. R. Rep. No. 91–975, *supra,* at 11–12. In particular, Congress intended to authorize more definite standards for determining what constitutes the type of unusual transaction that should be reported. S. Rep. No. 91–1139, *supra,* at 6.

Section 221 of the Act, 31 U. S. C. § 1081, therefore delegates to the Secretary the authority for specifying the currency transactions which should be reported, "if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify." Section 222 of the Act, 31 U. S. C. § 1082, provides that the Secretary may require such reports from the domestic financial institution involved or the parties to the transactions or both.[13] Section 223 of the Act, 31 U. S. C. § 1083, authorizes the Secretary to designate financial institutions to receive such reports.

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more, or $10,000 or more in any denominations. In 1952, the former amount was raised to $2,500 in denominations of $100 or more. See 17 Fed. Reg. 1822, 2306. When these regulations were revised in 1959 to simplify the reporting form, the Secretary noted the great value of the reports to law enforcement. See Treasury Release No. A–590, Aug. 3, 1959, included in the Jurisdictional Statement for the United States in No. 72–1073, App. E, pp. 127–130.

[13] The proper interpretation of this section is a source of dispute in these appeals. See n. 29, *infra.*

In the implementing regulations promulgated under this authority, the Secretary has required only that financial institutions file certain reports with the Commissioner of Internal Revenue. The regulations require that a report be made for each deposit, withdrawal, exchange of currency,[14] or other payment or transfer "which involves a transaction in currency of more than $10,000." 31 CFR § 103.22.[15] The regulations exempt from the reporting requirement certain intrabank transactions and "transactions with an established customer maintaining a deposit relationship [in amounts] commensurate with the customary conduct of the business, industry, or profession of the customer concerned."

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[14] "Currency" is defined in the Secretary's regulations as the "coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U. S. silver certificates, U. S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money." 31 CFR § 103.11.

[15] The form prescribed by the Secretary, see 31 CFR § 103.25 (a), for the reporting of the domestic currency transactions is Treasury Form 4789 (Currency Transaction Report). See Jurisdictional Statement for the United States in No. 72–1073, App. D, p. 121. Form 4789 requires information similar to that required by the previous Treasury reporting form, see n. 12, *supra,* including (1) the name, address, business or profession and social security number of the person conducting the transaction; (2) similar information as to the person or organization for whom it was conducted; (3) a summary description of the nature of the transaction, the type, amount, and denomination of the currency involved and a description of any check involved in the transaction; (4) the type of identification presented; and (5) the identity of the reporting financial institution.

The regulations also provide that the names of all customers whose currency transactions in excess of $10,000 are not reported on Form 4789 must be reported to the Secretary on demand. 31 CFR § 103.22.

Ibid.[16] Provision is also made in the regulations whereby information obtained by the Secretary may in some instances and in confidence be available to other departments or agencies of the United States. 31 CFR § 103.43; see 31 U. S. C. § 1061.[17] There is also provision made in the regulations whereby the Secretary may in his sole discretion make exceptions to or grant exemptions from the requirements of the regulation. 31 CFR § 103.45 (a).[18] Failure to file the re-

[16] Transactions with Federal Reserve Banks or Federal Home Loan Banks, or solely with or originated by financial institutions or foreign banks, are also excluded from these reporting requirements. 31 CFR § 103.22.

[17] Section 212 of the Act, 31 U. S. C. § 1061, authorizes the Secretary to provide by regulation for the availability of information provided in the reports required by the Act to other departments and agencies of the Federal Government. Pursuant to this authority, the Secretary has promulgated 31 CFR § 103.43, which provides:

"The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought."

The last sentence of this regulation was added by an amendment, see 37 Fed. Reg. 23114 (1972); 38 Fed. Reg. 2174 (1973), effective Jan. 17, 1973.

[18] Title 31 CFR § 103.45 (a) provides:

"The Secretary, in his sole discretion, may by written order or authorization make exceptions to or grant exemptions from the requirements of this part. Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as

quired report or the filing of a false report subjects the banks to criminal and civil penalties. 31 U. S. C. §§ 1056, 1058, 1059.

II

This litigation began in June 1972 in the United States District Court for the Northern District of California. Various plaintiffs applied for a temporary restraining order prohibiting the defendants, including the Secretary of the Treasury and heads of other federal agencies, from enforcing the provisions of the Bank Secrecy Act, enacted by Congress on October 26, 1970, and thereafter implemented by the Treasury regulations. The plaintiffs below included several named individual bank customers, the Security National Bank, the California Bankers Association, and the American Civil Liberties Union (ACLU), suing on behalf of itself and its various bank customer members.

The plaintiffs' principal contention in the District Court was that the Act and the regulations were violative of the Fourth Amendment's guarantee against unreasonable search and seizure. The complaints also alleged that the Act violated the First, Fifth, Ninth, Tenth, and Fourteenth Amendments. The District Court issued a temporary restraining order enjoining the enforcement of the foreign and domestic reporting provisions of Title II of the Act, and requested the convening of a three-judge court pursuant to 28 U. S. C. § 2284 to entertain the myriad of constitutional challenges to the Act.

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expressly stated in the order of authorization, and they shall be revocable in the sole discretion of the Secretary."

When originally promulgated, this regulation additionally gave the Secretary the authority to "impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of" the Act. 37 Fed. Reg. 6915 (1972). The amendment to the present form became effective January 17, 1973. 37 Fed. Reg. 23114 (1972); 38 Fed. Reg. 2174 (1973).

The three-judge District Court unanimously upheld the constitutionality of the recordkeeping requirements of Title I of the Act and the accompanying regulations, and the requirements of Title II of the Act and the regulations for reports concerning the import and export of currency and monetary instruments and relationships with foreign financial institutions. The District Court concluded, however, with one judge dissenting, that the domestic reporting provisions of §§ 221–223 of Title II of the Act, 31 U. S. C. §§ 1081–1083, were repugnant to the Fourth Amendment of the Constitution. 347 F. Supp. 1242 (1972). The court held that since the domestic reporting provisions of the Act permitted the Secretary of the Treasury to require detailed reports of virtually all domestic financial transactions, including those involving personal checks and drafts, and since the Act could conceivably be administered in such a manner as to compel disclosure of all details of a customer's financial affairs, the domestic reporting provisions must fall as facially violative of the Fourth Amendment. Their enforcement was enjoined.

Both the plaintiffs and the Government defendants filed timely notices of appeal from the portions of the District Court judgment adverse to them. We noted probable jurisdiction over three separate appeals from the decision below pursuant to 28 U. S. C. §§ 1252 and 1253. 414 U. S. 816 (1973):

No. 72–985. The appellant in this appeal is the California Bankers Association, an association of all state and national banks doing business in California. The Association challenges the constitutionality of the recordkeeping provisions of Title I, as implemented by the regulations, on two grounds. First, the Association contends that the Act violates the Due Process Clause of the Fifth Amendment because there is no rational rela-

tionship between the objectives of the Act and the recordkeeping required, and because the Act places an unreasonable burden on the Association's member banks. Second, the Association contends that the recordkeeping requirements of Title I violate the First Amendment right of privacy and anonymity of the member banks' customers.

No. 72–1196. This appeal was filed on behalf of a number of plaintiffs in the original suit in the District Court: on behalf of the Security National Bank, on behalf of the American Civil Liberties Union as a depositor in a bank subject to the recordkeeping requirements and as a representative of its bank customer members, and on behalf of certain bank customers. The appeal first challenges the constitutionality of the recordkeeping requirements of Title I of the Act and the implementing regulations, as does the appeal in No. 72–985, *supra*. Second, the appeal challenges the constitutionality of the foreign financial transaction reporting requirements of Title II of the Act and the implementing regulations. These recordkeeping and foreign reporting requirements are challenged on three grounds: first, that the requirements constitute an unreasonable search and seizure in violation of the Fourth Amendment; second, that the requirements constitute a coerced creation and retention of documents in violation of the Fifth Amendment privilege against compulsory self-incrimination; and third, that the requirements violate the First Amendment rights of free speech and free association.

No. 72–1073. In this appeal, the Secretary of the Treasury, as appellant, challenges that portion of the District Court's order holding the domestic financial transaction reporting requirements of Title II to violate the Fourth Amendment. The Government contends that the District Court erred in holding these provisions of Title II to

be unconstitutional on their face, without considering the actual implementation of the statute by the Treasury regulations. The Government urges that since only those who violate these regulations may incur civil or criminal penalties, it is the actual regulations issued by the Secretary of the Treasury, and not the broad authorizing language of the statute, which are to be tested against the standards of the Fourth Amendment; and that when so tested they are valid.

For convenience, we will refer throughout the remainder of this opinion to the District Court plaintiffs as plaintiffs, since they are both appellants and appellees in the appeals filed in this Court.

III

We entertain serious doubt as to the standing of the plaintiff California Bankers Association to litigate the claims which it asserts here. Its complaint alleged that it is an unincorporated association consisting of 158 state and national banks doing business in California. So far as appears from the complaint, the Association is not in any way engaged in the banking business, and is not even subject to the Secretary's regulations which it challenges. While the District Court found that the Association sued on behalf of its member banks, the Association's complaint contains no such allegation. The Association seeks to litigate, not only claims on behalf of its member banks, but also claims of injury to the depositors of its member banks. Since the Government has not questioned the standing of the Association to litigate the claims peculiar to banks, and more importantly since plaintiff Security National Bank has standing as an affected bank, and therefore determination of the Association's standing would in no way avoid resolution of any constitutional issues, we assume without deciding that

the Association does have standing. See *Doe* v. *Bolton,* 410 U. S. 179, 189 (1973); *Sierra Club* v. *Morton,* 405 U. S. 727, 739 (1972); *NAACP* v. *Button,* 371 U. S. 415, 428 (1963).

We proceed then to consider the initial contention of the bank plaintiffs that the recordkeeping requirements imposed by the Secretary's regulations under the authority of Title I deprive the banks of due process by imposing unreasonable burdens upon them, and by seeking to make the banks the agents of the Government in surveillance of its citizens. Such recordkeeping requirements are scarcely a novelty. The Internal Revenue Code, for example, contains a general authorization to the Secretary of the Treasury to prescribe by regulation records to be kept by both business and individual taxpayers, 26 U. S. C. § 6001, which has been implemented by the Secretary in various regulations.[19] And this Court has been

[19] See, *e. g.,* Treas. Reg. § 1.368–3 (records to be kept by taxpayers who participate in tax-free exchanges in connection with a corporate reorganization); § 1.374–3 (records to be kept by a railroad corporation engaging in a tax-free exchange in connection with a railroad reorganization); § 1.857–6 (real estate investment trusts must keep records of stock ownership); § 1.964–3 (shareholders must keep records of their interest in a controlled foreign corporation); § 1.1101–4 (records to be kept by a stock or security holder who receives stock or securities or other property upon a distribution made by a qualified bank holding corporation); § 1.1247–5 (foreign investment company must keep records sufficient to verify what taxable income it may have); § 1.6001–1 (all persons liable to tax under subtitle A of the Internal Revenue Code shall keep records sufficient to establish gross income, deductions, and credits); § 31.6001 *et seq.* (requirements that various employers keep records of withholding under the Railroad Retirement Tax Act and the Federal Unemployment Tax Act); §§ 45.6001–2 to 45.6001–4 (records to be kept by manufacturers of butter and cheese); § 46.6001–2 (records to be kept by manufacturers of sugar); § 46.6001–4 (records to be kept by persons paying premiums on policies issued by foreign insurers). Treas. Reg. § 301.7207–1 provides for criminal penalties

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faced with numerous cases involving similar recordkeeping requirements. Similar requirements imposed on the countless businesses subject to the Emergency Price Control Act during the Second World War were upheld in *Shapiro* v. *United States,* 335 U. S. 1 (1948), the Court observing that there was "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection . . . ." *Id.,* at 32. In *United States* v. *Darby,* 312 U. S. 100 (1941), the Court held that employers subject to the Fair Labor Standards Act could be required to keep records of wages paid and hours worked:

> "Since, as we have held, Congress may require production for interstate commerce to conform to [wage and hour] conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it." *Id.,* at 125.

We see no reason to reach a different result here. The plenary authority of Congress over both interstate and foreign commerce is not open to dispute, and that body was not limited to any one particular approach to effectuate its concern that negotiable instruments moving in the channels of that commerce were significantly aiding criminal enterprise. The Secretary of the Treasury, authorized by Congress, concluded that copying and retention of certain negotiable instruments by the bank upon which they were drawn would facilitate the detection and apprehension of participants in such criminal

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for willful delivery or disclosure to the Internal Revenue Service of a document known by the person disclosing it to be false as to any material matter.

enterprises. Congress could have closed the channels of commerce entirely to negotiable instruments, had it thought that so drastic a solution were warranted; it could have made the transmission of the proceeds of any criminal activity by negotiable instruments in interstate or foreign commerce a separate criminal offense. Had it chosen to do the latter, under the precise authority of *Darby* or *Shapiro, supra,* it could have required that each individual engaging in the sending of negotiable instruments through the channels of commerce maintain a record of such action; the bank plaintiffs concede as much.[20]

The bank plaintiffs contend, however, that the Act does not have as its primary purpose regulation of the banks themselves, and therefore the requirement that the banks keep the records is an unreasonable burden on the banks. *Shapiro* and *Darby,* which involved legislation imposing recordkeeping requirements in aid of substantive regulation, are therefore said not to control. But provisions requiring reporting or recordkeeping by the paying institution, rather than the individual who receives the payment, are by no means unique. The Internal Revenue Code and its regulations, for example, contain provisions which require businesses to report income payments to third parties (26 U. S. C. § 6041 (a)), employers to keep records of certain payments made to employees (Treas. Reg. § 31.6001 *et seq.*), corporations to report dividend payments made to third parties (26 U. S. C. § 6042), cooperatives to report patronage dividend payments (26 U. S. C. § 6044), brokers to report customers' gains and losses (26 U. S. C. § 6045), and banks to report payments of interest made to depositors (26 U. S. C. § 6049).

[20] Brief for Appellant California Bankers Association in No. 72–985, p. 25.

In *Darby* an identifiable class of employer was made subject to the Fair Labor Standards Act, and in *Shapiro* an identifiable class of business had been placed under the Price Control Act; in each of those instances, Congress found that the purpose of its regulation was adequately secured by requiring records to be kept by the persons subject to the substantive commands of the legislation. In this case, however, Congress determined that recordkeeping alone would suffice for its purposes, and that no correlative substantive legislation was required. Neither this fact, nor the fact that the principal congressional concern is with the activities of the banks' customers, rather than with the activities of the banks themselves, serves to invalidate the legislation on due process grounds.

The bank plaintiffs proceed from the premise that they are complete bystanders with respect to transactions involving drawers and drawees of their negotiable instruments. But such is hardly the case. A voluminous body of law has grown up defining the rights of the drawer, the payee, and the drawee bank with respect to various kinds of negotiable instruments. The recognition of such rights, both in the various States of this country and in other countries, is itself a part of the reason why the banking business has flourished and played so prominent a part in commercial transactions. The bank is a party to any negotiable instrument drawn upon it by a depositor, and upon acceptance or payment of an instrument incurs obligations to the payee. While it obviously is not privy to the background of a transaction in which a negotiable instrument is used, the existing wide acceptance and availability of negotiable instruments is of inestimable benefit to the banking industry as well as to commerce in general.

Banks are therefore not conscripted neutrals in trans-

actions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance. Congress not illogically decided that if records of transactions of negotiable instruments were to be kept and maintained, in order to be available as evidence under customary legal process if the occasion warranted, the bank was the most easily identifiable party to the instrument and therefore should do the recordkeeping. We believe this conclusion is consistent with *Darby* and *Shapiro,* and that there is a sufficient connection between the evil Congress sought to address and the recordkeeping procedure it required to pass muster under the Due Process Clause of the Fifth Amendment.[21]

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[21] Congress had before it ample testimony that the requirement that banks reproduce checks and maintain other records would significantly aid in the enforcement of federal tax, regulatory, and criminal laws. See House Hearings, *supra,* n. 1, at 151, 322, 359; Senate Hearings, *supra,* n. 1, at 61–68, 175, 230, 250–255, 282. While a substantial portion of the checks drawn on banks in the United States may never be of any utility for law enforcement, tax or regulatory purposes, the regulations do limit the check-copying requirement to checks in excess of $100. 31 CFR §§ 103.34 (b)(3) and (4). This $100 exception was added to the regulations since this litigation was instituted, see n. 5, *supra;* in reviewing the judgment of the District Court in this case, we look to the statute and the regulations as they now stand, not as they once did. *Hall* v. *Beals,* 396 U. S. 45, 48 (1969) (*per curiam*); *Thorpe* v. *Housing Authority,* 393 U. S. 268, 281 n. 38 (1969).

The California Bankers Association contends that the $100 exception is meaningless since microfilm cameras cannot discriminate between checks in different amounts. There was, however, testimony during the House Hearings that an additional step could be added to the check-handling procedures to sort out those checks not required to be copied, and that many banks have equipment that can sort checks on a dollar-amount basis. House Hearings, *supra,* n. 1, at 322, 359. In any event, it is clear that the Act and regulations do not require banks to microfilm all checks, which some

The bank plaintiffs somewhat halfheartedly argue, on the basis of the costs which they estimate will be incurred by the banking industry in complying with the Secretary's recordkeeping requirements, that this cost burden alone deprives them of due process of law. They cite no cases for this proposition, and it does not warrant extended treatment. In its complaint filed in the District Court, plaintiff Security National Bank asserted that it was an "insured" national bank; to the extent that Congress has acted to require records on the part of banks insured by the Federal Deposit Insurance Corporation, or of financial institutions insured under the National Housing Act, Congress is simply imposing a condition on the spending of public funds. See, *e. g., Steward Machine Co.* v. *Davis,* 301 U. S. 548 (1937); *Helvering* v. *Davis,* 301 U. S. 619 (1937). Since there was no allegation in the complaints filed in the District Court, and since it is not contended here that any bank plaintiff is not covered by FDIC or Housing Act insurance, it is unnecessary to consider what questions would arise had Congress relied solely upon its power over interstate commerce to impose the recordkeeping requirements. The cost burdens imposed on the banks by the recordkeeping requirements are far from unreasonable, and we hold that such burdens do not deny the banks due process of law.[22]

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banks have traditionally done, but instead leave the decision to the banks. Given the fact that the cost burden placed on the banks in implementing the recordkeeping requirements of the statute and regulations is also a reasonable one, see n. 22, *infra,* we do not think that the recordkeeping requirements are unreasonable.

[22] The only figures in the record as to the cost burden placed on the banks by the recordkeeping requirements show that the Bank of America, one of the largest banks in the United States, with 997 branches, $29 billion in deposits, and a net income in excess of $178 million (Moody's Bank and Finance Manual 633–

The bank plaintiffs also contend that the record-keeping requirements imposed by the Secretary pursuant to the Act undercut a depositor's right to effectively challenge a third-party summons issued by the Internal Revenue Service. See *Reisman* v. *Caplin,* 375 U. S. 440 (1964); *Donaldson* v. *United States,* 400 U. S. 517 (1971); *Couch* v. *United States,* 409 U. S. 322 (1973). Whatever wrong such a result might work on a depositor, it works no injury on his bank. It is true that in a limited class of cases this Court has permitted a party who suffered injury as a result of the operation of a law to assert his rights even though the sanction of the law was borne by another, *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), and conversely, the Court has allowed a party upon whom the sanction falls to rely on the wrong done to a third party in obtaining relief, *Barrows* v. *Jackson,* 346 U. S. 249 (1953); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972). Whether the bank might in other circumstances rely on an injury to its depositors, or whether, instead, this case is governed by the general rule that one has standing only to vindicate his own rights, *e. g., Moose Lodge* v. *Irvis,* 407 U. S. 163, 166 (1972), need not now be decided, since, in any event, the claim is premature. Claims of depositors against the compul-

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636 (1972)), expended $392,000 in 1971, including start-up costs, to comply with the microfilming requirements of Title I of the Act. Affidavit of William Ehler, App. 24–25.

The hearings before the House Committee on Banking and Currency indicated that the cost of making microfilm copies of checks ranged from 1½ mills per check for small banks down to about ½ mill or less for large banks. See House Hearings, *supra,* n. 1, at 341, 354–356; H. Rep. No. 91–975, *supra,* at 11. The House Report further indicates that the legislation was not expected to significantly increase the costs of the banks involved since it was found that many banks already followed the practice of maintaining the records contemplated by the legislation.

sion by lawful process of bank records involving the depositors' own transactions must wait until such process issues.

Certain of the plaintiffs below, appellants in No. 72–1196, including the American Civil Liberties Union, the Security National Bank, and various individual plaintiff depositors, argue that if "the dominant purpose of the Bank Secrecy Act is the creation, preservation, and collection of evidence of crime . . . [i]t is against the standards applicable to the criminal law, then, that its constitutionality must be measured." They contend that the recordkeeping requirements violate the provisions of the Fourth, Fifth, and First Amendments to the Constitution. At this point, we deal only with such constitutional challenges as they relate to the recordkeeping provisions of Title I of the Act.

We see nothing in the Act which violates the Fourth Amendment rights of any of these plaintiffs. Neither the provisions of Title I nor the implementing regulations require that any information contained in the records be disclosed to the Government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process.

Plaintiffs urge that when the bank makes and keeps records under the compulsion of the Secretary's regulations it acts as an agent of the Government, and thereby engages in a "seizure" of the records of its customers. But all of the records which the Secretary requires to be kept pertain to transactions to which the bank was itself a party. See *United States* v. *Biswell*, 406 U. S. 311, 316 (1972). The fact that a large number of banks voluntarily kept records of this sort before they were required to do so by regulation is an indication that the records were thought useful to the bank in the conduct of its

own business, as well as in reflecting transactions of its customers. We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities. See *First National Bank* v. *United States,* 267 U. S. 576 (1925), aff'g 295 F. 142 (SD Ala. 1924); *Donaldson* v. *United States, supra,* at 522. "[I]t is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress." *Id.,* at 537 (DOUGLAS, J., concurring).

Plaintiffs nevertheless contend that the broad authorization given by the Act to the Secretary to require the maintenance of records, coupled with the broad authority to require certain reports of financial transactions, amounts to the power to commit an unlawful search of the banks and the customers. This argument is based on the fact that 31 CFR § 103.45, as it existed when the District Court ruled in the case, permitted the Secretary to impose additional recordkeeping or reporting requirements by written order or authorization; this authority has now been deleted from the regulation; [23] plaintiffs thus argue that the Secretary could order the immediate reporting of any records made or kept under the compulsion of the Act. We, of course, must examine the statute and the regulations as they now exist. *Hall* v. *Beals,* 396 U. S. 45, 48 (1969) (*per curiam*); *Thorpe* v. *Housing Authority,* 393 U. S. 268, 281 n. 38 (1969). Even if plaintiffs were correct in urging that we decide the case on the basis of the regulation as it existed at the time the District Court ruled, their contention would be without merit. Whatever the Secretary *might* have authorized

[23] See n. 18, *supra.*

under the regulation, he did not in fact require the reporting of any records made or kept under the compulsion of the Act. Indeed, since the legislative history of the Act clearly indicates that records which it authorized the Secretary to require were to be available only by normal legal process, it is doubtful that the Secretary would have the authority ascribed to him by plaintiffs even under the earlier form of the regulation. But in any event, whether or not he had the authority, he did not exercise it, and in fact none of the records were required to be reported. Since we hold that the mere maintenance of the records by the banks under the compulsion of the regulations invaded no Fourth Amendment right of any depositor, plaintiffs' attack on the record-keeping requirements under that Amendment fails.[24] That the bank in making the records required by the Secretary acts under the compulsion of the regulation is clear, but it is equally clear that in doing so it neither searches nor seizes records in which the depositor has a Fourth Amendment right.

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[24] Chapter 4 of the Act, § 241, 31 U. S. C. § 1121, authorizes the Secretary to require by regulation the maintenance of records by persons who engage in any transaction or maintain a relationship, directly or indirectly, on behalf of themselves or others, with a foreign financial agency. The Secretary has, by regulation, required the maintenance of such records by persons having such financial interests and by domestic financial institutions which engage in monetary transactions outside the United States. 31 CFR §§ 103.32, 103.33. The Act also provides that production of such records shall be compelled only by "a subpena or summons duly authorized and issued or as may otherwise be required by law." 31 U. S. C. § 1121 (b). Though it is not apparent from the various briefs filed in this Court by the plaintiffs below whether this particular record-keeping requirement is challenged, our holding that a mere requirement that records be kept does not violate any constitutional right of the banks or of the depositors necessarily disposes of such a claim, since there is no indication at this point that there has been any attempt to compel the production of such records.

Plaintiffs have briefed their contentions in such a way that we cannot be entirely certain whether their Fifth Amendment attack is directed only to the reporting provisions of the regulations, or to the recordkeeping provisions as well. To the extent that it is directed to the regulations requiring the banks to keep records, it is without merit. Incorporated banks, like other organizations, have no privilege against compulsory self-incrimination, *e. g., Hale* v. *Henkel,* 201 U. S. 43, 74–75 (1906); *Wilson* v. *United States,* 221 U. S. 361, 382–384 (1911); *United States* v. *White,* 322 U. S. 694, 699 (1944). Since a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights, *Johnson* v. *United States,* 228 U. S. 457, 458 (1913); *Couch* v. *United States,* 409 U. S., at 328, the depositor plaintiffs here present no meritorious Fifth Amendment challenge to the recordkeeping requirements.

Plaintiff ACLU makes an additional challenge to the recordkeeping requirements of Title I. It argues that those provisions, and the implementing regulations, violate its members' First Amendment rights, since the provisions could possibly be used to obtain the identities of its members and contributors through the examination of the organization's bank records. This Court has recognized that an organization may have standing to assert that constitutional rights of its members be protected from governmentally compelled disclosure of their membership in the organization, and that absent a countervailing governmental interest, such information may not be compelled. *NAACP* v. *Alabama,* 357 U. S. 449 (1958). See *Pollard* v. *Roberts,* 283 F. Supp. 248 (ED Ark.), aff'd *per curiam,* 393 U. S. 14 (1968).

Those cases, however, do not elicit a *per se* rule that would forbid such disclosure in a situation where the governmental interest would override the associational

interest in maintaining such confidentiality. Each of them was litigated after a subpoena or summons had already been served for the records of the organization, and an action brought by the organization to prevent the actual disclosure of the records.[25] No such disclosure has been sought by the Government here, and the ACLU's challenge is therefore premature. This Court, in the absence of a concrete fact situation in which competing associational and governmental interests can be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred by cases such as *NAACP* v. *Alabama, supra.*[26] The threat to any First Amendment rights of the ACLU or its members from the mere existence of the records in the hands of the bank is a good deal more

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[25] The ACLU recognizes that these cases, and the other cases it cites involved situations in which a subpoena or summons had already issued. Brief for Appellant ACLU in No. 72–1196, p. 57. See *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965); *Gibson* v. *Florida Legislative Investigation Comm.,* 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293 (1961); *Shelton* v. *Tucker,* 364 U. S. 479 (1960); *Bates* v. *Little Rock,* 361 U. S. 516 (1960); *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *United States* v. *Rumely,* 345 U. S. 41 (1953).

[26] The ACLU contends that present injunctive relief is essential, since the banks might not notify it of the fact that their records have been subpoenaed, and might comply with the subpoena without giving the ACLU a chance to obtain judicial review. While noting that "most banks formally prohibit" it (citing American Banker, May 12, 1972, p. 1, cols. 3–4), the ACLU also contends that the "day-to-day practice of permitting 'informal' access to bank records is, unfortunately, widespread." Brief for Appellant ACLU in No. 72–1196, p. 58.

The record contains no showing of any attempt by the Government, formal or informal, to compel the production of bank records containing information relating to the ACLU; we accordingly express no opinion whether notice would in such an instance be required by either the Act or the Constitution.

remote than the threat assertedly posed by the Army's system of compilation and distribution of information which we declined to adjudicate in *Laird* v. *Tatum,* 408 U. S. 1 (1972).

IV

We proceed now to address the constitutional challenges directed at the reporting requirements of the regulations authorized in Title II of the Act. Title II authorizes the Secretary to require reporting of two general categories of banking transactions: foreign and domestic. The District Court upheld the constitutionality of the foreign transaction reporting requirements of regulations issued under Title II; certain of the plaintiffs below, appellants in No. 72–1196, have appealed from that portion of the District Court's judgment, and here renew their contentions of constitutional infirmity in the foreign reporting regulations based upon the First, Fourth, and Fifth Amendments. The District Court invalidated the Act insofar as it authorized the Secretary to promulgate regulations requiring banks to report domestic transactions involving their customers, and the Government in No. 72–1073 appeals from that portion of the District Court's judgment.

As noted above, the regulations issued by the Secretary under the authority of Title II contain two essential reporting requirements with respect to foreign financial transactions. Chapter 3 of Title II of the Act, 31 U. S. C. §§ 1101–1105, and the corresponding regulation, 31 CFR § 103.23, require individuals to report transportation of monetary instruments into or out of the United States, or receipts of such instruments in the United States from places outside the United States, if the instrument transported or received has a value in excess of $5,000. Chapter 4 of Title II of the Act, 31 U. S. C. §§ 1121–1122, and the corresponding regulation, 31 CFR § 103.24, gen-

erally require United States citizens, residents, and businessmen to file reports of their relationships with foreign financial institutions.

The domestic reporting provisions of the Act as implemented by the regulations, in contrast to the foreign reporting requirements, apply only to banks and financial institutions. In enacting the statute, Congress provided in § 221, 31 U. S. C. § 1081, that the Secretary might specify the types of currency transactions which should be reported:

> "Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe."

Section 222 of the Act, 31 U. S. C. § 1082, authorizes the Secretary to require such reports from the domestic financial institution involved, from the parties to the transactions, or from both. In exercising his authority under these sections, the Secretary has promulgated regulations which require only that the financial institutions make the report to the Internal Revenue Service; he has not required any report from the individual parties to domestic financial transactions.[27] The applicable regulation, 31 CFR § 103.22, requires the financial institution to "file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000." The regulation exempts several types of currency transactions

[27] See n. 29, *infra*.

from this reporting requirement, including transactions "with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned." *Ibid.*

A. Fourth Amendment Challenge to the Foreign Reporting Requirements

The District Court, in differentiating for constitutional purposes between the foreign reporting requirements and the domestic reporting requirements imposed by the Secretary, relied upon our opinion in *United States* v. *U. S. District Court,* 407 U. S. 297 (1972), for the proposition that Government surveillance in the area of foreign relations is in some instances subject to less constitutional restraint than would be similar activity in domestic affairs. Our analysis does not take us over this ground.

The plenary authority of Congress to regulate foreign commerce, and to delegate significant portions of this power to the Executive, is well established. *C. & S. Air Lines* v. *Waterman Corp.,* 333 U. S. 103, 109 (1948); *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294 (1933). Plaintiffs contend that in exercising that authority to require reporting of previously described foreign financial transactions, Congress and the Secretary have abridged their Fourth Amendment rights.

The familiar language of the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Since a statute requiring the filing and subsequent publication of a corporate tax return has been upheld against a Fourth Amendment challenge, *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 174–176 (1911), reporting requirements are by no means

per se violations of the Fourth Amendment. Indeed, a contrary holding might well fly in the face of the settled sixty-year history of self-assessment of individual and corporate income taxes in the United States. This Court has on numerous occasions recognized the importance of the self-regulatory aspects of that system, and interests of the Congress in enforcing it:

> "In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure it requires him to make in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil." *Helvering* v. *Mitchell,* 303 U. S. 391, 399 (1938).

To the extent that the reporting requirements of the Act and the settled practices of the tax collection process are similar, this history must be overcome by those who argue that the reporting requirements are a violation of the Fourth Amendment. Plaintiffs contend, however, that *Boyd* v. *United States,* 116 U. S. 616 (1886), establishes the invalidity of the foreign reporting requirement under the Fourth Amendment, and that the particular requirements imposed are so indiscriminate in their nature that the regulations must be deemed to be the equivalent of a general warrant of the kind condemned as obnoxious to the Fourth Amendment in cases such as *Stanford* v. *Texas,* 379 U. S. 476 (1965). We do not think these cases would support plaintiffs even if their contentions were directed at the domestic reporting requirements; in light of the fact that the foreign reporting requirements deal with matters in foreign commerce, we think plaintiffs' reliance on the cases to challenge those requirements must fail.

Boyd v. *United States, supra,* is a case which has been the subject of repeated citation, discussion, and explanation since the time of its decision 88 years ago. In *Communist Party* v. *SACB,* 367 U. S. 1 (1961), the Court described the *Boyd* holding as follows:

> "The *Boyd* case involved a statute providing that in proceedings other than criminal arising under the revenue laws, the Government could secure an order of the court requiring the production by an opposing claimant or defendant of any documents under his control which, the Government asserted, might tend to prove any of the Government's allegations. If production were not made, the allegations were to be taken as confessed. On the Government's motion, the District Court had entered such an order, requiring the claimants in a forfeiture proceeding to produce a specified invoice. Although the claimants objected that the order was improper and the statute unconstitutional in coercing self-incriminatory disclosures and permitting unreasonable searches and seizures, they did, under protest, produce the invoice, which was, again over their constitutional objection, admitted into evidence. This Court held that on such a record a judgment for the United States could not stand, and that the statute was invalid as repugnant to the Fourth and Fifth Amendments." *Id.,* at 110.

But the *Boyd* Court recognized that the Fourth Amendment does not prohibit all requirements that information be made available to the Government:

> "[T]he supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of

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unreasonable searches and seizures." 116 U. S., at 623–624.

Stanford v. *Texas, supra,* involved a warrant issued by a state judge which described petitioner's home and authorized the search and seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas." This Court found the warrant to be an unconstitutional general warrant, and invalidated the search and seizure conducted pursuant to it. Unlike the situation in *Stanford,* the Secretary's regulations do not authorize indiscriminate rummaging among the records of the plaintiffs, nor do the reports they require deal with literary material as in *Stanford;* the information sought is about commerce, not literature. The reports of foreign financial transactions required by the regulations must contain information as to a relatively limited group of financial transactions in foreign commerce, and are reasonably related to the statutory purpose of assisting in the enforcement of the laws of the United States.

Of primary importance, in addition, is the fact that the information required by the foreign reporting requirements pertains only to commercial transactions which take place across national boundaries. Mr. Chief Justice Taft, in his opinion for the Court in *Carroll* v. *United States,* 267 U. S. 132 (1925), observed:

> "Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Id.,* at 154.

This settled proposition has been reaffirmed as recently

as last Term in *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 272 (1973). If reporting of income may be required as an aid to enforcement of the federal revenue statutes, and if those entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment, we see no reason to invalidate the Secretary's regulations here. The statutory authorization for the regulations was based upon a conclusion by Congress that international currency transactions and foreign financial institutions were being used by residents of the United States to circumvent the enforcement of the laws of the United States. The regulations are sufficiently tailored so as to single out transactions found to have the greatest potential for such circumvention and which involve substantial amounts of money. They are therefore reasonable in the light of that statutory purpose, and consistent with the Fourth Amendment.

B. Fourth Amendment Challenge to the Domestic Reporting Requirements

The District Court examined the domestic reporting requirements imposed on plaintiffs by looking to the broad authorization of the Act itself, without specific reference to the regulations promulgated under its authority. The District Court observed:

> "[A]lthough to date the Secretary has required reporting only by the financial institutions and then only of *currency* transactions over $10,000, he is empowered by the Act, as indicated above, to require, if he so decides, reporting not only by the financial institution, but also by other parties to or participants in transactions with the institutions and, further, that the Secretary may require reports, not only of currency transactions but of any transaction

involving any monetary instrument—and in any amount—large or small." 347 F. Supp., at 1246.

The District Court went on to pose, as the question to be resolved, whether "these provisions, broadly authorizing an executive agency of government to require financial institutions and parties [thereto] . . . to routinely report . . . the detail of almost every conceivable financial transaction . . . [are] such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment." *Ibid.*

Since, as we have observed earlier in this opinion, the statute is not self-executing, and were the Secretary to take no action whatever under his authority there would be no possibility of criminal or civil sanctions being imposed on anyone, the District Court was wrong in framing the question in this manner. The question is not what sort of reporting requirements *might* have been imposed by the Secretary under the broad authority given him in the Act, but rather what sort of reporting requirements he did *in fact* impose under that authority.

> "Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. 'Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.' *Watson* v. *Buck,* 313 U. S. 387, 402." *Communist Party* v. *SACB,* 367 U. S., at 71.

The question for decision, therefore, is whether the regulations relating to the reporting of domestic trans-

actions, violations of which could subject those required to report to civil or criminal penalties, invade any Fourth Amendment right of those required to report. To that question we now turn.

The regulations issued by the Secretary require the reporting of domestic financial transactions only by financial institutions. *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950), held that organizations engaged in commerce could be required by the Government to file reports dealing with particular phases of their activities. The language used by the Court in that case is instructive:

> "It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. *Cf. Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186. Although the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men,' Brandeis, J., dissenting in *Olmstead* v. *United States,* 277 U. S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, *Boyd* v. *United States,* 116 U. S. 616, *Hale* v. *Henkel,* 201 U. S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale* v. *Henkel, supra; United States* v. *White,* 322 U. S. 694.
>
> "While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. *Cf. United States* v. *White, supra.* They are endowed with public attributes. They have a collective impact upon society, from

> which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. [Citations omitted.] Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." 338 U. S., at 651–652.

We have no difficulty then in determining that the Secretary's requirements for the reporting of domestic financial transactions abridge no Fourth Amendment right of the banks themselves. The bank is not a mere stranger or bystander with respect to the transactions which it is required to record or report. The bank is itself a party to each of these transactions, earns portions of its income from conducting such transactions, and in the past may have kept records of similar transactions on a voluntary basis for its own purposes. See *United States* v. *Biswell,* 406 U. S., at 316. The regulations presently in effect governing the reporting of domestic currency transactions require information as to the personal and business identity of the person conducting the transaction and of the person or organization for whom it was conducted, as well as a summary description of the nature of the transaction. It is conceivable, and perhaps likely, that the bank might not of its own volition compile this amount of detail for its own purposes, and therefore to that extent the regulations put the bank in the position of seeking information from the customer in order to eventually report it to the Government. But as we have noted above, "neither

incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." *United States* v. *Morton Salt Co., supra,* at 652.

The regulations do not impose unreasonable reporting requirements on the banks. The regulations require the reporting of information with respect to abnormally large transactions in currency, much of which information the bank as a party to the transaction already possesses or would acquire in its own interest. To the extent that the regulations in connection with such transactions require the bank to obtain information from a customer simply because the Government wants it, the information is sufficiently described and limited in nature, and sufficiently related to a tenable congressional determination as to improper use of transactions of that type in interstate commerce, so as to withstand the Fourth Amendment challenge made by the bank plaintiffs. "[T]he inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.'" *United States* v. *Morton Salt Co., supra,* at 652–653; see *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 208 (1946).

In addition to the Fourth Amendment challenge to the domestic reporting requirements made by the bank plaintiffs, we are faced with a similar challenge by the depositor plaintiffs, who contend that since the reports of domestic transactions which the bank is required to make will include transactions to which the depositors were parties, the requirement that the bank make a report of the transaction violates the Fourth Amendment rights of the depositor. The complaint filed in the District Court by the ACLU and the depositors contains

no allegation by any of the individual depositors that they were engaged in the type of $10,000 domestic currency transaction which would necessitate that their bank report it to the Government. This is not a situation where there might have been a mere oversight in the specificity of the pleadings and where this Court could properly infer that participation in such a transaction was necessarily inferred from the fact that the individual plaintiffs allege that they are in fact "depositors." Such an inference can be made, for example, as to the recordkeeping provisions of Title I, which require the banks to keep various records of certain transactions by check; as our discussion of the challenges by the individual depositors to the recordkeeping provisions, *supra*, implicitly recognizes, the allegation that one is a depositor is sufficient to permit consideration of the challenges to the recordkeeping provisions, since any depositor would to some degree be affected by them. Here, however, we simply cannot assume that the mere fact that one is a depositor in a bank means that he has engaged or will engage in a transaction involving more than $10,000 in currency, which is the only type of domestic transaction which the Secretary's regulations require that the banks report. That being so, the depositor plaintiffs lack standing to challenge the domestic reporting regulations, since they do not show that their transactions are required to be reported.[28]

> "Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from the puta-

[28] We hold here and in other parts of this opinion that certain of the plaintiffs did not make the requisite allegations in the District Court to give them standing to challenge the Act and the regulations issued pursuant to it. In so holding, we do not, of course, mean to imply that such claims would be meritorious if presented by a litigant who has standing.

> tively illegal action before a federal court may assume jurisdiction.' *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617 (1973). There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). . . . Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. *Massachusetts* v. *Mellon,* 262 U. S. 447, 488 (1923). The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' *Golden* v. *Zwickler,* 394 U. S. 103, 109–110 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273 (1941); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89–91 (1947)." *O'Shea* v. *Littleton,* 414 U. S. 488, 493–494 (1974) (footnote omitted).

We therefore hold that the Fourth Amendment claims of the depositor plaintiffs may not be considered on the record before us. Nor do we think that the California Bankers Association or the Security National Bank can vicariously assert such Fourth Amendment claims on behalf of bank customers in general.

The regulations promulgated by the Secretary require that a report concerning a domestic currency transaction involving more than $10,000 be filed only by the financial institution which is a party to the transaction; the regulations do not require a report from the customer. 31 CFR § 103.22; see 31 U. S. C. § 1082. Both the bank and depositor plaintiffs here argue that the regulations are constitutionally defective because they do not require

the financial institution to notify the customer that a report will be filed concerning the domestic currency transaction. Since we have held that the depositor plaintiffs have not made a sufficient showing of injury to make a constitutional challenge to the domestic reporting requirements, we do not address ourselves to the necessity of notice to those bank customers whose transactions must be reported. The fact that the regulations do not require the banks to notify the customer of the report violates no constitutional right of the banks, and the banks in any event are left free to adopt whatever customer notification procedures they desire.[29]

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[29] Plaintiffs similarly contend that the Secretary's regulation requiring the reporting of domestic currency transactions *only* by the banks or financial institutions which are parties thereto, violates a specific requirement of the Act. Section 222 of the Act, 31 U. S. C. § 1082, provides in pertinent part:

"The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require."

Plaintiffs contend that this language *requires* the Secretary to require either a signature on the report by the individual customer in the currency transaction, or a report from that customer. Since the Secretary has only required a report from the financial institution, plaintiffs urge, in addition, that there will not be notice to the individual customer of the report made by the financial institution.

In rebuttal, the Government urged in oral argument, Tr. of Oral Arg. 64–70, that not only does § 206 of the Act, 31 U. S. C. § 1055, give the Secretary broad authority to make exceptions to the requirements of the Act in promulgating the regulations, but that the House and Senate Reports on the bills considered by each house of the Congress, each of which contained a provision identical to the language of § 222, indicated that each chamber read that language differently. The Senate Committee believed that the language permitted the Secretary to require reports from the financial institution, the customer, *or* both, S. Rep. No. 91–1139, *supra*, at 15, while the House Committee felt that the language required

C. Fifth Amendment Challenge to the Foreign and Domestic Reporting Requirements

The District Court rejected the depositor plaintiffs' claim that the foreign reporting requirements violated the depositors' Fifth Amendment privilege against compulsory self-incrimination, and found it unnecessary to consider the similarly based challenge to the domestic reporting requirements since the latter were found to be in violation of the Fourth Amendment. The appeal of the depositor plaintiffs in No. 72–1196 challenges the foreign reporting requirements under the Fifth Amendment, and their brief likewise challenges the domestic reporting requirements as violative of that Amendment. Since they are free to urge in this Court reasons for affirming the judgment of the District Court which may not have been relied upon by the District Court, we consider here the Fifth Amendment objections to both the foreign and the domestic reporting requirements.

As we noted above, the bank plaintiffs, being corporations, have no constitutional privilege against compulsory self-incrimination by virtue of the Fifth Amendment. *Hale* v. *Henkel,* 201 U. S. 43 (1906). Their brief urges that they may vicariously assert Fifth Amendment claims on behalf of their depositors. But since we hold *infra* that those depositor plaintiffs who are actually parties in this litigation are premature in asserting any Fifth Amendment claims, we do not believe that the banks

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reports to be filed by both the financial institution and the customer, H. R. Rep. No. 91–975, *supra,* at 22.

We similarly do not reach this claim as it relates to the depositor plaintiffs since they failed to allege sufficient injury below. Whatever the merits of such a contention *vis-à-vis* the depositors, the regulation clearly has no adverse effect on any constitutional right of the banks, since the statute indisputably authorizes the Secretary to require a report from the bank.

under these circumstances have standing to assert Fifth Amendment claims on behalf of customers in general.

The individual depositor plaintiffs below made various allegations in the complaint and affidavits filed in the District Court. Plaintiff Stark alleged that he was, in addition to being president of plaintiff Security National Bank, a customer of and depositor in the bank. Plaintiff Marson alleged that he was a customer of and depositor in the Bank of America. Plaintiff Lieberman alleged that he had repeatedly in the recent past transported or shipped one or more monetary instruments exceeding $5,000 in value from the United States to places outside the United States, and expected to do likewise in the near future. Plaintiffs Lieberman, Harwood, Bruer, and Durell each alleged that they maintained a financial interest in and signature authority over one or more bank accounts in foreign countries. This, so far as we can ascertain from the record, is the sum and substance of the depositors' allegations of fact upon which they seek to mount an attack on the reporting requirements of regulations as violative of the privilege against compulsory self-incrimination granted to each of them by the Fifth Amendment.

Considering first the challenge of the depositor plaintiffs to the foreign reporting requirements, we hold that such claims are premature. In *United States* v. *Sullivan,* 274 U. S. 259 (1927), this Court reviewed a judgment of the Court of Appeals for the Fourth Circuit, 15 F. 2d 809 (1926), which had held that the Fifth Amendment protected the respondent from being punished for failure to file an income tax return. This Court reversed the decision below, stating:

> "As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo,* 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that

> the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." 274 U. S., at 263–264.

Here the depositor plaintiffs allege that they intend to engage in foreign currency transactions or dealings with foreign banks which the Secretary's regulations will require them to report, but they make no additional allegation that any of the information required by the Secretary will tend to incriminate them. It will be time enough for us to determine what, if any, relief from the reporting requirement they may obtain in a judicial proceeding when they have properly and specifically raised a claim of privilege with respect to particular items of information required by the Secretary, and the Secretary has overruled their claim of privilege. The posture of plaintiffs' Fifth Amendment rights here is strikingly similar to those asserted in *Communist Party* v. *SACB*, 367 U. S., at 105–110. The Communist Party there sought to assert the Fifth Amendment claims of its officers as a

defense to the registration requirement of the Subversive Activities Control Act, although the officers were not at that stage of the proceeding required by the Act to register, and had neither registered nor refused to register on the ground that registration might incriminate them. The Court said:

> "If a claim of privilege is made, it may or may not be honored by the Attorney General. We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. Whatever proceeding may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue." *Id.*, at 107.

Plaintiffs argue that cases such as *Albertson* v. *SACB*, 382 U. S. 70 (1965), have relaxed the requirements of earlier cases, but we do not find that contention supported by the language or holding of that case. There the Attorney General had petitioned for and obtained an order from the Subversive Activities Control Board compelling certain named members of the Communist Party to register their affiliation. In response to the Attorney General's petitions, both before the Board and in subsequent judicial proceedings, the Communist Party members had asserted the privilege against self-incrimination, and their claims had been rejected by the Attorney General. A previous decision of this Court had held that an affirmative answer to the inquiry as to membership in the Communist Party was an incriminating admission protected under the Fifth Amendment. *Blau* v. *United States*, 340 U. S. 159 (1950). The differences then between the posture of the depositor plaintiffs in this case and that of petitioner in *Albertson* v. *SACB*, *supra*, are evident.

We similarly think that the depositor plaintiffs' challenges to the domestic reporting requirements are premature. As we noted above, it is not apparent from the allegations of the complaints in these actions that any of the depositor plaintiffs would be engaged in $10,000 domestic transactions with the bank which the latter would be required to report under the Secretary's regulations pertaining to such domestic transactions. Not only is there no allegation that any depositor engaged in such transactions, but there is no allegation in the complaint that any report which such a bank was required to make would contain information incriminating any depositor. To what extent, if any, depositors may claim a privilege arising from the Fifth Amendment by reason of the obligation of the bank to report such a transaction may be left for resolution when the claim of privilege is properly asserted.

Depositor plaintiffs rely on *Marchetti* v. *United States,* 390 U. S. 39 (1968), *Grosso* v. *United States,* 390 U. S. 62 (1968), and *Haynes* v. *United States,* 390 U. S. 85 (1968), as supporting the merits of their Fifth Amendment claim. In each of those cases, however, a claim of privilege was asserted as a defense to the requirement of reporting particular information required by the law under challenge, and those decisions therefore in no way militate against our conclusion that depositor plaintiffs' efforts to litigate the Fifth Amendment issue at this time are premature.

D. Plaintiff ACLU's First Amendment Challenge to the Foreign and Domestic Reporting Requirements

The ACLU claims that the reporting requirements with respect to foreign and domestic transactions invade its associational interests protected by the First Amend-

ment. We have earlier held a similar claim by this organization to be speculative and hypothetical when addressed to the recordkeeping requirements imposed by the Secretary. *Supra,* at 55–57. The requirement that particular transactions be reported to the Government, rather than that records of them be available through normal legal process, removes part of the speculative quality of the claim. But the only allegation found in the complaints with respect to the financial activities of the ACLU states that it maintains accounts at one of the San Francisco offices of the Wells Fargo Bank & Trust Company. There is no allegation that the ACLU engages with any regularity in abnormally large domestic currency transactions, transports or receives monetary instruments from channels of foreign commerce, or maintains accounts in financial institutions in foreign countries. Until there is some showing that the reporting requirements contained in the Secretary's regulations would require the reporting of information with respect to the organization's financial activities, no concrete controversy is presented to this Court for adjudication. *O'Shea* v. *Littleton,* 414 U. S., at 493–494.

V

All of the bank and depositor plaintiffs have stressed in their presentations to the District Court and to this Court that the recordkeeping and reporting requirements of the Bank Secrecy Act are focused in large part on the acquisition of information to assist in the enforcement of the criminal laws. While, as we have noted, Congress seems to have been equally concerned with civil liability which might go undetected by reason of transactions of the type required to be recorded or reported, concern for the enforcement of the criminal law was undoubtedly prominent in the minds of the legislators who considered

the Act. We do not think it is strange or irrational that Congress, having its attention called to what appeared to be serious and organized efforts to avoid detection of criminal activity, should have legislated to rectify the situation. We have no doubt that Congress, in the sphere of its legislative authority, may just as properly address itself to the effective enforcement of criminal laws which it has previously enacted as to the enactment of those laws in the first instance. In so doing, it is of course subject to the strictures of the Bill of Rights, and may not transgress those strictures.[30] But the fact that a legislative enactment manifests a concern for the enforcement of the criminal law does not cast any generalized pall of constitutional suspicion over it. Having concluded that on the record in these appeals, plaintiffs have failed to state a claim for relief under the First, Fourth, and Fifth Amendments, and having concluded that the enactment in question was within the legislative authority of Congress, our inquiry is at an end.

On the appeal of the California Bankers Association in No. 72–985 from that portion of the judgment of the District Court upholding the recordkeeping requirements imposed by the Secretary pursuant to Title I, the judgment is affirmed. On the appeal of the bank and depositor plaintiffs in No. 72–1196 from that portion of the District Court's judgment upholding the recordkeeping requirements and regulations of Title I and the foreign reporting requirements imposed under the authority of Title II, the judgment is likewise affirmed. On the Gov-

[30] There have been recent hearings in Congress on various legislative proposals to amend the Bank Secrecy Act. Hearings to amend the Bank Secrecy Act (S. 3814 and S. 3828) before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (1972). See S. 3814 and S. 3828, 92d Cong., 2d Sess. (1972).

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ernment's appeal in No. 72–1073 from that portion of the District Court's judgment which held that the domestic reporting requirements imposed under Title II of the Act violated the Constitution, the judgment is reversed. The cause is remanded to the District Court for disposition consistent with this opinion.

So ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion, but add a word concerning the Act's domestic reporting requirements.

The Act confers broad authority on the Secretary to require reports of domestic monetary transactions from the financial institutions and parties involved. 31 U. S. C. §§ 1081 and 1082. The implementing regulations, however, require only that the financial institution "file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a *transaction in currency of more than $10,000.*" 31 CFR § 103.22 (italics added). As the Court properly recognizes, we must analyze plaintiffs' contentions in the context of the Act as narrowed by the regulations. *Ante,* at 64. From this perspective, I agree that the regulations do not constitute an impermissible infringement of any constitutional right.

A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations,

and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. *United States* v. *U. S. District Court,* 407 U. S. 297, 316–317 (1972). As the issues are presently framed, however, I am in accord with the Court's disposition of the matter.

MR. JUSTICE DOUGLAS, dissenting.

I

The Court expresses a doubt that the California Bankers Association has standing to litigate the claims it asserts. That doubt, however, should be dissipated by our decisions.

Sierra Club v. *Morton,* 405 U. S. 727, 739, stated unequivocally that "an organization whose members are injured may represent those members in a proceeding for judicial review."

Appellants in No. 72–1196 are a national bank, a bank customer and depositor, a membership organization which is a customer of banks and receives money through banks for its members, a businessman who has engaged in and expects to engage in foreign financial transactions, and individuals having interests in or authority over foreign bank accounts. There can hardly be any doubt that these persons—at least the individuals and the membership organization—have standing. I think the same is true of the national bank in No. 72–1196 and the California Bankers Association in No. 72–985.

The claims the associations litigate in these cases are not only those of its members but also those of the depositors of those member banks. This will cost the banks, it is estimated, over $6 million a year. Certainly that is enough to give the banks standing. Moreover, they must spy on their customers. The Bank Secrecy Act requires banks to record and retain the details of their customers' financial lives. In *Pierce* v. *Society of Sisters,* 268 U. S. 510, the Court upheld the right of a representative litigant, a parochial school, to have standing to raise questions pertaining to the rights of parents, guardians, and children. See *Barrows* v. *Jackson,* 346 U. S. 249, 257. In *Eisenstadt* v. *Baird,* 405 U. S. 438, we upheld the standing of a distributor of contraceptives to assert rights of unmarried persons, since they were denied "a forum in which to assert their own rights." *Id.,* at 446. The question of standing has been variously described. But the "gist" of the question, we said in *Baker* v. *Carr,* 369 U. S. 186, 204, was whether the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." There is that "concrete adverseness" here; and that doubtless is the reason the Solicitor General does not raise the question which the Court now stirs.

II

The Act has as its primary goal the enforcement of the criminal law.[1] The recordkeeping requirements orig-

[1] The House Report, No. 91–975, p. 10, states:

"Petty criminals, members of the underworld, those engaging in 'white collar' crime and income tax evaders use, in one way or another, financial institutions in carrying on their affairs."

That was the reason for requiring the report of large domestic cash transactions. "Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or

inated according to Congressman Patman, author of the measure, with the Department of Justice and the Internal Revenue Service in response to two problems: (1) "A trend was developing in the larger banks away from their traditional practices of microfilming all checks drawn on them." 116 Cong. Rec. 16953. (2) As respects the identification of depositors, "[a] typical example might involve a situation where a person with a criminal reputation holds an account but does not personally make deposits or withdrawals." *Ibid.*

The purpose of the Act was to give the Secretary of the Treasury "primary responsibility" under Title II "to see to it that criminals do not take undue advantage

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its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials." *Id.*, at 11.

A sponsor on the floor of the House stated: "With respect to full financial recordkeeping, the problem can be simply stated; in the past decade, as organized crime and criminals have become more sophisticated, more and greater use has been made by criminal elements of our Nation's financial institutions. Law enforcement officials believe that an effective attack on organized crime requires the maintenance of adequate and appropriate records by financial institutions." 116 Cong. Rec. 16950.

Congressman Patman, author of the bill, stated: "This is really a bill which, if enacted into law, will be the longest step in the direction of stopping crime than any other we have had before this Congress in a long time." *Id.*, at 16951.

While it started with a different objective, it was changed to serve an additional purpose: "We also discovered that secret foreign bank accounts were not the only criminal activities related to the banking field. The major law enforcement authority—the Justice Department—of the U. S. Government called our attention to the urgent need for regulations which would make uniform and adequate the present recordkeeping practices, or lack of recordkeeping practices, by domestic banks and other financial institutions." *Id.*, at 16952.

of international trade and go undetected and unpunished." *Id.*, at 16954. He added: "I would be the first to admit that this legislation does not provide perfect crime prevention. However, it is felt that the legislation will substantially increase the risk of discovery of any criminal who undertakes to hide his activity behind foreign secrecy." *Id.*, at 16955.

The same purpose was reflected in the Senate. Senator Proxmire, the author of the Senate version of the bill, stated: "[T]he purpose of the bill is to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime." [2] *Id.*, at 32627.

Customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected in their bank accounts. That wall is not impregnable. Our Constitution provides the procedures whereby the confidentiality of one's financial affairs may be disclosed.

A

First, as to the recordkeeping requirements,[3] their announced purpose is that they will have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings," 12 U. S. C. §§ 1829b (a)(2), 1953 (a). The duty of the bank or institution is to microfilm or otherwise copy every check, draft, or similar instrument drawn on it or presented to it for payment and to keep

[2] The Senate Report, No. 91–1139, is replete with the same philosophy. See pp. 1, 5, 7, 8.

[3] The Act authorizes the Secretary to issue regulations to carry out its purposes, 12 U. S. C. § 1829b (b). It empowers him to define institutions or persons affected, 12 U. S. C. §§ 1953 (a), (b)(5), to make exceptions, exemptions, or other special arrangements, 12 U. S. C. §§ 1829b (c), (f); to seek injunctions, 12 U. S. C. § 1954; and to assess and collect civil penalties, 12 U. S. C. § 1955.

a record of each one "received by it for deposit or collection," 12 U. S. C. §§ 1829b (d)(1) and (2). The retention is for up to six years unless the Secretary determines that "a longer period is necessary," 12 U. S. C. § 1829b (g). The regulations [4] issued by the Secretary

[4] Title 31 CFR § 103.34 at the time this litigation was commenced provided that banks shall:

"(a) . . . secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

"(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

"(1) Each document granting signature authority over each deposit or share account;

"(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

"(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

"(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer, comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section;

"(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

"(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities,

show the depth and extent of the quicksand in which our financial institutions must now operate.[5]

It is estimated that a minimum of 20 billion checks—and perhaps 30 billion—will have to be photocopied and that the weight of these little pieces of paper will approximate 166 million pounds a year.[6]

It would be highly useful to governmental espionage to have like reports from all our bookstores, all our hard-

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or credit, of more than $10,000 to a person, account or place outside the United States;

"(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

"(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

"(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

"(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subparagraph shall be applicable only with respect to demand deposits." 37 Fed. Reg. 6914.

During this litigation the above provision was amended by the Secretary making it unnecessary to microfilm copies of checks "drawn for $100 or less," 31 CFR § 103.34 (b)(3) (1973). Since banks must copy all checks it is hard to see how this new exemption is meaningful.

[5] Like requirements are placed on brokers and dealers in securities, 31 CFR § 103.35.

[6] Hearings on Foreign Bank Secrecy and Bank Records (H. R. 15073) before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess., 320 (1969–1970).

ware and retail stores, all our drugstores. These records too might be "useful" in criminal investigations.

One's reading habits furnish telltale clues to those who are bent on bending us to one point of view. What one buys at the hardware and retail stores may furnish clues to potential uses of wires, soap powders, and the like used by criminals. A mandatory recording of all telephone conversations would be better than the recording of checks under the Bank Secrecy Act, if Big Brother is to have his way. The records of checks—now available to the investigators—are highly useful. In a sense a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on *ad infinitum*. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.

It is, I submit, sheer nonsense to agree with the Secretary that *all bank records of every citizen* "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." That is unadulterated nonsense unless we are to assume that every citizen is a crook, an assumption I cannot make.

Since the banking transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests, a regulation impounding them and making them automatically available to all federal investigative agencies is a sledge-hammer approach to a problem that only a delicate scalpel can manage. Where fundamental personal rights are involved—as is true when as here the

Government gets large access to one's beliefs, ideas, politics, religion, cultural concerns, and the like—the Act should be "narrowly drawn" (*Cantwell* v. *Connecticut,* 310 U. S. 296, 307) to meet the precise evil.[7] Bank accounts at times harbor criminal plans. But we only rush with the crowd when we vent on our banks and their customers the devastating and leveling requirements of the present Act. I am not yet ready to agree that America is so possessed with evil that we must level all constitutional barriers to give our civil authorities the tools to catch criminals.

Heretofore this Nation has confined compulsory record-keeping to that required to monitor either (1) the record-keeper, or (2) his business. *Marchetti* v. *United States,* 390 U. S. 39, and *United States* v. *Darby,* 312 U. S. 100, are illustrative. Even then, as Mr. Justice Harlan writing for the Court said, they must be records that would "customarily" be kept, have a "public" rather than a private purpose, and arise out of an " 'essentially non-criminal and regulatory area of inquiry.' " *Marchetti* v. *United States, supra,* at 57.

Those requirements are in no way satisfied here, and yet there is saddled upon the banks of this Nation an estimated bill of over $6 million a year to spy on their customers.

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[7] And see *Roe* v. *Wade,* 410 U. S. 113, 155; *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 101; *Gooding* v. *Wilson,* 405 U. S. 518, 522; *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 151; *Cameron* v. *Johnson,* 390 U. S. 611, 617; *Zwickler* v. *Koota,* 389 U. S. 241, 250; *Whitehill* v. *Elkins,* 389 U. S. 54, 62; *Ashton* v. *Kentucky,* 384 U. S. 195, 201; *Elfbrandt* v. *Russell,* 384 U. S. 11, 18.

The same view is often expressed in concurring opinions. See *Doe* v. *Bolton,* 410 U. S. 179, 216 (DOUGLAS, J., concurring); *Gregory* v. *Chicago,* 394 U. S. 111, 119 (Black, J., concurring); *United States* v. *Robel,* 389 U. S. 258, 270 (BRENNAN, J., concurring in result).

B

Second, as to the *reporting* provisions of the Act, they require disclosure of two types of foreign financial transactions and relationships. One provision requires a *report* of transportation into or out of the country of monetary instruments exceeding $5,000.[8] Another requires parties to any transaction or relationship with "a foreign financial agency" to make such reports or make and keep such records as the Secretary may require.[9] Civil [10] and criminal [11] penalties are sanctions behind these *reporting* provisions.

The Act also requires the Secretary to make the *reported information* concerning transactions "available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government" upon request.[12] And to overcome any claims of self-incrimination it requires the grant of use immunity.[13]

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[8] 31 U. S. C. § 1101.

[9] 31 U. S. C. § 1121. The Secretary requires reports in yearly tax returns of any "financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country," 31 CFR § 103.24.

[10] 31 U. S. C. §§ 1056, 1102–1103; 31 CFR §§ 103.47–103.48.

[11] 31 U. S. C. §§ 1058–1059; 31 CFR § 103.49.

[12] 31 U. S. C. § 1061. The regulations read as follows:

"The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor." 31 CFR § 103.43.

[13] 31 U. S. C. § 1060. The Court in *Kastigar* v. *United States,* 406 U. S. 441, held that "use immunity" satisfies the Self-Incrimination Clause of the Fifth Amendment. I disagreed then and persist in my view that it is "transactional" immunity, not "use" immunity,

As respects domestic transactions the Secretary established two *reporting* requirements. (1) Routine reports are, with some exceptions, required concerning any transaction of more than $10,000 in currency from each financial institution involved.[14] The signature of at least one principal party to the transaction is required.[15] (2) The Secretary at the time of the trial reserved the right to grant exemptions from the requirements, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part.[16]

We said in *Katz* v. *United States*, 389 U. S. 347, 351–352: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to pre-

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that is required to lift this constitutional protection. See *id.*, at 462–467 (dissenting opinion). But since "use" immunity is "the law" of the present Court—though I doubt if it can long survive—I do not write this dissent against the narrow immunity that is granted.

[14] 31 CFR § 103.22.

[15] 31 U. S. C. § 1082.

[16] At that time 31 CFR § 103.45 read as follows: "(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

"(b) The Secretary shall have the authority to further define all terms used herein."

Since then, the language "impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify" has been deleted from § 103.45.

serve as private, even in an area accessible to the public, may be constitutionally protected." As stated in *United States* v. *White,* 401 U. S. 745, 752, the question is "what expectations of privacy" will be protected by the Fourth Amendment "in the absence of a warrant." A search and seizure conducted without a warrant is *per se* unreasonable, subject to "jealously and carefully drawn" exceptions, *Jones* v. *United States,* 357 U. S. 493, 499. One's bank accounts are within the "expectations of privacy" category. For they mirror not only one's finances but his interests, his debts, his way of life, his family, and his civic commitments. There are administrative summonses for documents, cf. *Camara* v. *Municipal Court,* 387 U. S. 523; *See* v. *City of Seattle,* 387 U. S. 541. But there is a requirement that their enforcement receive judicial scrutiny and a judicial order, *United States* v. *U. S. District Court,* 407 U. S. 297, 313–318. As we said in that case, "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *Id.,* at 317.

Suppose Congress passed a law requiring telephone companies to record and retain all telephone calls and make them available to any federal agency on request. Would we hesitate even a moment before striking it down? I think not, for we condemned in *United States* v. *U. S. District Court* "the broad and unsuspected gov-

ernmental incursions into conversational privacy which electronic surveillance entails." *Id.*, at 313.

A checking account, as I have said, may well record a citizen's activities, opinion, and beliefs as fully as transcripts of his telephone conversations.

The Fourth Amendment warrant requirements may be removed by constitutional amendment but they certainly cannot be replaced by the Secretary of the Treasury's finding that certain information will be highly useful in "criminal, tax, or regulatory investigations or proceedings." 12 U. S. C. § 1951 (b).

We cannot avoid the question of the constitutionality of the reporting provisions of the Act and of the regulations by saying they have not yet been applied to a customer in any criminal case. Under the Act and regulations the reports go forward to the investigative or prosecuting agency on written request without notice to the customer. Delivery of the records without the requisite hearing of probable cause [17] breaches the Fourth Amendment.

I also agree in substance with my Brother BRENNAN'S view that the grant of authority by Congress to the Secretary of the Treasury is too broad to pass constitutional muster. This legislation is symptomatic of the

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[17] A criminal prosecution in this country for not reporting an overseas transaction is still a criminal prosecution under the Bill of Rights; and to these the Fourth Amendment has been applicable from the beginning. Cases of immigration officers stopping people at the border who are leaving or entering the country are obviously inapposite and certainly the Court cannot be serious in saying that the monetary value of the article being seized is relevant to whether the search and seizure without a warrant was constitutional. As said in *Katz* it is "persons" not "places" that the Fourth Amendment protects; and it would labor the point to engage in lengthy argument that "things" as well as "places" are not the object of the Fourth Amendment's concerns.

slow eclipse of Congress by the mounting Executive power. The phenomenon is not brand new. It was reflected in *Schechter Corp.* v. *United States,* 295 U. S. 495. *United States* v. *Robel,* 389 U. S. 258, is a more recent example. *National Cable Television Assn.* v. *United States,* 415 U. S. 336, and *FPC* v. *New England Power Co.,* 415 U. S. 345, are even more recent. These omnibus grants of power allow the Executive Branch to make the law as it chooses in violation of the teachings of *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, as well as *Schechter,* that lawmaking is a congressional, not an Executive, function.

MR. JUSTICE BRENNAN, dissenting.

I concur in Parts I and II–A of MR. JUSTICE DOUGLAS' opinion. As to the Act's foreign and domestic reporting requirements, however, I see no need to address the independent constitutional objections the plaintiffs below attempt to raise. The reporting requirements are inseparable from—and in some cases considerably broader than—the recordkeeping requirements. Thus, since in my view the recordkeeping provisions unconstitutionally vest impermissibly broad authority in the Secretary of the Treasury, see *United States* v. *Robel,* 389 U. S. 258, 269 (1967) (BRENNAN, J., concurring in result), the reporting provisions, too, are invalid.

The symbiotic nature of the recordkeeping and reporting requirements is clearly manifested in the expressions of congressional purpose found in 12 U. S. C. § 1951 (b) and 31 U. S. C. § 1051, which lay down blanket commands that "records" and "reports" be required where they "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."

One example of this interdependence may be found in 12 U. S. C. §§ 1951–1953, which apply to "any uninsured

bank or uninsured institution," terms which are themselves not defined in the Act. Section 1953 authorizes the Secretary to require the keeping of "any records or evidence of any type" so long as he may require them of insured banks. Section 1952 authorizes him to require "the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein." As appears from the legislative history, these provisions work in tandem, permitting the Secretary to detect instances of the use of sham or illegal transactions in which the institutional party is merely an alter ego of the customer it purportedly services. See S. Rep. No. 91–1139, p. 3 (1970); Hearings on Foreign Bank Secrecy and Bank Records (H. R. 15073) before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess., 10–14 (1969–1970). Neither provision would usefully aid the detection of such practices without the other.

Not only are the reporting and recordkeeping requirements functionally inseparable, but the reporting provisions impose additional requirements, thus adding to the power of the Secretary to invade individual rights. For instance, the reporting requirement for all transactions involving domestic financial institutions, 31 U. S. C. § 1081, authorizes the Secretary to require reports at any time and in any manner and detail, of any transaction that involves the "payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify." Although the Secretary has by regulation limited the meaning of "monetary instruments," 31 CFR § 103.11, and invoked the section only where the transaction involves more than $10,000, see 31 CFR § 103.22, this in no way alters the fundamental vice of the statute.

That vice, see concurring opinion in *United States* v. *Robel, supra,* is the delegation of power to the Secretary in broad and indefinite terms under a statute that lays down criminal sanctions and potentially affects fundamental rights. See *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Cantwell* v. *Connecticut,* 310 U. S. 296, 304–307 (1940). My view in *Robel* applies here:

> "Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. '[S]tandards of permissible statutory vagueness are strict . . .' in protected areas. *NAACP* v. *Button,* 371 U. S., at 432. 'Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.' *Greene* v. *McElroy,* 360 U. S. 474, 507." 389 U. S., at 276.

In the case of the Bank Secrecy Act, also potentially involving First, Fourth, and Fifth Amendment rights of the vast majority of our citizenry, it exceeds Congress' constitutional power of delegation to empower the Secretary of the Treasury to require whatever reports and records he believes to be possessed of a "high degree of usefulness" where the purpose is to further "criminal, tax, or regulatory investigations or proceedings."

MR. JUSTICE MARSHALL, dissenting.

Although I am in general agreement with the opinions of my Brothers DOUGLAS and BRENNAN, I believe it important to set forth what I view as the essential issue in these cases.

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The purposes of the recordkeeping requirements of the Bank Secrecy Act are clear from the language of the legislation itself—to require the maintenance of records which will later be available for examination by the Government in "criminal, tax, or regulatory investigations or proceedings." See 12 U. S. C. §§ 1829b (a)(2) and 1951 (b). The maintenance of the records is thus but the initial step in a process whereby the Government seeks to acquire the private financial papers of the millions of individuals, businesses, and organizations that maintain accounts in banks and use negotiable instruments such as checks to carry out the financial side of their day-by-day transactions. In my view, this attempt to acquire private papers constitutes a search and seizure under the Fourth Amendment.

As this Court settled long ago in *Boyd* v. *United States*, 116 U. S. 616, 622 (1886), "a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment to the Constitution . . . ." The acquisition of records in this case, as we said of the order to produce an invoice in *Boyd*, may lack the "aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers . . . ," *ibid.*, but this cannot change its intrinsic character as a search and seizure. We do well to recall the admonishment in *Boyd*, *id.*, at 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

By compelling an otherwise unwilling bank to photocopy the checks of its customers, the Government has as much of a hand in seizing those checks as if it had forced

a private person to break into the customer's home or office and photocopy the checks there. See *Byars* v. *United States,* 273 U. S. 28 (1927). Compare *Burdeau* v. *McDowell,* 256 U. S. 465 (1921), with *Lustig* v. *United States,* 338 U. S. 74, 78–79 (Frankfurter, J.). See also *Corngold* v. *United States,* 367 F. 2d 1 (CA9 1966). Our Fourth Amendment jurisprudence should not be so wooden as to ignore the fact that through microfilming and other techniques of this electronic age, illegal searches and seizures can take place without the brute force characteristic of the general warrants which raised the ire of the Founding Fathers. See *Entick* v. *Carrington,* 19 How. St. Tr. 1029 (1765); *Stanford* v. *Texas,* 379 U. S. 476, 483–484 (1965). As we emphasized in *Katz* v. *United States,* 389 U. S. 347 (1967), the absence of any physical seizure of tangible property does not foreclose Fourth Amendment inquiry. *Id.,* at 352–353. The Fourth Amendment "governs not only the seizure of tangible items, but extends as well to the recording of oral statements . . . ." *Id.,* at 353. By the same logic, the Fourth Amendment should apply to the recording of checks mandated by the Act here. And such a massive and indiscriminate search and seizure, not only without a warrant but also without probable cause to believe that any evidence to be obtained is relevant to any investigation, is plainly inconsistent with the principles behind the Amendment. See *Stanford* v. *Texas, supra,* at 485–486; *Katz* v. *United States, supra,* at 356–359.

It is suggested that there is no seizure under the Fourth Amendment because the bank, which is required to create and maintain the record, is already a party to the transaction. See *ante,* at 52. Surely this is irrelevant to the question of whether a Government search or seizure is involved. The fact that one has disclosed private papers to the bank, for a limited purpose, within the context of

a confidential customer-bank relationship, does not mean that one has waived all right to the privacy of the papers. Like the user of the pay phone in *Katz* v. *United States,* who, having paid the toll, was "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world," 389 U. S., at 352, so the customer of a bank, having written or deposited a check, has a reasonable expectation that his check will be examined for bank purposes only—to credit, debit or balance his account—and not recorded and kept on file for several years by Government decree so that it can be available for Government scrutiny. See *United States* v. *First Nat. Bank of Mobile,* 67 F. Supp. 616 (SD Ala. 1946).

The majority argues that any Fourth Amendment claim is premature, since the Act itself only affects the keeping of records and in no way changes the law regarding acquisition of the records by the Government. I cannot agree. This attempt to bifurcate the acquisition of information into two independent and unrelated steps is wholly unrealistic. As the Government itself concedes, "banks have in the past voluntarily allowed law enforcement officials to inspect bank records without requiring the issuance of a summons." Brief for Appellees in Nos. 72–985 and 72–1196, p. 38 n. 19. Indeed, the Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Justice Department told a Senate Subcommittee in 1972 that access by the FBI to bank records without process occurs "with some degree of frequency." Hearings to amend the Bank Secrecy Act (S. 3814 and S. 3828) before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., 114–115 (1972).

The plain fact of the matter is that the Act's record-keeping requirement feeds into a system of widespread

informal access to bank records by Government agencies and law enforcement personnel. If these customers' Fourth Amendment claims cannot be raised now, they cannot be raised at all, for once recorded, their checks will be readily accessible, without judicial process and without any showing of probable cause, to any of the several agencies that presently have informal access to bank records.

The Government suggests that the Act does not in any way preclude banks from refusing to allow informal access and insisting on the issuance of legal process before turning over a customer's financial records. Such a refusal, however, even if accompanied by notice to the customer with an opportunity for him to assert his constitutional claims, comes too late, for the seizure has already taken place. By virtue of the Act's recordkeeping requirement, copies of the customer's checks are already in the bank's files and amenable to process. The seizure has already occurred, and all that remains is the transfer of the documents from the agent forced by the Government to accomplish the seizure to the Government itself. Indeed, it is ironic that although the majority deems the bank customers' Fourth Amendment claims premature, it also intimates that once the bank has made copies of a customer's checks, the customer no longer has standing to invoke his Fourth Amendment rights when a demand is made on the bank by the Government for the records. See *ante,* at 53. By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of the records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late.

Nor can I accept the majority's analysis of the First Amendment associational claims raised by the American

Civil Liberties Union on behalf of its members who seek to preserve the anonymity of their financial support of the organization. The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure. See *NAACP* v. *Alabama,* 357 U. S. 449 (1958). See also *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965); *Gibson* v. *Florida Legislative Investigation Comm'n,* 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293 (1961); *Shelton* v. *Tucker,* 364 U. S. 479 (1960); *Bates* v. *Little Rock,* 361 U. S. 516 (1960); *United States* v. *Rumley,* 345 U. S. 41 (1953). It is certainly inconsistent with this long line of cases for the Government, absent any showing of need whatsoever, to require the bank with which the ACLU maintains an account to make and keep a microfilm record of all checks received by the ACLU and deposited to its account. The net result of this requirement, obviously, is an easily accessible list of all of the ACLU's contributors. And, given the widespread informal access to bank records by Government agencies, see *supra,* at 96–97, the existence of such a list surely will chill the exercise of First Amendment rights of association on the part of those who wish to have their contributions remain anonymous. The technique of examining bank accounts to investigate political organizations is, unfortunately, not rare. See, *e. g., Pollard* v. *Roberts,* 283 F. Supp. 248 (ED Ark.), aff'd *per curiam,* 393 U. S. 14 (1968); *United States Servicemen's Fund* v. *Eastland,* 159 U. S. App. D. C. 352. 488 F. 2d 1252 (1973).

First Amendment freedoms are "delicate and vulnerable." They need breathing space to survive. *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). The threat of disclosure entailed in the existence of an easily accessible

list of contributors may deter the exercise of First Amendment rights as potently as disclosure itself. Cf. *ibid.* See also *United States Servicemen's Fund* v. *Eastland, supra,* at 365–368, 488 F. 2d, at 1265–1268. More importantly, however slight may be the inhibition of First Amendment rights caused by the bank's maintenance of the list of contributors, the crucial factor is that the Government has shown no need, compelling or otherwise, for the maintenance of such records. Surely the fact that some may use negotiable instruments for illegal purposes cannot justify the Government's running roughshod over the First Amendment rights of the hundreds of lawful yet controversial organizations like the ACLU. Congress may well have been correct in concluding that law enforcement would be facilitated by the dragnet requirements of this Act. Those who wrote our Constitution, however, recognized more important values.

I respectfully dissent.

MAHON, TRUSTEE IN BANKRUPTCY, ET AL. *v.* STOWERS ET AL.

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

No. 73–1131. Decided April 15, 1974

Respondents sold cattle to a meat packer at its Texas plant and received checks in payment, but the packer was adjudged a bankrupt before the checks were paid. With the consent of all parties, the receiver and trustee in bankruptcy continued to sell meat of cattle slaughtered and packaged by the bankrupt and held the sale proceeds subject to disposition by the referee. Respondents then sought reclamation of the cattle sold to the bankrupt, and asserted a concomitant right to the sale proceeds. This claim was opposed by the trustee and C. I. T. Corporation, which held a perfected lien on the bankrupt's inventory and other property. The referee sustained the respondents' position, but the District Court reversed on the ground that under the Texas Business and Commercial Code the trustee's and C. I. T.'s claims were superior to that of respondents, who by delivering the cattle to the bankrupt retained only an unperfected security interest subject to reclamation. The Court of Appeals reversed on the ground that the Packers and Stockyards Act, along with the implementing regulations and trade usages, established the superiority of respondents' claim notwithstanding Texas law by making the bankrupt a trustee of the proceeds received from the sale of the cattle delivered by respondents. *Held:*

(1) On the facts, nothing in either the specific sections of the Packers and Stockyards Act relating to packers or in the general sections of the Act applying to all persons subject to the Act, or in the implementing regulations, *ex propria vigore* overrides the Texas Business and Commercial Code in determining the parties' respective rights to the funds held by the trustee or establishes a special priority in bankruptcy.

(a) An ordinary debtor-creditor relationship requires more than post-bankruptcy disappointment of the creditor to convert it into a trust relationship. *McKee* v. *Paradise*, 299 U. S. 119.

(b) Although the Packers and Stockyards Act regulates methods of payment and recordkeeping procedures for packers, the

Act was primarily aimed at the monopoly of the packers which enabled them arbitrarily to lower prices to shippers and increase the price to consumers, and there is no evidence in either the Act or the regulations that packers are to hold cattle or carcasses in trust until the sellers actually convert into cash the checks given them as payment for each sale.

(2) But a course of conduct mandated by the Act or regulations might be relevant or even dispositive under state law in determining priorities to the funds in question, and hence to the extent that respondents in appealing to the Court of Appeals challenged the District Court's determination to the contrary, such determination will be open for adjudication on remand.

Certiorari granted; 483 F. 2d 557, reversed and remanded.

PER CURIAM.

This litigation arose out of the bankruptcy of Samuels & Co., a large meat packing concern with plants in various parts of Texas. Respondents had sold cattle to Samuels, for which they received checks in payment, but bankruptcy ensued before the checks had been paid by the drawee bank. With the consent of all parties the receiver and the trustee of the bankrupt estate continued to sell meat from the cattle that had been slaughtered and packaged by Samuels and held the proceeds of such sales subject to disposition by the referee. Respondents sought reclamation of the cattle which they had sold to Samuels, and asserted a concomitant right to the proceeds from sale of the packaged meat. C. I. T. Corporation, which held a perfected lien on the bankrupt's inventory and other property, and the trustee in bankruptcy opposed the respondents' claim.

The referee made findings of fact and conclusions of law which sustained the respondents' position. The District Court upheld the referee's findings of fact, but reversed the judgment on the grounds that under the applicable provisions of the Texas Business and Commercial Code the claims of the trustee and C. I. T. were

superior to that of respondents. The Court of Appeals for the Fifth Circuit, however, agreed with the referee and reversed the District Court judgment because it read the Packers and Stockyards Act, 42 Stat. 159, 7 U. S. C. § 181 *et seq.*, and certain regulations issued by the Secretary of Agriculture thereunder, as establishing the superiority of respondents' claim notwithstanding Texas law. We disagree with this reading of the applicable provisions of the Packers and Stockyards Act, and therefore grant certiorari and reverse the judgment of the Court of Appeals.

I

The uncontested facts in this case are contained in the findings of the bankruptcy referee. The referee found that respondents, for a period of some ten days before Samuels filed a Chapter XI petition under the Bankruptcy Act, had been selling live cattle to Samuels for slaughter on a "grade and yield" basis, and that this was a recognized custom and usage in the trade. Under this usage the contract price is left open at the time of delivery to the purchaser, who slaughters the livestock and allows the carcasses to chill for approximately 24 hours. At that time they are graded by the United States Department of Agriculture and the price is determined. The purchaser then gives the seller a check for the established amount. The referee further found that Samuels was subject to the regulations of the Packers and Stockyards Act, and that all of the livestock in question had been delivered to Samuels at its plant in Mount Pleasant, Texas, where it was slaughtered and then graded by the Department of Agriculture.

Until the livestock is actually graded and the yield determined, the sellers can identify their particular livestock, but once the carcasses are processed and the meat packaged, identification is no longer possible. When the

petition for bankruptcy was filed in this case, none of the respondents was able to identify his own particular livestock, but the referee found that at least some of the carcasses sold by respondents were on Samuels' premises at that time. The referee also determined that no proceeds from sale of packaged meat could be identified as realized from carcasses delivered by respondents.

Examining the competing claims, the referee found that at all times material to the action C. I. T. was the holder of a duly perfected security interest in all livestock, animal carcasses, packaged and unpackaged meat, packing materials, and other inventory owned by Samuels or in which Samuels may have had an interest. At the time the bankruptcy petition was filed Samuels was indebted to C. I. T. in an amount in excess of $1,800,000. C. I. T. had been advancing large sums weekly to Samuels, and the bankruptcy was precipitated on May 23, 1969, when C. I. T., deeming itself to be insecure, refused to make a weekly advance of approximately $184,000 which Samuels needed to continue its operations. The referee found that C. I. T. "knew or should have known" of the method by which Samuels bought livestock from respondents on a grade-and-yield basis. He further found that no respondent held a security agreement with Samuels, and that none had filed a financing statement reflecting the transactions with Samuels.

The referee reasoned from these facts that respondents and Samuels had intended to transact their sales business on a cash, rather than a credit, basis, and that title to the livestock "did not pass from plaintiff to bankrupt until payment was made to plaintiff." Therefore, he concluded, C. I. T.'s perfected lien could not attach to the livestock in Samuels' inventory until the checks issued in payment were subsequently honored. Any

other decision would, he said, make the cattle sellers "a species of involuntary creditor against their wishes and intent," although they had complied with normal selling arrangements under the Packers and Stockyards Act. He found it unnecessary for the respondents to identify proceeds from the sale of specific carcasses which they had delivered, and placed the duty on C. I. T. to show that the funds to which it laid claim had not been received from the sale of carcasses furnished by respondents.

The District Court accepted the referee's findings of fact but reversed on the law. Turning to the provisions of the Texas Business and Commercial Code, which are largely counterparts of the Uniform Commercial Code, the court found that the respondents by their delivery of the cattle had retained only a security interest in those animals and the proceeds therefrom.[1] It further found that the respondents had taken no action to perfect their security interest [2] nor attempted to utilize any right of reclamation they might have had under Texas law.[3] Delivery of the cattle to Samuels on this basis enabled it to transfer good title to a good-faith purchaser for value, a category of persons which included both C. I. T. and the trustee in bankruptcy.[4] The District Court also found that respondents were unable to "establish their right to possession by ownership . . . [by] identify[ing] positively the property sought to be reclaimed in either its original or substituted form."

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[1] Tex. Bus. & Com. Code §§ 1.201 (37) and 2.401 (a) (1968).

[2] *Id.*, § 9.312 (c) (1968).

[3] *Id.*, § 2.702 (b) (1968). The Court further noted that, in any event, the rights of C. I. T. and the bankruptcy trustee would not have been affected by a demand for reclamation under the Code. See § 2.702 (c).

[4] *Id.*, § 2.403 (a) (1968).

The District Court was in turn reversed by a divided Court of Appeals for the Fifth Circuit. Although that court conceded that C. I. T. would have a superior right to the sales proceeds were the transaction governed solely by the provisions of the Texas Business and Commercial Code, it found that the Packers and Stockyards Act, 7 U. S. C. § 181 *et seq.*, along with the regulations promulgated thereunder and the relevant usages of trade, made Samuels a trustee of the proceeds received from the sale of cattle delivered by respondents. The court stated:

> "The reasoning of these cases and the impact of the Packers and Stockyards Act convinces this court that more than an unperfected security interest subject to reclamation is reserved for the cattle seller. Not by contract but by statute and regulation a packer lacks full dominion over the carcasses until the seller has been paid. Where the packer defaults by the issuance of a bad check (and destroys the identity of the security by processing the carcasses into fungible meat products), the seller is the beneficiary of a trust imposed by remedial statute." [5]

The right of the cattle sellers to funds thus found to be specifically held in trust for their benefit was deemed superior to the general perfected lien of C. I. T. on Samuels' inventory.

II

This Court has previously held that an ordinary debtor-creditor relationship requires more than the post-bankruptcy disappointment of the creditor to convert it into a trust relationship. See *McKee* v. *Paradise,* 299 U. S. 119 (1936). Examining a claim by employees that funds held for their general benefit by an employee asso-

[5] 483 F. 2d 557, 563.

ciation were funds held in trust, the Court in *McKee* stated:

> "The bankrupt was a debtor which had failed to pay its debt. We know of no principle upon which that failure can be treated as a conversion of property held in trust. At no time throughout the whole period was there a trust fund or *res*. No fund was segregated or set up by special deposit or in any manner. When the wages became due, there was no such fund but only the general assets of the employer and its obligation to pay a debt. . . . The fact that the failure to pay the association was an acute disappointment and was especially regrettable as the claimant was an association of employees, cannot avail to change the debtor into a trustee or enable the creditor to obtain a preference over other claims against a bankrupt estate." *Id.*, at 122–123.

The Court therefore held that the employees were entitled to share in the bankrupt's assets only in the position of a general unsecured creditor.

Similarly, we believe that the Court of Appeals, in concluding that in this case a trust relationship existed between Samuels and respondents, placed more weight on the Packers and Stockyards Act, and corresponding regulations and practices, than they will properly bear. For although the Act does regulate methods of payment and recordkeeping procedures for persons defined as "packers" by the Act, we must remember that the "chief evil" at which it was aimed was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys." *Stafford* v. *Wallace*, 258 U. S. 495, 514–515 (1922). We find no evidence in either the Act or the regulations that

packers are to hold cattle or carcasses in trust until the sellers actually convert into cash the checks given them as payment for each sale.

We note at the outset that Samuels is subject to the Packers and Stockyards Act solely as a "packer" [6] rather than as a "stockyard owner," [7] "market agency," [8] or "dealer." [9] This difference is important, for the Act regulates packers in a different manner than it does those in the other enumerated categories. Thus, for example, the bonding requirements of 7 U. S. C. § 204 are not applicable to packers, nor does the Act give a private cause of action against packers, as it does against stockyards, market agencies, and dealers. 7 U. S. C. § 209. An implicit fiduciary obligation which would override state commercial law and establish a special priority in bankruptcy, such as the Court of Appeals found to exist here, must therefore be extracted either from the specific sections relating to packers, or from the few general sections which are applicable to all categories of persons subject to the Act.

The specific provisions dealing with packers impose no such duty.[10] The only section which might possibly be relevant to this question, 7 U. S. C. § 192, deals generally with unlawful practices of packers, placing heavy emphasis on practices which might be considered to be in restraint of trade. Enforcement of this section is the responsibility of the Secretary of Agriculture, who is given authority to hold hearings and enter binding orders. But there is no indication that, lurking within this intention to control deceptive and monopolistic practices in the packing industry, lies a further intention

[6] See 7 U. S. C. § 191.
[7] See *id.*, § 201 (a).
[8] See *id.*, § 201 (c).
[9] See *id.*, § 201 (d).
[10] *Id.*, §§ 191–195.

to guarantee persons who sell cattle to such packers a special favored position in regard to the packers' assets. Nor do the general provisions show such an intent.[11] Those sections are primarily concerned with recordkeeping, allocation of responsibility between the Secretary of Agriculture and the Federal Trade Commission, and the authority of the Secretary of Agriculture to promulgate appropriate rules and regulations to carry out the provisions of the Act.

The Court of Appeals did not rest its decision upon the Act itself, however, but rather upon two regulations promulgated by the Secretary of Agriculture. The first regulation, 9 CFR § 201.43 (b),[12] requires that a packer "before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock." The second regulation, 9 CFR § 201.99,[13] requires a packer "purchas-

[11] *Id.*, §§ 221–229.

[12] Title 9 CFR § 201.43 (b) reads:

"(b) *Purchasers to pay promptly for livestock.* Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction. The provisions of this section shall not be construed to permit any transaction prohibited by § 201.61 (a) relating to financing by market agencies selling on a commission basis."

[13] Title 9 CFR § 201.99 reads:

"(a) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such pur-

ing livestock on a . . . carcass grade and weight basis" to "maintain the identity of each seller's livestock and the carcasses therefrom" and, after determination of the

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chase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

"(b) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis, shall maintain the identity of each seller's livestock and the carcasses therefrom and shall, after determination of the amount of the purchase price, transmit or deliver to the seller, or his duly authorized agent, a true written account of such purchase showing the number, weight, and price of the carcasses of each grade (identifying the grade) and of the ungraded carcasses, an explanation of any condemnations, and any other information affecting final accounting. Packers purchasing livestock on such a basis shall maintain sufficient records to substantiate the settlement of each transaction.

"(c) When livestock are purchased by a packer on a carcass weight or carcass grade and weight basis, purchase and settlement therefore shall be on the basis of carcass price. This paragraph does not apply to purchases of livestock by a packer on a guaranteed yield basis.

"(d) Settlement and final payment for livestock purchased by a packer on a carcass weight or carcass grade and weight basis shall be on actual (hot) carcass weights. The hooks, rollers, and gambrels or other similar equipment used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare weight shall include only the weight of such equipment: *Provided, however,* That until July 1, 1968, these packers who shroud carcasses before weighing them may include in the tare weight the average weight of the shrouds and pins.

"(e) Settlement and final payment for livestock purchased by a packer on a USDA carcass grade shall be on an official (final—not preliminary) grade. If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent. For

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purchase price, to deliver to the seller a "true written account of such purchase" incorporating the pertinent terms. The Court of Appeals reasoned that these regulations, read in conjunction, were intended to provide cattle sellers with special protection when forced to deal on a carcass grade-and-weight basis. The protection fashioned by the Court of Appeals was to make a packer, such as Samuels, a trustee for the proceeds of any sale derived from cattle delivered under these provisions. We believe that that conclusion was erroneous.

We think that a fair reading of 9 CFR § 201.99 reveals its overriding concern that cattle sellers, having delivered their livestock into the hands of a purchasing packer prior to actual determination of the purchase price, receive a fair and accurate accounting of the proceeds of their sale. A seller operating without the benefit of such provisions clearly would face substantial risk that his livestock might be mingled with other livestock of lesser value and thereby become indistinguishable from livestock delivered by other sellers, or that he might become subject to arbitrary weighing practices on the part of the packers. Regulation 201.99 insures that the packers both observe principles of fair dealing in determining the proceeds of the sale and also maintain sufficient records so that the sellers and the Secretary of Agriculture can exercise proper supervision. But there is no indication in this record that Samuels failed to comply with the provisions of Regulation 201.99. Respondents complained, not that Samuels commingled their livestock, or failed to provide fair pricing, but rather that bankruptcy intervened before checks in the concededly

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purposes of settlement and final payment for livestock purchased on a grade or grade and weight basis, carcasses shall be final graded before the close of the second business day following the day the livestock are slaughtered."

proper amount cleared the bank on which they were drawn. And Regulation 201.99 simply does not address itself to this problem.

Regulation 201.43, though more to the point, likewise fails to support the imposition of a trust on Samuels. It requires packers, market agencies, and dealers purchasing livestock to make payment within one business day following the determination of the amount of the purchase price, but does not meet the question of whether a seller, failing to receive payment within that time, has a special claim against the defaulting payor. Respondents argue strongly that this regulation insures prompt payment, and that the failure to make prompt payment is a prohibited deceptive practice under the Act. While this contention may well be true, it does not necessarily support a conclusion that the regulation, designed to regulate payment procedures between a buyer and seller, was also intended to determine security rights between the sellers and third parties holding a valid claim on the packer's assets. Whatever might be the policy reasons for insuring that packers did not take unnecessary advantage of cattle sellers by holding funds for their own purposes, it is hard to see that those reasons would automatically require that such sellers stand on better footing than persons who have extended secured credit to a packer. And the regulation in no way suggests an intention to override established principles of state commercial law which might strike a different balance.

When the Secretary has desired to impose trust relationships by regulation, he has chosen language which clearly effectuates that purpose. Regulation 201.42, 9 CFR § 201.42, deals specifically with the subject of custodial accounts, and provides in subsection (a) that payments made to a market agency or licensee are to be considered trust funds until a payee custodial account has

been paid in full. Subsection (b) requires that any market agency or licensee engaged in selling livestock "on a commission or agency basis" establish a custodial account for the sales proceeds. Subsection (e) requires establishment of custodial accounts when market agencies or licensees representing buyers of livestock misuse funds entrusted to them for that purpose.

Had the Secretary deemed it lawful and desirable to require that packers or other persons purchasing livestock establish trust accounts on behalf of the sellers until payment was actually received, such a provision could easily have been included within these regulations. Its absence suggests the Secretary expected that cattle sellers, making sales to packers in the ordinary course of business, would assume the normal risks of insolvency which any seller in that situation assumes. Their interests, like that of similarly situated sellers, would depend for protection upon their taking of appropriate steps under the commercial law of the various States in which they did business.

The cases cited by the Court of Appeals to support its position require no different conclusion. The case most heavily relied on, *Bowman* v. *Department of Agriculture*, 363 F. 2d 81 (CA5 1966), cited for the proposition that a packer's obligation to pay is that of a fiduciary, dealt not with packers at all, but rather with a person who was a stockyard owner, market agency, and dealer. The court in that case did discuss the duty of prompt payment by such a person, but the discussion occurred in the context of a discussion of the test for insolvency. The court there concluded that a definition of insolvency dealing with the relation of current assets and current liabilities was appropriate in this instance, since the ability to meet current obligations and to make prompt payment was necessary to effect the beneficial purposes

of the Act. The only specific discussion of trustee relationships, however, occurs in a separate discussion on the matter of custodial bank accounts. As discussed above, this discussion would be relevant to the obligation of market agencies under Regulation 201.42 to maintain custodial accounts and to refrain from commingling their own funds with the funds of the persons for whom they act. The other cases cited by the Court of Appeals do not deal with packers,[14] or deal with them in a totally different situation from that presented here.[15] None of the cases holds or even intimates that packers hold livestock and carcasses as trustees until cash proceeds are realized by the sellers.

III

We hold that, on the undisputed facts of this case, nothing in the Packers and Stockyards Act or the regulations issued by the Secretary under the Act overrides the Texas Business and Commercial Code in determining the respective rights of the parties to the funds held by the trustee. We do note, however, that an isolated passage at the end of the Court of Appeals' opinion states that the "Packers and Stockyards Act and Regulations 201.42 and 201.99 thereunder comprise a course of dealing and usage of trade known to both the bankrupt packer and C. I. T., which had financed it for an extended period." 483 F. 2d 557, 563. While we hold that the Act and regulations do not *ex proprio vigore* override the provisions of Texas law determining priorities to the funds in question, we do not mean to say that a course of con-

[14] *Glover Livestock Comm'n Co.* v. *Hardin,* 454 F. 2d 109 (CA8 1972).

[15] *Bruhn's Freezer Meats of Chicago* v. *Department of Agriculture,* 438 F. 2d 1332 (CA8 1971); *Swift & Co.* v. *United States,* 393 F. 2d 247 (CA7 1968).

duct mandated by the Act or regulations might not, just as any other course of conduct, be relevant or even dispositive under state law. The District Judge, herself a longtime Texas practitioner and then state court judge before taking the federal bench, determined otherwise here. To the extent that respondents in appealing to the Court of Appeals challenged that determination, it will of course be open for adjudication in the Court of Appeals on remand.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

SUPER TIRE ENGINEERING CO. ET AL. *v.* McCORKLE ET AL.

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

No. 72–1554. Argued January 15, 1974—Decided April 16, 1974

Workers engaged in an economic strike in New Jersey are eligible for public assistance through state welfare programs. Petitioners, employers whose plants were struck, brought this suit for injunctive and declaratory relief against such eligibility, claiming that the regulations according benefits to striking workers were invalid because they interfered with the federal labor policy of free collective bargaining expressed in the Labor Management Relations Act and with other federal policy set forth in the Social Security Act. Before the case was tried, the labor dispute was settled and the strike ended. The District Court, rejecting the respondent union's contention that the case had been mooted, dismissed the complaint on the grounds that Congress was the appropriate forum for the claim and that the challenged laws did not violate the Supremacy Clause. The Court of Appeals remanded the case with instructions to vacate and dismiss for mootness. *Held:* To the extent that *declaratory* relief was sought, the case-or-controversy requirement of Art. III, § 2, and the Declaratory Judgment Act is completely satisfied. Pp. 121–127.

(a) Even though the case for an injunction dissolved with the settlement of the strike and the strikers' return to work, the petitioners and respondent state officials may still retain sufficient interests and injury to justify declaratory relief. Pp. 121–122.

(b) The challenged governmental action is not contingent upon executive discretion and has not ceased, but is a fixed and definite policy which, by its continuing presence, casts what may well be a substantial adverse effect on petitioners' interests. *Oil Workers Unions* v. *Missouri,* 361 U. S. 363; *Harris* v. *Battle,* 348 U. S. 803, distinguished. Pp. 122–125.

(c) If judicial review were conditioned on the existence of an economic strike, this case most certainly would be of the type presenting an issue "capable of repetition, yet evading review," *Southern Pac. Terminal Co.* v. *ICC,* 219 U. S. 498, 515. It suffices that the litigant show an immediate and definite governmental

action or policy that has adversely affected and continues to affect a present interest, since to require the presence of an active labor dispute would unduly tax the litigant by slighting claims of adverse injury from actual or immediately threatened governmental action, and since otherwise a state policy affecting a collective-bargaining arrangement but not involving a fine or other penalty could be only rarely adjudicated, and the purposes of the Declaratory Judgment Act would be frustrated. Pp. 125–127.

469 F. 2d 911, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 127.

Lawrence M. Cohen argued the cause for petitioners. With him on the briefs were *Herbert G. Keene, Jr.*, and *James A. Young*.

Stephen Skillman, First Assistant Attorney General of New Jersey, argued the cause for respondents McCorkle et al. With him on the briefs were *George F. Kugler, Jr.*, former Attorney General, *William F. Hyland*, Attorney General, and *Jane Sommer* and *Paul N. Watter*, Deputy Attorneys General. *Robert F. O'Brien* argued the cause and filed briefs for respondent Teamsters Local Union No. 676.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In New Jersey, workers engaged in an economic strike are eligible for public assistance through state welfare programs. Employers whose plants were struck insti-

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

tuted this suit for injunctive and declaratory relief against such eligibility. Before the case was tried, the labor dispute was settled and the strike came to an end. The question presented is whether a "case" or "controversy" still exists, within the meaning of Art. III, § 2, of the Constitution, and of the Declaratory Judgment Act, 28 U. S. C. §§ 2201–2202.

I

A collective-bargaining agreement between petitioners Super Tire Engineering Company and Supercap Corporation, affiliated New Jersey corporations,[1] and Teamsters Local Union No. 676, the certified collective-bargaining representative for the two corporations' production and maintenance employees, expired on May 14, 1971. Because a new agreement had not as yet been reached, the employees promptly went out on strike. Some four weeks later, with the strike continuing, the two corporations, and their president and chief executive officer, filed the present suit in the United States District Court for the District of New Jersey against various New Jersey officials.[2]

The complaint alleged that many of the striking employees had received and would continue to receive pub-

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[1] Super Tire Engineering Company is engaged in the business of truck tire sales and service and the manufacture and sale of industrial polyurethane tires and wheels. Supercap Corporation is engaged in the business of truck tire recapping and repairing.

[2] The named defendants were Lloyd W. McCorkle, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; Irving J. Engelman, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; Fred L. Streng, Director of the Camden County, New Jersey, Welfare Board; and Juanita E. Dicks, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey.

lic assistance through two New Jersey public welfare programs,[3] pursuant to regulations issued and administered by the named defendants. The petitioners sought a declaration that these interpretive regulations,[4] accord-

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[3] The General Public Assistance Law, N. J. Stat. Ann. § 44:8–107 *et seq.* (Supp. 1973–1974), a state program, and the Assistance for Dependent Children Law (ADC), N. J. Stat. Ann. § 44:10–1 *et seq.* (Supp. 1973–1974), a federal-state program created by § 402 of the Social Security Act, as amended, 42 U. S. C. § 602.

Effective June 30, 1971, New Jersey elected no longer to participate in the unemployed parent segment of the AFDC program, and enacted, in its place, the Assistance to Families of the Working Poor program, N. J. Stat. Ann. § 44:13–1 *et seq.* (Supp. 1973–1974).

[4] The Regulations (M. A. 1.006, revised Mar. 1957), issued by the New Jersey Department of Institutions and Agencies under the General Public Assistance Law, provided in pertinent part:

"A. Citation of Statute and Constitution

"Chapter 156, P. L. 1947 (R. S. 44:8–108) defines reimbursable public assistance as 'assistance rendered to needy persons not otherwise provided for under the laws of this State, *where such persons are willing to work* but are unable to secure employment due either to physical disability or inability to find employment.'

"The Constitution of New Jersey 1947, Article I, paragraph 19, guarantees that 'Persons in private employment shall have the right to organize and bargain collectively.'

"B. Interpretation and Policy

"It may be inferred from the quoted section of the statute that persons unwilling to work are ineligible for public assistance. However, for purposes of public administration, the phrase 'unwilling to work' must be defined as objectively as possible.

. . . . .

". . . The Constitutional guarantee of the 'right to organize and bargain collectively' implies the right of the individual to participate in a bona fide labor dispute as between the employer and the collective bargaining unit by which the individual is represented. Moreover, a 'strike,' when lawfully authorized and conducted, is recognized as an inherent and lawful element of the process of bargaining collectively and of resolving labor disputes. Accordingly, when an individual is participating in a lawful 'strike,' he

ing benefits to striking workers, were null and void because they constituted an interference with the federal labor policy of free collective bargaining expressed in the Labor Management Relations Act, 1947, 29 U. S. C. § 141 *et seq.*, and with other federal policy pronounced in provisions of the Social Security Act of 1935, *viz.*, 42 U. S. C. §§ 602 (a)(8)(C), 606 (e)(1), and 607 (b)(1)(B).[5] The petitioners also sought injunctive relief against the New Jersey welfare administrators' making public funds available to labor union members engaged in the strike.

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may not be considered merely because of such participation, as refusing to work without just cause.

"C. Regulations

"Based on the foregoing statement of interpretation and policy, the following regulations are established:

. . . . . .

"4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept suitable employment, merely because he is participating in a lawful labor dispute.

"5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

"6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, 'strike benefits' or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for."

The record is not clear as to the eligibility of strikers under New Jersey's newly enacted program of Assistance to Families of the Working Poor. Petitioners state that striking workers are eligible for benefits under that program. Brief for Petitioners 4 n. 1. The respondents concede this, as "a matter of administrative application." Tr. of Oral Arg. 46.

[5] The complaint also alleged that the inclusion of striking workers in these programs was contrary to New Jersey law.

With their complaint, the petitioners filed a motion for a preliminary injunction. The supporting affidavit by the individual petitioner recited the expiration of the collective-bargaining agreement, the failure of the parties to reach a new agreement, the commencement and continuation of the strike, the application by many of the strikers for state welfare benefits, and their receipt of such benefits from the beginning of the strike to the date of the affidavit. The affiant further stated that the availability of these benefits interfered with and infringed upon free collective bargaining as guaranteed by Congress and "hardened the resolve of the said strikers to remain out of work in support of their bargaining demands," App. 32, and, in addition, that

> "the current strike will undoubtedly be of longer duration than would have otherwise been the case; that the impact of the grant of welfare benefits and public assistance to the strikers involved has resulted in the State of New Jersey subsidizing one party to the current labor dispute; and that such subsidization by the State has resulted in upsetting the economic balance between employer and employees otherwise obtained in such a labor dispute." *Ibid.*

At the hearing held on June 24 on the motion for preliminary injunction, the union, now a respondent here, was permitted to intervene. App. 37. Counsel for the union contended that "this entire matter . . . has been mooted" because "these employees voted to return to work and are scheduled to return to work tomorrow morning." [6] App. 39. The District Court, nonetheless, pro-

[6] All the strikers returned to work by Monday, June 28, 1971, and normal operations at the corporate petitioners' plants were then resumed.

ceeded to the merits of the dispute and, on the basis of the holding in *ITT Lamp Division* v. *Minter,* 435 F. 2d 989 (CA1 1970), cert. denied, 402 U. S. 933 (1971), ruled that the appropriate forum for the petitioners' claim was the Congress, and that the New Jersey practice of according aid to striking workers was not violative of the Supremacy Clause of the Constitution. The court denied the motion for preliminary injunction and dismissed the complaint. App. 45–46. On appeal, the United States Court of Appeals for the Third Circuit, by a divided vote, did not reach the merits but remanded the case with instructions to vacate and dismiss for mootness. 469 F. 2d 911, 922 (1972). We granted certiorari to consider the mootness issue. 414 U. S. 817 (1973).

II

The respondent union invites us to conclude that this controversy between the petitioners and the State became moot when the particular economic strike terminated upon the execution of the new collective-bargaining agreement and the return of the strikers to work in late June. That conclusion, however, is appropriate with respect to only one aspect of the lawsuit, that is, the request for injunctive relief made in the context of official state action during the pendency of the strike.

The petitioners here have sought, from the very beginning, *declaratory* relief as well as an injunction. Clearly, the District Court had "the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Zwickler* v. *Koota,* 389 U. S. 241, 254 (1967); *Roe* v. *Wade,* 410 U. S. 113, 166 (1973); *Steffel* v. *Thompson,* 415 U. S. 452, 468–469 (1974). Thus, even though the case for an injunction dissolved with the subsequent settlement of the strike and the strikers'

return to work, the parties to the principal controversy, that is, the corporate petitioners and the New Jersey officials, may still retain sufficient interests and injury as to justify the award of declaratory relief. The question is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273 (1941). And since this case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here "capable of repetition, yet evading review," so that petitioners are adversely affected by government "without a chance of redress." *Southern Pac. Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911).

A. We hold that the facts here provide full and complete satisfaction of the requirement of the Constitution's Art. III, § 2, and the Declaratory Judgment Act, that a case or controversy exist between the parties. Unlike the situations that prevailed in *Oil Workers Unions* v. *Missouri,* 361 U. S. 363 (1960), on which the Court of Appeals' majority chiefly relied, and in *Harris* v. *Battle,* 348 U. S. 803 (1954), the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.

In both *Harris* and *Oil Workers* a state statute authorized the Governor to take immediate possession of a public utility in the event of a strike or work stoppage that interfered with the public interest. The seizure was not automatic for every public utility labor dis-

pute. It took effect only upon the exercise of the Governor's discretion. In each case the Court held the controversy to be moot because both the seizure and the strike had terminated prior to the time the case reached this Court. The governmental action challenged was the authority to seize the public utility, and it was clear that a seizure would not recur except in circumstances where (a) there was another strike or stoppage, and (b) in the judgment of the Governor, the public interest required it. The question was thus posed in a situation where the threat of governmental action was two steps removed from reality. This made the recurrence of a seizure so remote and speculative that there was no tangible prejudice to the existing interests of the parties and, therefore, there was a "want of a subject matter" on which any judgment of this Court could operate. *Oil Workers,* 361 U. S., at 371. This was particularly apparent in *Oil Workers* because, although the union had sought both declaratory and injunctive relief, the decision the Court was asked to review "upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago." *Ibid.*

The present case has a decidedly different posture. As in *Harris* and *Oil Workers,* the strike here was settled before the litigation reached this Court. But, unlike those cases, the challenged governmental action has not ceased. The New Jersey governmental action does not rest on the distant contingencies of another strike and the discretionary act of an official.[7] Rather, New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an

[7] Although the threat of seizure in *Oil Workers* constituted a far more severe form of governmental action, going as it did to cripple any strike, the features of that action were inexorably contingent, serving to make it more remote and speculative.

economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion.[8] Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, *and* in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing.

The decision in *Bus Employees* v. *Missouri,* 374 U. S. 74 (1963), is not to the contrary. In that case the Court adjudicated the merits of the same statutory scheme that had been challenged earlier in *Oil Workers.* It reached the merits even though the Governor had terminated the seizure of the public utility. His exec-

[8] It may not appropriately be argued that there is an element of discretion present here in the making of the determination of individual "need" for welfare benefits. That determination has no measurable effect on the rights of the corporate petitioners. Instead, it is the basic eligibility for assistance that allegedly prejudices those petitioners' economic position.

utive order, however, recited that the labor dispute "remains unresolved." The Court's rationale was that, since the labor dispute had not ended, "[t]here thus exists in the present case not merely the speculative possibility of invocation of the King-Thompson Act in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the Act. Cf. *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498, 514–516; *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 632." 374 U. S., at 78. The existence of the strike was important in that it rendered concrete the likelihood of state action prejudicial to the interests of the union. It was the remoteness of the threat of state action that convinced the Court in *Oil Workers* to hold that case moot. In the case now before us, the state action is not at all contingent. Under the petitioners' view of the case, it is immediately and directly injurious to the corporate petitioners' economic positions. Where such state action or its imminence adversely affects the status of private parties, the courts should be available to render appropriate relief and judgments affecting the parties' rights and interests.

B. If we were to condition our review on the existence of an economic strike, this case most certainly would be of the type presenting an issue "capable of repetition, yet evading review." *Southern Pac. Terminal Co.* v. *ICC,* 219 U. S., at 515; *Grinnell Corp.* v. *Hackett,* 475 F. 2d 449 (CA1), cert. denied, 414 U. S. 858 and 879 (1973); *ITT Lamp Division* v. *Minter,* 435 F. 2d, at 991. To require the presence of an active and live labor dispute would tax the litigant too much by arbitrarily slighting claims of adverse injury from concrete governmental action (or the immediate threat thereof). It is sufficient, therefore, that the litigant show the existence of an immediate and definite gov-

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ernmental action or policy that has adversely affected and continues to affect a present interest. Otherwise, a state policy affecting a collective-bargaining arrangement, except one involving a fine or other penalty, could be adjudicated only rarely, and the purposes of the Declaratory Judgment Act would be frustrated.

Certainly, the pregnant appellants in *Roe* v. *Wade, supra,* and in *Doe* v. *Bolton,* 410 U. S. 179 (1973), had long since outlasted their pregnancies by the time their cases reached this Court. Yet we had no difficulty in rejecting suggestions of mootness. 410 U. S., at 125 and 187. Similar and consistent results were reached in *Storer* v. *Brown,* 415 U. S. 724, 737 n. 8 (1974); *Rosario* v. *Rockefeller,* 410 U. S. 752, 756 n. 5 (1973); *Dunn* v. *Blumstein,* 405 U. S. 330, 333 n. 2 (1972); and *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969), cases concerning various challenges to state election laws. The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society.

The issues here are no different. Economic strikes are of comparatively short duration. There are exceptions, of course. See, for example, *Local 833, UAW* v. *NLRB,* 112 U. S. App. D. C. 107, 300 F. 2d 699, cert. denied *sub nom. Kohler Co.* v. *Local 833, UAW,* 370 U. S. 911 (1962). But the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. U. S. Dept. of Labor, Bureau of Labor Statistics, Analysis of Work Stoppages 1971, Table A–3, p. 16 (1973). A strike that lasts six weeks, as this one did, may seem long, but its termination, like pregnancy at nine months and elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue in force, unabated and un-

reviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings on the merits of the controversy.

It is so ordered.

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

The Court today reverses the Court of Appeals and holds that this case is not moot, despite the fact that the underlying labor dispute that gave rise to the petitioners' claims ended even before the parties made their initial appearance in the District Court. I think this holding ignores the limitations placed upon the federal judiciary by Art. III of the Constitution and disregards the clear teachings of prior cases. Accordingly, I dissent.

This Court has repeatedly recognized that the inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306 n. 3. See also *North Carolina* v. *Rice*, 404 U. S. 244, 246; *Powell* v. *McCormack*, 395 U. S. 486, 496 n. 7; *Sibron* v. *New York*, 392 U. S. 40, 50 n. 8. Since Art. III courts are precluded from issuing advisory opinions, *Hayburn's Case*, 2 Dall. 409; *Muskrat* v. *United States*, 219 U. S. 346, it necessarily follows that they are impotent "to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice, supra*, at 246; *St. Pierre* v. *United States*, 319 U. S. 41, 42.[1]

[1] See generally Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L. Rev. 125; Note, Mootness on Appeal in the

These broad constitutional principles, of course, provide no more than the starting point, since the decision as to whether any particular lawsuit is moot can be made only after analysis of the precise factual situation of the parties involved. But in my view our task in the present case is greatly simplified, for this Court has had several occasions within the past 20 years to apply the general principles of mootness to the specific facts of labor disputes closely analogous to the one at hand.

The first of these cases was *Harris* v. *Battle,* 348 U. S. 803, in which the issue was whether a Virginia statute that permitted the state Governor to order that "possession" be taken of a transit company whose employees were on strike was in conflict with the National Labor Relations Act. The underlying labor dispute was settled and the seizure terminated before the case came to trial, but the trial court nevertheless proceeded to decide the merits of the controversy, finding the statute constitutional. After the Virginia Supreme Court refused review, an appeal was taken to this Court. In a brief *per curiam* opinion, this Court held that the case was moot and ordered the appeal dismissed.

In *Oil Workers Unions* v. *Missouri,* 361 U. S. 363, we had occasion to explicate the holding of *Harris* v. *Battle* in the context of a challenge to Missouri's King-Thompson Act, which allowed the Governor on behalf of the State to take possession of and operate a privately owned public utility affected by a work stoppage. In that case, the underlying strike and seizure had terminated while the case was on appeal to the Supreme Court of Missouri. Nonetheless, that court considered the merits of the law-

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Supreme Court, 83 Harv. L. Rev. 1672; Note, Mootness and Ripeness: The Postman Always Rings Twice, 65 Col. L. Rev. 867; Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772.

suit, holding the King-Thompson Act constitutional. We read *Harris* v. *Battle* as requiring that the case be held moot, since the termination of both the strike and the seizure left "no 'actual matters in controversy essential to the decision of the particular case' " then before us. 361 U. S., at 367, quoting from *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116.

The constitutionality of the King-Thompson Act was again at issue in *Bus Employees* v. *Missouri,* 374 U. S. 74. The strike and seizure in that case were still in effect at the time of the decision of the Supreme Court of Missouri, but, after the appellants' jurisdictional statement was filed in this Court, the Governor of Missouri terminated the outstanding seizure order. Consequently, the appellees argued that the case had become moot, relying on *Harris* and *Oil Workers.* We rejected the contention, noting that in both those cases, the underlying labor dispute had been settled by the time the litigation reached this Court. In *Bus Employees,* by contrast, the strike was still unresolved, and the appellants were thus fully subject to the provisions of the King-Thompson Act. Hence, we concluded that *Harris* and *Oil Workers* did not control, and we proceeded to decide the merits of the case, holding the Missouri law to be in conflict with the National Labor Relations Act, and thus invalid under the Supremacy Clause.

I think it is clear that the facts of the case before us serve to bring it within the teaching of *Harris* and *Oil Workers,* and outside the ambit of *Bus Employees.* Here, as in *Harris* and *Oil Workers,* both the underlying work stoppage and the challenged governmental action—the providing of welfare benefits to the petitioners' employees—had ceased long before review was sought in this Court. Any view that a federal court might express on the merits of the petitioners' Supremacy Clause claims

would, therefore, amount to an advisory opinion, having no effect on any "actual matters in controversy." As we noted in *Oil Workers,* such an undertaking would ignore a "basic limitation upon the duty and function of the Court, and . . . disregard principles of judicial administration long established and repeatedly followed." 361 U. S., at 368.

The Court offers essentially two arguments aimed at distinguishing this case from *Harris* and *Oil Workers.* First, it says that the very existence of the New Jersey welfare programs constitutes a continuing burden on the petitioners' ability to engage in collective bargaining with the respondent union. Secondly, the Court says that the underlying controversy here is "capable of repetition, yet evading review," and thus comes within the rule of *Southern Pac. Terminal Co.* v. *ICC,* 219 U. S. 498, 515.

Similar arguments, however, were considered and rejected in both *Harris* and *Oil Workers.* In each of those cases it was argued that the *Southern Pacific* doctrine prevented a finding of mootness, and it was also argued that the case was not moot because of the continuing threat of state seizure of public utilities in future labor disputes. The Court's summary dismissal of the *Harris* appeal necessarily rejected both of these contentions, and we explicitly adhered to that holding in *Oil Workers:*

> "In [*Harris*] it was urged that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. It was contended that the situation was akin to cases like *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n,* 219

> U. S. 498, 514–516. In finding that the controversy was moot, the Court necessarily rejected all these contentions. 348 U. S. 803. Upon the authority of that decision the same contentions must be rejected in the present case. See also *Barker Co.* v. *Painters Union,* 281 U. S. 462; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360." 361 U. S., at 368–369 (footnotes omitted).

I find no reason to depart from this holding in the case before us. While it is not inconceivable that the petitioners' employees will once again strike and perhaps once again become eligible for future New Jersey welfare benefits, I find little to distinguish that hypothetical situation from the "speculative possibility of invocation of the King-Thompson Act in some future labor dispute" [2] that was present in *Oil Workers.* And, even if it could be assumed that the present controversy is "capable of repetition" within the meaning of the *Southern Pacific* test, I am less than confident that the issues presented can truly be characterized as "evading review." If nothing else, the *Bus Employees* case teaches that even the most confident predictions about the future unreviewability of specific legal controversies are often proved inaccurate. Indeed, several courts of appeals have had the opportunity to consider the precise Supremacy Clause issues now raised by the petitioners in the context of ongoing labor disputes.[3] Given that experience, I

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[2] *Bus Employees* v. *Missouri,* 374 U. S. 74, 78.

[3] In *ITT Lamp Division* v. *Minter,* 435 F. 2d 989 (CA1), two cases were consolidated on appeal; one of them involved an ongoing strike. Similarly, the underlying labor dispute in *Russo* v. *Kirby,* 453 F. 2d 548 (CA2), was still in effect at the time of the Court of Appeals' decision, although the appellate court did not reach the employers' Supremacy Clause arguments, since it found that the District Court lacked jurisdiction to hear the suit, which

cannot conclude that it is permissible to resolve these important questions in a case where their resolution will have no direct effect on the parties to the litigation.

The argument that eligibility of strikers for future New Jersey welfare benefits might affect the "ongoing" process of collective bargaining fares no better in the light of the *Oil Workers* decision. The continued existence of the King-Thompson Act in *Oil Workers* arguably had a most significant effect on the employees' collective-bargaining ability, since it threatened to deprive them of their principal economic weapon, the capacity to strike. Yet the Court found the continuing threat of seizure in future labor disputes to be insufficient to save the *Oil Workers* case from mootness. No different weight should be accorded to the petitioners' argument that the possibility of strikers receiving welfare benefits will make future work stoppages less onerous for their employees.[4]

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had been brought by strikers to *compel* the payment of welfare benefits.

[4] The Court characterizes the governmental action challenged in *Oil Workers* and *Harris* as more "remote" and "contingent" than the New Jersey policy at hand. For mootness purposes, I think that this is a distinction without a difference. For one thing, New Jersey does not automatically extend welfare benefits to striking workers; it merely makes them *eligible* to receive such benefits, provided that they meet all other appropriate criteria. Thus, for the challenged governmental action here to recur, at least two things must happen: the respondent union must again call a strike, and the workers must satisfy the standards of need that may then be set forth in the New Jersey welfare statutes. If the threat of seizure in *Oil Workers* was viewed as "contingent" in nature, no different conclusion can be reached here.

Moreover, as the Court concedes, *ante*, at 123 n. 7, the threat of seizure in *Oil Workers* involved "a far more severe form" of governmental interference in the collective-bargaining process than does the New Jersey policy of making strikers eligible for welfare benefits, since invocation of the Missouri statute served to cripple any strike

In short, I think that this case is completely controlled by *Harris* and *Oil Workers*. The doctrine of mootness is already a difficult and complex one, and I think that the Court today muddies the waters further by straining unnecessarily to distinguish and limit some of the few clear precedents available to us.

For these reasons I would affirm the judgment of the Court of Appeals.

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completely. Thus, even if the governmental action involved in *Oil Workers* is viewed as more "contingent" than in the present case, I cannot understand how its effect on the collective-bargaining process can be characterized as less serious.

ARNETT, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, ET AL. *v.* KENNEDY ET AL.

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

No. 72–1118. Argued November 7, 1973—Decided April 16, 1974

Appellee, a nonprobationary employee in the competitive Civil Service, was dismissed from his position in the Office of Economic Opportunity (OEO) for allegedly having made recklessly false and defamatory statements about other OEO employees. Though previously advised of his right under OEO and Civil Service Commission (CSC) regulations to reply to the charges and that the material on which the dismissal notice was based was available for his inspection, he did not respond to the substance of the charges but brought this suit for injunctive and declaratory relief, contending that the standards and procedures established by and under the Lloyd-La Follette Act, 5 U. S. C. § 7501, for the removal of nonprobationary employees from the federal service unwarrantedly interfere with such employees' freedom of expression and deny them procedural due process. A three-judge District Court held that the Act and attendant regulations denied appellee due process because they failed to provide for a trial-type preremoval hearing before an impartial official and were unconstitutionally vague because they failed to furnish sufficiently precise guidelines as to what kind of speech might be made the basis for removal action. Section 7501 of the Act provides for removal of nonprobationary federal employees "only for such cause as will promote the efficiency of the service" and prescribes that the employing agency must furnish the employee with written notice of the proposed removal action and a copy of the charges; give him a reasonable time for a written answer and supporting affidavits; and promptly furnish him with the agency's decision. The Act further provides, however, that "[e]xamination of witnesses, trial, or hearing is not required," but is discretionary with the individual directing the removal. CSC and OEO regulations enlarge the statutory provisions by requiring 30 days' advance notice before removal and in other respects, and entitle the employee to a post-removal evidentiary trial-type hearing at the appeal stage. If the employee is reinstated on appeal, he receives full backpay. In addi-

tion to his First Amendment claims, appellee contends that, absent a full adversary hearing before removal, he could not consistently with due process requirements be divested of his property interest or expectancy in employment or be deprived of his "liberty" to refute the charges of dishonesty on which he asserts his dismissal was based. *Held:* The judgment is reversed and the case remanded. Pp. 148–171.

349 F. Supp. 863, reversed and remanded.

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

1. In conferring upon nonprobationary federal employees the right not to be discharged except for "cause" and at the same time conditioning the grant of that right by procedural limitations, the Act did not create and the Due Process Clause does not require any additional expectancy of job retention. Cf. *Board of Regents* v. *Roth*, 408 U. S. 564, 577. Pp. 148–155.

2. The CSC and OEO post-termination hearing procedures adequately protect the liberty interest of federal employees, recognized in *Roth, supra*, in not being wrongfully stigmatized by untrue and unsupported administrative charges. Pp. 156–158.

3. The Act's standard of employment protection, which describes as explicitly as is feasible in view of the wide variety of factual situations where employees' statements might justify dismissal for "cause" the conduct that is ground for removal, is not impermissibly vague or overbroad in regulating federal employees' speech. *CSC* v. *Letter Carriers*, 413 U. S. 548, 578–579. Pp. 158–163.

MR. JUSTICE POWELL, joined by MR. JUSTICE BLACKMUN, while agreeing that 5 U. S. C. § 7501 (a) is not unconstitutionally vague or overbroad, concluded with respect to the due process issue that appellee, as a nonprobationary federal employee who could be discharged only for "cause," had a legitimate claim of entitlement to a property interest under the Fifth Amendment and his employment could not be terminated without notice and a full evidentiary hearing. On the other hand, the Government as an employer must have discretion expeditiously to remove employees who hinder efficient operation. Since the procedures under the Act and regulations minimize the risk of error in the initial removal decision and provide for a post-removal evidentiary hearing with reinstatement and backpay should that decision be wrongful, a reasonable accommodation comporting with due proc-

ess is provided between the competing interests of the employee and the Government as employer. Pp. 164–171.

REHNQUIST, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and STEWART, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the result in part, in which BLACKMUN, J., joined, *post*, p. 164. WHITE, J., filed an opinion concurring in part and dissenting in part, *post*, p. 171. DOUGLAS, J., filed a dissenting opinion, *post*, p. 203. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 206.

Daniel M. Friedman argued the cause for appellants. On the brief were *Solicitor General Bork, Assistant Attorney General Wood, Keith A. Jones, Walter H. Fleischer,* and *William Kanter.*

Charles Barnhill, Jr., argued the cause for appellees. With him on the brief were *Judson H. Miner* and *Leo Pellerzi.**

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

Prior to the events leading to his discharge, appellee Wayne Kennedy [1] was a nonprobationary federal em-

**Mozart G. Ratner* and *Jerry D. Anker* filed a brief for the National Association of Letter Carriers, AFL–CIO, et al. as *amici curiae* urging affirmance.

[1] "Appellee" refers to appellee Wayne Kennedy, the named plaintiff in the original complaint. The participation of the 18 other named plaintiffs, who were added in the amended complaint, see n. 3, *infra,* appears to have been little more than nominal. The amended complaint alleged that the added named plaintiffs' exercise of their rights of free speech were chilled because they feared that any off-duty public comments made by them would constitute grounds for discharge or punishment under the Lloyd-La Follette Act. Two conclusory affidavits supporting that bare allegation (one signed by one of the added named plaintiffs, the other by the

ployee in the competitive Civil Service. He was a field representative in the Chicago Regional Office of the Office of Economic Opportunity (OEO). In March 1972, he was removed from the federal service pursuant to the provisions of the Lloyd-La Follette Act, 5 U. S. C. § 7501, after Wendell Verduin, the Regional Director of the OEO, upheld written administrative charges made in the form of a "Notification of Proposed Adverse Action" against appellee. The charges listed five events occurring in November and December 1971; the most serious of the charges was that appellee "without any proof whatsoever and in reckless disregard of the actual facts" known to him or reasonably discoverable by him had publicly stated that Verduin and his administrative assistant had attempted to bribe a representative of a community action organization with which the OEO had dealings. The alleged bribe consisted of an offer of a $100,000 grant of OEO funds if the representative would sign a statement against appellee and another OEO employee.

Appellee was advised of his right under regulations promulgated by the Civil Service Commission and the OEO to reply to the charges orally and in writing, and to submit affidavits to Verduin. He was also advised that the material on which the notice was based was available for his inspection in the Regional Office, and that a copy of the material was attached to the notice of proposed adverse action.

Appellee did not respond to the substance of the charges against him, but instead asserted that the charges were unlawful because he had a right to a trial-type hearing before an impartial hearing officer before he could be removed from his employment, and because state-

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remaining 17) were filed in connection with plaintiffs' motion for summary judgment or temporary injunctive relief.

ments made by him were protected by the First Amendment to the United States Constitution.[2] On March 20, 1972, Verduin notified appellee in writing that he would be removed from his position at the close of business on March 27, 1972. Appellee was also notified of his right to appeal Verduin's decision either to the OEO or to the Civil Service Commission.

Appellee then instituted this suit in the United States District Court for the Northern District of Illinois on behalf of himself and others similarly situated, seeking both injunctive and declaratory relief. In his amended complaint,[3] appellee contended that the standards and procedures established by and under the Lloyd-La Follette Act for the removal of nonprobationary em-

[2] Appellee's response to the "Notification of Proposed Adverse Action," made through counsel, set forth briefly his position that the charges against him were unlawful under the Fifth and First Amendments. One of the three sentences devoted to his First Amendment claim noted parenthetically that the "conversations . . . with union members and the public" for which he was being punished were "inaccurately set forth in the adverse action." Appellee's response did not explain in what respects the charges against him were inaccurate, nor did it offer any alternative version of the events described in the charges.

[3] Appellee's original complaint, filed March 27, 1972, contained two counts. In the first count appellee sought, on behalf of himself and others similarly situated, to enjoin his removal pending a full, trial-type hearing before an impartial hearing officer. In the second count appellee sought to enjoin his removal for the exercise of his rights of free speech. The single-judge court referred the constitutional question presented in the first count to a three-judge court, and dismissed the second count pending appellee's exhaustion of available administrative remedies before the Civil Service Commission. Appellee then amended the second count of his complaint to allege, on behalf of himself, 18 added named plaintiffs, see n. 1, *supra*, and others similarly situated, that the Lloyd-La Follette Act's removal standard was unconstitutionally vague and overbroad and violated the plaintiffs' First Amendment rights.

ployees from the federal service unwarrantedly interfere with those employees' freedom of expression and deny them procedural due process of law. The three-judge District Court, convened pursuant to 28 U. S. C. §§ 2282 and 2284, granted summary judgment for appellee. 349 F. Supp. 863. The court held that the discharge procedures authorized by the Act and attendant Civil Service Commission and OEO regulations denied appellee due process of law because they failed to provide for a trial-type hearing before an impartial agency official prior to removal; the court also held the Act and implementing regulations unconstitutionally vague because they failed to furnish sufficiently precise guidelines as to what kind of speech may be made the basis of a removal action. The court ordered that appellee be reinstated in his former position with backpay, and that he be accorded a hearing prior to removal in any future removal proceedings. Appellants were also enjoined from further enforcement of the Lloyd-La Follette Act, and implementing rules, as "construed to regulate the speech of competitive service employees." [4]

I

The numerous affidavits submitted to the District Court by both parties not unexpectedly portray two widely differing versions of the facts which gave rise to this lawsuit. Since the District Court granted summary judgment to appellee, it was required to resolve all genuine disputes as to any material facts in favor of appellants, and we therefore take as true for purposes

[4] The court ordered appellee's reinstatement but deferred determination whether the suit was maintainable as a class action. Appellee's appeal to the Civil Service Commission was first delayed as a result of the pendency of this suit, then "terminated" because of appellee's reinstatement following the decision of the District Court.

of this opinion the material particulars of appellee's conduct which were set forth in the notification of proposed adverse action dated February 18, 1972. The District Court's holding necessarily embodies the legal conclusions that, even though all of these factual statements were true, the procedure which the Government proposed to follow in this case was constitutionally insufficient to accomplish appellee's discharge, and the standard by which his conduct was to be judged in the course of those procedures infringed his right of free speech protected by the First Amendment.

The statutory provisions which the District Court held invalid are found in 5 U. S. C. § 7501. Subsection (a) of that section provides that "[a]n individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service."

Subsection (b) establishes the administrative procedures by which an employee's rights under subsection (a) are to be determined, providing:

> "(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to—
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> "(1) notice of the action sought and of any charges preferred against him;
>
> "(2) a copy of the charges;
>
> "(3) a reasonable time for filing a written answer to the charges, with affidavits; and
>
> "(4) a written decision on the answer at the earliest practicable date.
>
> "Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order

> of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission."

This codification of the Lloyd-La Follette Act is now supplemented by the regulations of the Civil Service Commission, and, with respect to the OEO, by the regulations and instructions of that agency. Both the Commission and the OEO have by regulation given further specific content to the general removal standard in subsection (a) of the Act. The regulations of the Commission [5] and the OEO,[6] in nearly identical language, re-

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[5] 5 CFR §§ 735.201a, 735.209. Section 735.201a provides:

"An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

"(a) Using public office for private gain;

"(b) Giving preferential treatment to any person;

"(c) Impeding Government efficiency or economy;

"(d) Losing complete independence or impartiality;

"(e) Making a Government decision outside official channels; or

"(f) Affecting adversely the confidence of the public in the integrity of the Government."

Section 735.209 provides:

"An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government."

[6] 45 CFR §§ 1015.735–1, 1015.735–24. Section 1015.735–1 provides:

"The purpose of this part is to guide OEO employees toward maintaining the high standard of integrity expected of all Government employees. It is intended to require that employees avoid any action which might result in, or create the appearance of:

"(a) Using public office for private gain;

"(b) Giving preferential treatment to any organization or person;

"(c) Impeding Government efficiency or economy;

"(d) Making a Government decision outside official channels;

"(e) Losing complete independence or impartiality of action; or

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quire that employees "avoid any action . . . which might result in, or create the appearance of . . . [a]ffecting adversely the confidence of the public in the integrity of [OEO and] the Government," and that employees not "engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful or other conduct prejudicial to the Government." The OEO further provides by regulation that its Office of General Counsel is available to supply counseling on the interpretation of the laws and regulations relevant to the conduct of OEO employees.[7]

Both the Commission and the OEO also follow regulations enlarging the procedural protections accorded by the Act itself.[8] The Commission's regulations provide,

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"(f) Affecting adversely the confidence of the public in the integrity of OEO and the Government."

Section 1015.735–24 provides:

"No employee shall engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct prejudicial to the Government."

[7] 45 CFR § 1015.735–4. Section 1015.735–4 provides:

"The Office of General Counsel of OEO is available to advise on the interpretation of the provisions of this part and the other laws and regulations relevant to the conduct of OEO employees. The General Counsel is designated as OEO counselor for this purpose."

[8] The Civil Service Commission regulations governing procedures for adverse actions implement, in addition to the Lloyd-La Follette Act, the Veterans' Preference Act of 1944 and Executive Order No. 11491. The Veterans' Preference Act, Act of June 27, 1944, c. 287, 58 Stat. 387, imposed procedural requirements for processing adverse actions in addition to those imposed by the Lloyd-La Follette Act. Those additional requirements include an opportunity for the employee to respond orally or in writing to the charges on which his dismissal is based; the Veterans' Preference Act also authorizes Civil Service Commission appeals from adverse agency decisions. See 5 U. S. C. § 7701. The Act itself applies only to veterans of military service, 5 U. S. C. §§ 2108, 7511, but Executive Order No. 11491, printed in note following 5 U. S. C. § 7301, extends the Act's protections to all nonpreference eligible employees in the classified service.

inter alia, that the employing agency must give 30 days' advance written notice to the employee prior to removal, and make available to him the material on which the notice is based.[9] They also provide that the employee shall have an opportunity to appear before the official vested with authority to make the removal decision in order to answer the charges against him,[10]

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[9] 5 CFR § 752.202 (a). Section 752.202 (a) provides:

"(a) *Notice of proposed adverse action.* (1) Except as provided in paragraph (c) of this section, an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

"(2) Subject to the provisions of subparagraph (3) of this paragraph, the material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material.

"(3) Material which cannot be disclosed to the employee, or to his designated physician under § 294.401 of this chapter, may not be used by an agency to support the reasons in the notice."

[10] 5 CFR § 752.202 (b). Section 752.202 (b) provides:

"(b) *Employee's answer.* Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does

that the employee must receive notice of an adverse decision on or before its effective date, and that the employee may appeal from an adverse decision.[11] This appeal may be either to a reviewing authority within the employing agency,[12] or directly to the Commis-

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not include the right to a trial or formal hearing with examination of witnesses. When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made."

[11] 5 CFR § 752.202 (f). Section 752.202 (f) provides:

"(f) *Notice of adverse decision.* The employee is entitled to notice of the agency's decision at the earliest practicable date. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

"(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;

"(2) Of his right of appeal to the appropriate office of the Commission;

"(3) Of any right of appeal to the agency under Subpart B of Part 771 of this chapter, including the person with whom, or the office with which, such an appeal shall be filed;

"(4) Of the time limit for appealing as provided in § 752.204;

"(5) Of the restrictions on the use of appeal rights as provided in § 752.205; and

"(6) Where he may obtain information on how to pursue an appeal."

[12] 5 CFR §§ 771.205, 771.208. Section 771.205 provides:

"An employee is entitled to appeal under the agency appeals system from the original decision. The agency shall accept and process a properly filed appeal in accordance with its appeals system."

Section 771.208 provides:

"(a) *Entitlement.* Except as provided in paragraph (b) of this section, an employee is entitled to a hearing on his appeal before an examiner. The employee is entitled to appear at the hearing personally or through or accompanied by his representative. The

sion,[13] and the employee is entitled to an evidentiary trial-type hearing at the appeal stage of the proceeding.[14] The only trial-type hearing available within the OEO is, by

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hearing may precede either the original decision or the appellate decision, at the agency's option. Only one hearing shall be held unless the agency determines that unusual circumstances require a second hearing.

"(b) *Denial of hearing.* The agency may deny an employee a hearing on his appeal only (1) when a hearing is impracticable by reason of unusual location or other extraordinary circumstance, or (2) when the employee failed to request a hearing offered before the original decision.

"(c) *Notice.* The agency shall notify an employee in writing before the original decision or before the appellate decision of (1) his right to a hearing, or (2) the reasons for the denial of a hearing."

[13] 5 CFR § 752.203. Section 752.203 provides:

"An employee is entitled to appeal to the Commission from an adverse action covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such offer of proof and pertinent documents as he is able to submit."

Appeals to both the discharging agency and the Commission from an original adverse action will not be processed concurrently, 5 CFR § 752.205 (a), and a direct appeal to the Commission from an initial removal decision constitutes a waiver of appeal rights within the employing agency. 5 CFR § 752.205 (b). However, if the employee first appeals within the employing agency, he is entitled, if necessary, to an appeal to the Commission. 5 CFR § 752.205 (c).

[14] 5 CFR §§ 771.208, 771.210–771.212, 772.305 (c). Sections 771.210–771.212 govern the conduct of hearings by the discharging agency. Those sections provide:

"§ 771.210 Conduct of hearing.

"(a) The hearing is not open to the public or the press. Except as provided in paragraph (h) of this section, attendance at a hearing is limited to persons determined by the examiner to have a direct connection with the appeal.

"(b) The hearing is conducted so as to bring out pertinent facts, including the production of pertinent records.

[*Footnote 14 is continued on p. 146*]

virtue of its regulations and practice, typically held after actual removal; [15] but if the employee is reinstated on appeal, he receives full backpay, less any amounts earned by him through other employment during that period.[16]

"(c) Rules of evidence are not applied strictly, but the examiner shall exclude irrelevant or unduly repetitious testimony.

"(d) Decisions on the admissibility of evidence or testimony are made by the examiner.

"(e) Testimony is under oath or affirmation.

"(f) The examiner shall give the parties opportunity to cross-examine witnesses who appear and testify.

"(g) The examiner may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

"(h) An agency may provide through a negotiated agreement with a labor organization holding exclusive recognition for the attendance at hearings under this subpart of an observer from that organization. When attendance is provided for, the agreement shall further provide that when the employee who requested the hearing objects to the attendance of an observer on grounds of privacy, the examiner shall determine the validity of the objection and make the decision on the question of attendance.

"§ 771.211 Witnesses.

"(a) Both parties are entitled to produce witnesses.

"(b) The agency shall make its employees available as witnesses before an examiner when requested by the examiner after consideration of a request by the employee or the agency.

"(c) If the agency determines that it is not administratively practicable to comply with the request of the examiner, it shall notify him in writing of the reasons for that determination. If, in the examiner's judgment, compliance with his request is essential to a full and fair hearing, he may postpone the hearing until such time as the agency complies with his request.

"(d) Employees of the agency are in a duty status during the time they are made available as witnesses.

"(e) The agency shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

"§ 771.212 Record of hearing.

"(a) The hearing shall be recorded and transcribed verbatim. All

[*Footnotes 15 and 16 are on p. 148*]

We must first decide whether these procedures established for the purpose of determining whether there is "cause" under the Lloyd-La Follette Act for the dismissal

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documents submitted to and accepted by the examiner at the hearing shall be made a part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the employee. If the employee submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

"(b) The employee is entitled to be furnished a copy of the hearing record at or before the time he is furnished a copy of the report of the examiner."

Section 772.305 (c) governs the conduct of hearings before the Civil Service Commission. It provides:

"(c) *Hearing procedures.* (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency is also entitled to participate in the hearing. Both parties are entitled to produce witnesses. The Commission is not authorized to subpoena witnesses.

"(2) An agency shall make its employees available as witnesses at the hearing when (i) requested by the Commission after consideration of a request by the appellant or the agency and (ii) it is administratively practicable to comply with the request of the Commission. If the agency determines that it is not administratively practicable to comply with the request of the Commission, it shall submit to the Commission its written reasons for the declination. Employees of the agency shall be in a duty status during the time they are made available as witnesses. Employees of the agency shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

"(3) Hearings are not open to the public or the press. Attendance at hearings is limited to persons determined by the Commission to have a direct connection with the appeal.

"(4) A representative of the Commission shall conduct the hearing and shall afford the parties opportunity to introduce evidence (including testimony and statements by the appellant, his representative, representatives of the agency, and witnesses), and to cross-examine witnesses. Testimony is under oath or affirmation. Rules of evidence are not applied strictly, but the representative

of a federal employee comport with procedural due process, and then decide whether that standard of "cause" for federal employee dismissals was within the constitutional power of Congress to adopt.

II

For almost the first century of our national existence, federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reasons might appeal to the responsible executive hiring officer. Following the Civil War, grass-roots sentiment for "Civil Service reform" began to grow, and it was apparently brought to a head by the assassination of President James A. Garfield on July 2, 1881. Garfield, having then held office only four months, was accosted in Washington's Union Station and shot by a dissatisfied office seeker who believed that the President had been instrumental in refusing his request for appointment as United States Consul in Paris. During the

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of the Commission shall exclude irrelevant or unduly repetitious testimony.

"(5) The office of the Commission having initial jurisdiction of the appeal shall determine how the hearing will be reported. When the hearing is reported verbatim, that office shall make the transcript a part of the record of the proceedings and shall furnish a copy of the transcript to each party. When the hearing is not reported verbatim, the representative of the Commission who conducts the hearing shall make a suitable summary of the pertinent portions of the testimony. When agreed to in writing by the parties, the summary constitutes the report of the hearing and is made a part of the record of the proceedings. Each party is entitled to be furnished a copy of the report of the hearing. If the representative of the Commission and the parties fail to agree on the summary, the parties are entitled to submit written exceptions to any parts of the summary which are made a part of the record of the proceedings for consideration in deciding the appeal."

[15] OEO Staff Instruction No. 771–2 (1971).

[16] 5 U. S. C. § 5596.

summer, while President Garfield lingered prior to his death in September, delegates from 13 Civil Service reform associations met and formed the National Civil Service Reform League. Responding to public demand for reform led by this organization, Congress in January 1883 enacted the Pendleton Act.[17]

While the Pendleton Act is regarded as the keystone in the present arch of Civil Service legislation, by present-day standards it was quite limited in its application. It dealt almost exclusively with entry into the federal service, and hardly at all with tenure, promotion, removal, veterans' preference, pensions, and other subjects addressed by subsequent Civil Service legislation. The Pendleton Act provided for the creation of a classified Civil Service, and required competitive examination for entry into that service. Its only provision with respect to separation was to prohibit removal for the failure of an employee in the classified service to contribute to a political fund or to render any political service.[18]

For 16 years following the effective date of the Pendleton Act, this last-mentioned provision of that Act appears to have been the only statutory or regulatory limitation on the right of the Government to discharge classified employees. In 1897, President William McKinley promulgated Civil Service Rule II,[19] which provided that removal from the competitive classified service should not be made except for just cause and for

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[17] Act of Jan. 16, 1883, c. 27, 22 Stat. 403.

[18] *Id.*, § 2.

[19] Fifteenth Report of the Civil Service Commission 70 (1897–1898). Rule II, § 8, provided: "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense."

reasons given in writing. While job tenure was thereby accorded protection, there were no administrative appeal rights for action taken in violation of this rule, and the courts declined to judicially enforce it. Thus matters stood with respect to governmental authority to remove federal employees until the enactment of the Lloyd-La Follette Act.

The Lloyd-La Follette Act was enacted as one section of the Post Office Department appropriation bill for the fiscal year 1913. That Act guaranteed the right of federal employees to communicate with members of Congress, and to join employee organizations. It also substantially enacted and enlarged upon Civil Service Rule II in the following language:

> "[N]o person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same. . . ." [20]

[20] Act of Aug. 24, 1912, c. 389, § 6, 37 Stat. 555.

That Act, as now codified, 5 U. S. C. § 7501, together with the administrative regulations issued by the Civil Service Commission and the OEO, provided the statutory and administrative framework which the Government contends controlled the proceedings against appellee. The District Court, in its ruling on appellee's procedural contentions, in effect held that the Fifth Amendment to the United States Constitution prohibited Congress, in the Lloyd-La Follette Act, from granting protection against removal without cause and at the same time—indeed, in the same sentence—specifying that the determination of cause should be without the full panoply of rights which attend a trial-type adversary hearing. We do not believe that the Constitution so limits Congress in the manner in which benefits may be extended to federal employees.

Appellee recognizes that our recent decisions in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), and *Perry* v. *Sindermann,* 408 U. S. 593 (1972), are those most closely in point with respect to the procedural rights constitutionally guaranteed public employees in connection with their dismissal from employment. Appellee contends that he had a property interest or an expectancy of employment which could not be divested without first affording him a full adversary hearing.

In *Board of Regents* v. *Roth,* we said:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U. S., at 577.

Here appellee did have a statutory expectancy that he not be removed other than for "such cause as will pro-

mote the efficiency of [the] service." But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing, *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 896–897 (1961), we do not believe that a statutory enactment such as the Lloyd-La Follette Act may be parsed as discretely as appellee urges. Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice. Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.

The Court has previously viewed skeptically the action of a litigant in challenging the constitutionality of por-

tions of a statute under which it has simultaneously claimed benefits. In *Fahey* v. *Mallonee,* 332 U. S. 245 (1947), it was observed:

> "In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. . . . It would be intolerable that the Congress should endow an association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions." *Id.,* at 255–256.
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> "It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' *United States* v. *San Francisco,* 310 U. S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 348, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' " *Id.,* at 255.

This doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach. We believe that at the very least it gives added weight to our conclusion that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in

determining that right, a litigant in the position of appellee must take the bitter with the sweet.

To conclude otherwise would require us to hold that although Congress chose to enact what was essentially a legislative compromise, and with unmistakable clarity granted governmental employees security against being dismissed without "cause," but refused to accord them a full adversary hearing for the determination of "cause," it was constitutionally disabled from making such a choice. We would be holding that federal employees had been granted, as a result of the enactment of the Lloyd-La Follette Act, not merely that which Congress had given them in the first part of a sentence, but that which Congress had expressly withheld from them in the latter part of the same sentence. Neither the language of the Due Process Clause of the Fifth Amendment nor our cases construing it require any such hobbling restrictions on legislative authority in this area.

Appellees urge that the judgment of the District Court must be sustained on the authority of cases such as *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), *Bell* v. *Burson,* 402 U. S. 535 (1971), and *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969). *Goldberg* held that welfare recipients are entitled under the Due Process Clause of the Fifth and Fourteenth Amendments to an adversary hearing before their benefits are terminated. *Fuentes* v. *Shevin* held that a hearing was generally required before one could have his property seized under a writ of replevin. In *Bell* v. *Burson* the Court held that due process required a procedure for determining whether there was a reasonable possibility of a judgment against a driver as a result of an accident before his license and vehicle registration could be suspended for failure to post security under Georgia's uninsured motorist statute. And in *Sniadach*

v. *Family Finance Corp.* a Wisconsin statute providing for prejudgment garnishment without notice to the debtor or prior hearing was struck down as violative of the principles of due process. These cases deal with areas of the law dissimilar to one another and dissimilar to the area of governmental employer-employee relationships with which we deal here. The types of "liberty" and "property" protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy,* 367 U. S., at 895.

Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest. The Government might, then, under our holdings dealing with Government employees in *Roth, supra,* and *Sindermann, supra,* constitutionally deal with appellee's claims as it proposed to do here.[21]

[21] Our Brother WHITE would hold that Verduin himself might not make the initial decision as to removal on behalf of the agency, because he was the victim of the alleged slander which was one of the bases for appellee's removal. Because of our holding with respect to appellee's property-type expectations under *Roth* and *Sindermann,* we do not reach this question in its constitutional dimension. But since our Brother WHITE suggests that he reaches that conclusion as a matter of statutory construction, albeit because of constitutional emanations, we state our reasons for disagreeing with his conclusion. We, of course, find no constitutional overtones lurking in the statutory issue, because of our holding as to the nature of appellee's property interest in his employment. The reference in the Lloyd-La Follette Act itself to the discretion "of the officer making the removal" suggests rather strongly that he is likewise the

Appellee also contends in this Court that because of the nature of the charges on which his dismissal was based, he was in effect accused of dishonesty, and that therefore a hearing was required before he could be deprived of this element of his "liberty" protected by the Fifth Amendment against deprivation without due process. In *Board of Regents* v. *Roth,* 408 U. S., at 573, we said:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of

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officer who will have brought the charges, and there is no indication that during the 60 years' practice under the Act it has ever been administratively construed to require the initial hearing on the discharge to be before any official other than the one making the charges. And while our Brother WHITE's statement of his conclusion suggests that it may be limited to facts similar to those presented here, *post,* at 199, we doubt that in practice it could be so confined. The decision of an employee's supervisor to dismiss an employee "for such cause as will promote the efficiency of the service" will all but invariably involve a somewhat subjective judgment on the part of the supervisor that the employee's performance is not "up to snuff." Employer-employee disputes of this sort can scarcely avoid involving clashes of personalities, and while a charge that an employee has defamed a supervisor may generate a maximum of personal involvement on the part of the latter, a statement of more typical charges will necessarily engender some degree of personal involvement on the part of the supervisor.

Additional difficulties in applying our Brother WHITE's standard would surely be found if the official bringing the charges were himself the head of a department or an agency, for in that event none of his subordinates could be assumed to have a reasonable degree of detached neutrality, and the initial hearing would presumably have to be conducted by someone wholly outside of the department or agency. We do not believe that Congress, clearly indicating as it did in the Lloyd-LaFollette Act its preference for relatively simple procedures, contemplated or required the complexities which would be injected into the Act by our Brother WHITE.

> his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. . . . In such a case, due process would accord an opportunity to refute the charge before university officials." [22]

The liberty here implicated by appellants' action is not the elemental freedom from external restraint such as was involved in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), but is instead a subspecies of the right of the individual "to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). But that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person "an opportunity to clear his name," a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause. Here appellee chose not to rely on his administrative appeal, which, if his factual contentions are correct, might well have vindicated his reputation and removed any wrongful stigma from his reputation.

Appellee urges that the delays in processing agency and Civil Service Commission appeals, amounting to more than three months in over 50% of agency appeals,[23] mean that the available administrative appeals do not

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[22] The Court's footnote there stated:

"The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." 408 U. S., at 573 n. 12.

[23] See Merrill, Procedures for Adverse Actions Against Federal Employees, 59 Va. L. Rev. 196, 206 (1973).

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suffice to protect his liberty interest recognized in *Roth*. During the pendency of his administrative appeals, appellee asserts, a discharged employee suffers from both the stigma and the consequent disadvantage in obtaining a comparable job that result from dismissal for cause from Government employment. We assume that some delay attends vindication of an employee's reputation throughout the hearing procedures provided on appeal, and conclude that at least the delays cited here do not entail any separate deprivation of a liberty interest recognized in *Roth*.

III

Appellee also contends that the provisions of 5 U. S. C. § 7501 (a), authorizing removal or suspension without pay "for such cause as will promote the efficiency of the service," are vague and overbroad. The District Court accepted this contention:

> "Because employees faced with the standard of 'such cause as will promote the efficiency of the service' can only guess as to what utterances may cost them their jobs, there can be little question that they will be deterred from exercising their First Amendment rights to the fullest extent." 349 F. Supp., at 866.

A certain anomaly attends appellee's substantive constitutional attack on the Lloyd-La Follette Act just as it does his attack on its procedural provisions. Prior to the enactment of this language in 1912, there was no such statutory inhibition on the authority of the Government to discharge a federal employee, and an employee could be discharged with or without cause for conduct which was not protected under the First Amendment. Yet under the District Court's holding, a federal employee after the enactment of the Lloyd-La Follette Act may not even be discharged for conduct which constitutes "cause" for discharge and which is not protected

by the First Amendment, because the guarantee of job security which Congress chose to accord employees is "vague" and "overbroad."

We hold the standard of "cause" set forth in the Lloyd-La Follette Act as a limitation on the Government's authority to discharge federal employees is constitutionally sufficient against the charges both of overbreadth and of vagueness. In *CSC* v. *Letter Carriers,* 413 U. S. 548, 578–579 (1973), we said:

> "[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. '[T]he general class of offense to which . . . [the provisions are] directed is plainly within [their] terms . . . , [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise.' *United States* v. *Harriss,* 347 U. S. 612, 618 (1954)."

Congress sought to lay down an admittedly general standard, not for the purpose of defining criminal conduct, but in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection. We do not believe that Congress was confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all. As we said in *Colten* v. *Kentucky,* 407 U. S. 104 (1972):

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficul-

> ties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Id.*, at 110.

Here the language "such cause as will promote the efficiency of the service" was not written upon a clean slate in 1912, and it does not appear on a clean slate now. The Civil Service Commission has indicated that what might be said to be longstanding principles of employer-employee relationships, like those developed in the private sector, should be followed in interpreting the language used by Congress.[24] Moreover, the OEO has provided by regulation that its Office of General Counsel is available to counsel employees who seek advice on the interpretation of the Act and its regulations.[25] We found the similar procedure offered by the Civil Service Commission important in rejecting the respondents' vagueness contentions in *CSC* v. *Letter Carriers*, 413 U. S., at 580.

The phrase "such cause as will promote the efficiency of the service" as a standard of employee job protection is without doubt intended to authorize dismissal for speech as well as other conduct. *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968), makes it clear that in certain situations the discharge of a Government employee may be based on his speech without offending guarantees of the First Amendment:

> "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the

[24] The Federal Personnel Manual, Subchapter S3–1. a., states: "Basically a 'cause' for disciplinary adverse action is a recognizable offense against the employer-employee relationship. Causes for adverse action run the entire gamut of offenses against the employer-employee relationship, including inadequate performance of duties and improper conduct on or off the job. . . ." Supp. 752–1, Adverse Action by Agencies, Feb. 1972.

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

> speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Because of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for "cause," we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal. The essential fairness of this broad and general removal standard, and the impracticability of greater specificity, were recognized by Judge Leventhal, writing for a panel of the United States Court of Appeals for the District of Columbia Circuit in *Meehan* v. *Macy,* 129 U. S. App. D. C. 217, 230, 392 F. 2d 822, 835 (1968), modified, 138 U. S. App. D. C. 38, 425 F. 2d 469, aff'd en banc, 138 U. S. App. D. C. 41, 425 F. 2d 472 (1969):

> "[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include 'catchall' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.' We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a Government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons]. . . . [Dismissal in such circumstances

neither] comes as an unfair surprise [nor] is so unexpected as to chill . . . freedom to engage in appropriate speech."

Since Congress when it enacted the Lloyd-La Follette Act did so with the intention of conferring job protection rights on federal employees which they had not previously had, it obviously did not intend to authorize discharge under the Act's removal standard for speech which is constitutionally protected. The Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer. Indeed the Act is not directed at speech as such, but at employee behavior, including speech, which is detrimental to the efficiency of the employing agency. We hold that the language "such cause as will promote the efficiency of the service" in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad. *Colten* v. *Kentucky,* 407 U. S., at 111. We have observed previously that the Court has a duty to construe a federal statute to avoid constitutional questions where such a construction is reasonably possible. *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 n. 7 (1973); *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 368–369 (1971).

We have no hesitation, as did the District Court, in saying that on the facts alleged in the administrative charges against appellee, the appropriate tribunal would infringe no constitutional right of appellee in concluding that there was "cause" for his discharge. *Pickering* v. *Board of Education,* 391 U. S., at 569. Nor have we any doubt that satisfactory proof of these allegations could constitute "such cause as will promote the effi-

ciency of the service" within the terms of 5 U. S. C. § 7501 (a). Appellee's contention then boils down to the assertion that although no constitutionally protected conduct of his own was the basis for his discharge on the Government's version of the facts, the statutory language in question must be declared inoperative, and a set of more particularized regulations substituted for it, because the generality of its language might result in marginal situations in which other persons seeking to engage in constitutionally protected conduct would be deterred from doing so. But we have held that Congress in establishing a standard of "cause" for discharge did not intend to include within that term any constitutionally protected conduct. We think that our statement in *Colten* v. *Kentucky,* is a complete answer to appellee's contention:

> "As we understand this case, appellant's own conduct was not immune under the First Amendment and neither is his conviction vulnerable on the ground that the statute threatens constitutionally protected conduct of others." 407 U. S., at 111.

In sum, we hold that the Lloyd-La Follette Act, in at once conferring upon nonprobationary federal employees the right not to be discharged except for "cause" and prescribing the procedural means by which that right was to be protected, did not create an expectancy of job retention in those employees requiring procedural protection under the Due Process Clause beyond that afforded here by the statute and related agency regulations. We also conclude that the post-termination hearing procedures provided by the Civil Service Commission and the OEO adequately protect those federal employees' liberty interest, recognized in *Roth, supra,* in not being wrongfully stigmatized by untrue and unsupported administrative charges. Finally, we hold that

the standard of employment protection imposed by Congress in the Lloyd-La Follette Act, is not impermissibly vague or overbroad in its regulation of the speech of federal employees and therefore unconstitutional on its face. Accordingly, we reverse the decision of the District Court on both grounds on which it granted summary judgment and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in part and concurring in the result in part.

For the reasons stated by MR. JUSTICE REHNQUIST, I agree that the provisions of 5 U. S. C. § 7501 (a) are neither unconstitutionally vague nor overbroad. I also agree that appellee's discharge did not contravene the Fifth Amendment guarantee of procedural due process. Because I reach that conclusion on the basis of different reasoning, I state my views separately.

I

The applicability of the constitutional guarantee of procedural due process depends in the first instance on the presence of a legitimate "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment. Governmental deprivation of such an interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing.[1]

[1] As the Court stated in *Boddie* v. *Connecticut,* 401 U. S. 371, 378 (1971), "The formality and procedural requisites for [a due process] hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." In this case, we are concerned with an administrative hearing in the context of appellee's discharge from public employment.

The Court's decisions in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), and *Perry* v. *Sindermann,* 408 U. S. 593 (1972), provide the proper framework for analysis of whether appellee's employment constituted a "property" interest under the Fifth Amendment. In *Roth,* the Court stated:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U. S., at 577.

The Court recognized that the "wooden distinction" between "rights" and "privileges" was not determinative of the applicability of procedural due process and that a property interest may be created by statute as well as by contract. *Id.,* at 571. In particular, the Court stated that a person may have a protected property interest in public employment if contractual or statutory provisions guarantee continued employment absent "sufficient cause" for discharge. *Id.,* at 576–578.

In *Sindermann,* the Court again emphasized that a person may have a protected property interest in con-

tinued public employment. There, a state college teacher alleged that the college had established a *de facto* system of tenure and that he had obtained tenure under that system. The Court stated that proof of these allegations would establish the teacher's legitimate claim of entitlement to continued employment absent "sufficient cause" for discharge. In these circumstances, the teacher would have a property interest safeguarded by due process, and deprivation of that interest would have to be accompanied by some form of notice and a hearing.

Application of these precedents to the instant case makes plain that appellee is entitled to invoke the constitutional guarantee of procedural due process. Appellee was a nonprobationary federal employee, and as such he could be discharged only for "cause." 5 U. S. C. § 7501 (a). The federal statute guaranteeing appellee continued employment absent "cause" for discharge conferred on him a legitimate claim of entitlement which constituted a "property" interest under the Fifth Amendment. Thus termination of his employment requires notice and a hearing.

The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. Indeed, it would lead directly to the conclusion that whatever the nature

of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment,[2] it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. *Goldberg* v. *Kelly,* 397 U. S. 254 (1970);[3] *Bell* v. *Burson,* 402 U. S. 535 (1971); *Board of Regents* v. *Roth, supra; Perry* v. *Sindermann, supra.*

II

Having determined that the constitutional guarantee of procedural due process applies to appellee's discharge from public employment, the question arises whether an evidentiary hearing, including the right to present favorable witnesses and to confront and examine adverse witnesses, must be accorded *before* removal. The resolution of this issue depends on a balancing process in which the Government's interest in expeditious removal

[2] No property interest would be conferred, for example, where the applicable statutory or contractual terms, either expressly or by implication, did not provide for continued employment absent "cause." See *Board of Regents* v. *Roth,* 408 U. S. 564, 578 (1972).

[3] In *Goldberg,* for example, the statutes and regulations defined both eligibility for welfare benefits and the procedures for termination of those benefits. The Court held that such benefits constituted a statutory entitlement for persons qualified to receive them and that the constitutional guarantee of procedural due process applied to termination of benefits. 397 U. S., at 261–263.

of an unsatisfactory employee is weighed against the interest of the affected employee in continued public employment. *Goldberg* v. *Kelly, supra,* at 263–266. As the Court stated in *Cafeteria & Restaurant Workers* v. *McElroy,* 367 U. S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial.[4]

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[4] My Brother MARSHALL rejects the Government's interest in efficiency as insignificant, citing *Goldberg* v. *Kelly,* 397 U. S. 254, 266 (1970), and *Fuentes* v. *Shevin,* 407 U. S. 67, 90–91, n. 22 (1972). He also notes that nine federal agencies presently accord prior evidentiary hearings. *Post,* at 223, 224.

Neither *Goldberg* nor *Fuentes* involved the Government's substantial interest in maintaining the efficiency and discipline of its

Appellee's countervailing interest is the continuation of his public employment pending an evidentiary hearing. Since appellee would be reinstated and awarded backpay if he prevails on the merits of his claim, appellee's actual injury would consist of a temporary interruption of his income during the interim. To be sure, even a temporary interruption of income could constitute a serious loss in many instances. But the possible deprivation is considerably less severe than that involved in *Goldberg,* for example, where termination of welfare benefits to the recipient would have occurred in the face of "brutal need." 397 U. S., at 261. Indeed, as the Court stated in that case, "the crucial factor in this context—*a factor not present in the case of . . . the discharged government employee . . .*—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of *the very means by which to live while he waits.*" *Id.,* at 264 (emphasis added). By contrast, a public employee may well have independent resources to overcome any temporary hardship, and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits.

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own employees. Moreover, the fact that some federal agencies may have decided to hold prior evidentiary hearings cannot mean that such a procedure is constitutionally mandated. The Federal Government's general practice to the contrary argues that efficiency is in fact thought to be adversely affected by prior evidentiary hearings.

Nor do I agree with my Brother WHITE's argument that suspension with pay would obviate any problem posed by prolonged retention of a disruptive or unsatisfactory employee. Aside from the additional financial burden which would be imposed on the Government, this procedure would undoubtedly inhibit warranted discharges and weaken significantly the deterrent effect of immediate removal. In addition, it would create a strong incentive for the suspended employee to attempt to delay final resolution of the issues surrounding his discharge.

Appellee also argues that the absence of a prior evidentiary hearing increases the possibility of wrongful removal and that delay in conducting a post-termination evidentiary hearing further aggravates his loss. The present statute and regulations, however, already respond to these concerns. The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§ 771.208 and 772.305; 5 U. S. C. § 5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful.[5]

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[5] My Brother WHITE argues that affirmance is required because the supervisory official who would have conducted the preremoval hearing was the "object of slander that was the basis for the employee's proposed discharge." *Post*, at 199. He would conclude that this violated the statutory requirement of an "impartial decisionmaker." I find no such requirement anywhere in the statute or the regulations. Nor do I believe that due process so mandates at the preremoval stage. In my view, the relevant fact is that an impartial decisionmaker is provided at the post-removal hearing where the employee's claims are finally resolved.

There are also significant practical considerations that argue against such a requirement. In most cases, the employee's supervisor is the official best informed about the "cause" for termination. If disqualification is required on the ground that the responsible supervisor could not be wholly impartial, the removal procedure

On balance, I would conclude that a prior evidentiary hearing is not required and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests.[6]

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

The Lloyd-La Follette Act, 5 U. S. C. § 7501 (a), provides that "[a]n individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service."[1] The

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would become increasingly complex. In effect, a "mini-trial" would be necessary to educate the impartial decisionmaker as to the basis for termination.

[6] Appellee also argues that the failure to provide a prior evidentiary hearing deprived him of his "liberty" interest in violation of the Fifth Amendment. For the reasons stated above, I find that the present statute comports with due process even with respect to appellee's liberty interest.

[1] The full text of the Act's pertinent provisions provides:

"(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

"(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to—

"(1) notice of the action sought and of any charges preferred against him;

"(2) a copy of the charges;

"(3) a reasonable time for filing a written answer to the charges, with affidavits; and

"(4) a written decision on the answer at the earliest practicable date.

"Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and,

regulations of the Civil Service Commission and the Office of Economic Opportunity (OEO), at which appellee was employed, give content to "cause" by specifying grounds for removal which include "any action . . . which might result in . . . [a]ffecting adversely the confidence of the public in the integrity of [OEO and] the Government" and any "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government." [2]

Aside from specifying the standards for discharges, Congress has also established the procedural framework in which the discharge determinations are to be made. The employee is to receive 30 days' advance written notice of the action sought and of any charges preferred against him, a copy of the charges, and a

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on request, shall be furnished to the individual affected and to the Civil Service Commission.

"(c) This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under section 7532 of this title." 5 U. S. C. § 7501.

[2] The regulation of the Civil Service Commission as to "Proscribed actions," 5 CFR § 735.201a, provides:

"An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

"(a) Using public office for private gain;

"(b) Giving preferential treatment to any person;

"(c) Impeding Government efficiency or economy;

"(d) Losing complete independence or impartiality;

"(e) Making a Government decision outside official channels; or

"(f) Affecting adversely the confidence of the public in the integrity of the Government."

The regulations, 5 CFR § 735.209, also provided:

"An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government."

reasonable time for filing a written answer to the charges. Before being terminated he may also make a personal appearance before an agency official, and implementing Civil Service Commission regulations provide that "[t]he right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or a formal hearing with examination of witnesses." The regulations further provide that the "representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made." The employee is entitled to notice of the agency's decision in writing, and the notice must inform the employee "[w]hich of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained." [3] The employee

[3] The Civil Service Procedural Regulations, 5 CFR § 752.202, provide in relevant part:

"(a) *Notice of proposed adverse action.* (1) Except as provided in paragraph (c) of this section, an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

"(2) Subject to the provisions of subparagraph (3) of this paragraph, the material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material.

"(3) Material which cannot be disclosed to the employee, or to his designated physician under § 294.401 of this chapter, may not be used by an agency to support the reasons in the notice.

"(b) *Employee's answer.* Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for

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may appeal from an adverse decision and is entitled to an evidentiary trial-type hearing at this stage.[4] This later hearing affords the employee certain rights not available within OEO at the pretermination stage, particu-

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answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or formal hearing with examination of witnesses. When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

. . . . . .

"(f) *Notice of adverse decision.* The employee is entitled to notice of the agency's decision at the earliest practicable date. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

"(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained . . . ."

[4] The Veterans' Preference Act of 1944 authorizes Civil Service Commission appeals from adverse agency decisions. See 5 U. S. C. § 7701. The Act itself applies only to veterans of military service, 5 U. S. C. §§ 2108, 7511, but Executive Order No. 11491, printed in note following 5 U. S. C. § 7301, extends the Act's protections to all nonpreference eligible employees in the classified service.

larly the taking of testimony under oath and the cross-examination of witnesses.

Appellee Kennedy was a nonprobationary federal employee in the competitive civil service and held the position of field representative in the Chicago Regional Office of OEO. As such, he was entitled to the protection of the statutes and regulations outlined above. On February 18, 1972, Kennedy received a "Notification of Proposed Adverse Action" from the Regional Director of OEO, Wendell Verduin. The notice charged, among other things, that Kennedy had made slanderous statements about Verduin and another coworker charging them with bribing or attempting to bribe a potential OEO grantee and had thereby caused disharmony in his office by preventing its smooth functioning. Verduin then ruled on March 20, 1972, after Kennedy had filed a written answer objecting to the lack of certain procedures furnished at this pretermination hearing, but had declined to appear personally, that Kennedy be removed from his job with OEO, effective March 27, 1972.[5]

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[5] Appellee's response stated:

"The charges and proceedings brought against Mr. Kennedy are invalid and, in fact, unlawful for the following two reasons among others:

"*First,* Mr. Kennedy is entitled to a fair and impartial hearing *prior* to any adverse action being taken against him. This means a proceeding where there is a genuinely impartial hearing officer, a proceeding where there is an opportunity to offer witnesses and confront and cross examine those furnishing evidence against him, a proceeding where he will have an opportunity to respond to all evidence offered against him, a proceeding where a written record is made of all evidence, testimony and argument, a proceeding where the decision will be based exclusively on the record, a proceeding where the decision will contain findings of fact and conclusions of law with regard to all controverted issues, together with an analysis indicating the manner in which the controversies were resolved.

"The present adverse action procedure fails in substantial ways to provide all of these rudimentary elements required for a due

Kennedy then appealed directly to the Civil Service Commission and also instituted the present action. The first count of his complaint alleged that the discharge procedure of the Lloyd-La Follette Act, and the attendant Civil Service Commission regulations, deprived him of due process by failing to provide for a full hearing prior to termination. The second count alleged that he was discharged because of certain conversations, in violation of his rights under the First Amendment. The single judge who reviewed the complaint convened a three-judge court to hear the first count, and dismissed the second, without prejudice to refiling after the Civil Service Commission ruled on his appeal. It was the court's view that it should not act until the agency had the opportunity to review the merits of appellee's First Amendment claim.

After the convening of the three-judge court, appellee amended his complaint, then limited to the due process claim, to include a challenge to the Lloyd-La Follette Act on the grounds that it was vague and overbroad and violated the First Amendment.

The three-judge District Court, convened pursuant to 28 U. S. C. §§ 2282 and 2284, granted summary judgment for appellee. 349 F. Supp. 863. It held that the discharge procedures violated due process because "[t]here was no provision . . . for the decision on removal or suspension to be made by an impartial agency

process hearing. It therefore fails to meet the requirements of due process secured by the Fifth Amendment to the Constitution of the United States and is hence, invalid, null and void.

"*Second*, the charges brought against Mr. Kennedy are facially insufficient and illegal. As the adverse action makes clear, Mr. Kennedy is being punished for his conversations (inaccurately set forth in the adverse action) with union members and the public. Since the First Amendment protects such conversations these allegations are totally without merit." App. 62.

official, or for Kennedy (by his own means) to present witnesses; or for his right to confront adverse witnesses." *Id.*, at 865. The court also held that § 7501 was unconstitutional on vagueness and overbreadth grounds. The Government was ordered to reinstate Kennedy to his former position with backpay and to conduct any future removal proceedings with a hearing consistent with its opinion. Appellants were also enjoined from further enforcement of the Lloyd-La Follette Act, and implementing regulations, as "construed to regulate the speech of competitive service employees." *Id.*, at 866.

I

In my view, three issues must be addressed in this case. First, does the Due Process Clause require that there be a full trial-type hearing *at some time* when a Federal Government employee in the competitive service is terminated? Secondly, if such be the case, must this hearing be held *prior* to the discharge of the employee, and, if so, was the process afforded in this case adequate? Third, and as an entirely separate matter, are the Lloyd-La Follette Act and its attendant regulations void for vagueness or overbreadth? I join the Court as to the third issue.

II

I differ basically with the plurality's view that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet," and that "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Ante,* at 153–154, 155. The rationale of this position quickly leads to the conclusion that even though

the statute requires cause for discharge, the requisites of due process could equally have been satisfied had the law dispensed with any hearing at all, whether pre-termination or post-termination.

The past cases of this Court uniformly indicate that some kind of hearing is required at some time before a person is finally deprived of his property interests.[6] The principles of due process "come to us from the law of England . . . and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law." *Dent* v. *West Virginia,* 129 U. S. 114, 123 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring).

This basic principle has unwaveringly been applied when private property has been taken by the State. A fundamental requirement of due process is "the opportunity to be heard." *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1965). Where the Court has rejected the need for a hearing prior to the initial "taking," a principal rationale has been that a hearing would be provided before the taking became final. See *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306 (1908) (seizure of food unfit for consumption); *Central Trust Co.* v. *Garvan,* 254 U. S. 554 (1921) (seizure of property under Trading with the

[6] My views as to the requirements of due process where property interests are at stake does not deal with the entirely separate matter and requirements of due process when a person is deprived of liberty.

Enemy Act); *Corn Exchange Bank* v. *Coler,* 280 U. S. 218 (1930) (seizure of assets of an absconding husband); *Phillips* v. *Commissioner,* 283 U. S. 589 (1931) (collection of a tax); *Bowles* v. *Willingham,* 321 U. S. 503 (1944) (setting of price regulations); *Fahey* v. *Mallonee,* 332 U. S. 245 (1947) (appointment of conservator of assets of savings and loan association); *Ewing* v. *Mytinger & Casselberry,* 339 U. S. 594 (1950) (seizure of misbranded articles in commerce). While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time.

This principle has also been applied in situations where the State has licensed certain activities. Where the grant or denial of a license has been involved, and the "right" to engage in business has been legitimately limited by the interest of the State in protecting its citizens from inexpert or unfit performance, the decision of the State to grant or deny a license has been subject to a hearing requirement. See, *e. g., Dent* v. *West Virginia, supra* (licensing of physicians); *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117 (1926) (licensing of accountant); *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96 (1963) (admission to the bar). The Court has put particular stress on the fact that the absence of a hearing would allow the State to be arbitrary in its grant or denial, and to make judgments on grounds other than the fitness of a particular person to pursue his chosen profession. In the context of admission to the bar, the Court has stated: "Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no

basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 239 (1957). The hearing requirement has equally been applied when the license was to be removed, *In re Ruffalo,* 390 U. S. 544 (1968), or a licensee has been subject to state regulation, *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n of Ohio,* 301 U. S. 292 (1937).

Similar principles prevail when the State affords its process and mechanism of dispute settlement, its law enforcement officers, and its courts, in aiding one person to take property from another. Where there is a "taking" before a final determination of rights, as in some cases when the State seizes property, to protect one of the parties *pendente lite,* the Court has acted on the assumption that at some time a full hearing will be available, as when there is an attachment of property preliminary to resolution of the merits of a dispute, *Ownbey* v. *Morgan,* 256 U. S. 94 (1921); *Coffin Brothers* v. *Bennett,* 277 U. S. 29 (1928); *McKay* v. *McInnes,* 279 U. S. 820 (1929). The opportunity to defend one's property before it is finally taken is so basic that it hardly bears repeating. Adequate notice of the court proceeding must be furnished, *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950), and there must be jurisdiction over the person, *Pennoyer* v. *Neff,* 95 U. S. 714 (1878).

Since there is a need for some kind of hearing before a person is finally deprived of his property, the argument in the instant case, and that adopted in the plurality opinion, is that there is something different about a final taking from an individual of property rights which have their origin in the public rather than the private sector of the economy, and, as applied here, that there is no need for any hearing at any time when the Government

discharges a person from his job, even though good cause for the discharge is required.

In cases involving employment by the Government, the earliest cases of this Court have distinguished between two situations, where the entitlement to the job is conditioned "at the pleasure" of the employer and where the job is to be held subject to certain requirements being met by the employee, as when discharge must be for "cause." The Court has stated: "The inquiry is therefore whether there were any causes of removal prescribed by law . . . . If there were, then the rule would apply that where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient." *Reagan* v. *United States,* 182 U. S. 419, 425 (1901); *Shurtleff* v. *United States,* 189 U. S. 311, 314 (1903). The Court has thus made clear that Congress may limit the total discretion of the Executive in firing an employee, by providing that terminations be for cause, and only for cause, and, if it does so, notice and a hearing are "essential."

Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided that employment was conditioned on " 'maintain[ing] the respect due to courts of justice and judicial officers,' " *Ex parte Secombe,* 19 How. 9, 14 (1857) (attorney and counsellor of court), or was subject to no conditions at all, *Ex parte Hennen,* 13 Pet. 225 (1839) (clerk of the court), no hearing is required. See also *Crenshaw* v. *United States,* 134 U. S. 99 (1890) (Navy officer could be removed at will); *Parsons* v. *United States,* 167 U. S. 324 (1897) (district attorney could be terminated by the President at his pleasure); *Keim* v. *United States,* 177 U. S. 290 (1900) (post office

clerks removable at pleasure). To like effect is *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961), where the Court held that no hearing need be provided to a cook employed by a private concessionaire of the Navy before the Government revoked her security clearance. The revocation of security clearances was within the "unfettered control" of the Navy in order "to manage the internal operation of an important federal military establishment." *Id.,* at 896. The Court there assumed that "Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory . . . ." *Id.,* at 898.

Where the Congress has confined Executive discretion, notice and hearing have been required. In *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123 (1951), an organization was put on the Attorney General's list, as disloyal to the United States, without a hearing before the Attorney General. The Executive Order, as defined by implementing regulations, required the Executive to make an "appropriate determination" of disloyalty. It was apparent that members of organizations employed by the Government who belonged to an organization on the Attorney General's list would be in danger of losing their jobs. The Court held, assuming the facts as alleged by the complaints were true, that it would be arbitrary, and not consistent with an "appropriate determination," to deny a hearing on the matter to the affected organizations. As Mr. Justice Frankfurter observed in his concurring opinion, "[t]he heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Id.,* at 170.

To some extent, *McGrath,* and like cases, see *Greene* v. *McElroy,* 360 U. S. 474 (1959), depended on statutory construction—the intent of Congress to require that procedural fairness be observed in making decisions on security clearances or status, which affected employment—but it is obvious that the constitutional requirements of fairness were a guiding hand to the Court's statutory interpretation. "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process," and it has been "the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers . . . ." *Id.,* at 507–508.

The concern of the Court that fundamental fairness be observed when the State deals with its employees has not been limited to action which is discriminatory and infringes on constitutionally protected rights, as in *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Slochower* v. *Board of Education,* 350 U. S. 551 (1956); *Speiser* v. *Randall,* 357 U. S. 513 (1958); *Sherbert* v. *Verner,* 374 U. S. 398 (1963). See also *Connell* v. *Higginbotham,* 403 U. S. 207 (1971). It has been observed that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is *patently arbitrary* or discriminatory." *Wieman* v. *Updegraff, supra,* at 192; *Slochower* v. *Board of Education, supra,* at 556. (Emphasis added.) In *Slochower, supra,* New York law provided that a tenured employee taking the Fifth Amendment before a legislative committee inquiring into his official conduct could be fired. Quite apart from the Fifth Amendment "penalty" assessed by the State, the Court was concerned with the arbitrariness of drawing a conclusion, without a hearing, that any employee who

took the Fifth Amendment was guilty or unfit for employment. The Court stated:

> "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here." *Id.*, at 559.

The Court's decisions in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), and *Perry* v. *Sindermann,* 408 U. S. 593 (1972), reiterate the notion that the Executive Branch cannot be arbitrary in depriving a person of his job, when the Legislative Branch has provided that a person cannot be fired except for cause, and, if anything, extend the principles beyond the facts of this case.

In *Sindermann,* a teacher who had held his position for a number of years but was not tenured under contract, alleged that he had *de facto* tenure under contract law due to "the existence of rules or understandings" with the college which employed him, *id.,* at 602. The Court held that if the professor could prove the existence of a property interest it would "obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." *Id.,* at 603. In *Roth,* an assistant professor was hired for a fixed term of one academic year, and had no tenure. The Court held that the teacher had no property interest in the job, since the terms of employment allowed that his contract not be renewed. The critical consideration was that the terms "did not provide for contract renewal absent 'sufficient cause.'" 408 U. S., at 578. The rights to continued employment were determined by state law. The Court took great pains,

however, to point out that a tenured appointment, providing for entitlement to a job, absent cause, would be a far different case.

These cases only serve to emphasize that where there is a legitimate entitlement to a job, as when a person is given employment subject to his meeting certain specific conditions, due process requires, in order to insure against arbitrariness by the State in the administration of its law, that a person be given notice and a hearing before he is finally discharged. As the Court stated in *Dismuke* v. *United States,* 297 U. S. 167, 172 (1936):

> "If [the administrative officer] is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority . . . by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized."

To be sure, to determine the existence of the property interest, as for example, whether a teacher is tenured or not, one looks to the controlling law, in this case federal statutory law, the Lloyd-La Follette Act, which provides that a person can only be fired for cause. The fact that the origins of the property right are with the State makes no difference for the nature of the procedures required. While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition.

I conclude, therefore, that as a matter of due process, a hearing must be held at some time before a competitive civil service employee may be finally terminated for misconduct. Here, the Constitution and the Lloyd-La Follette Act converge, because a full trial-type hearing

is provided by statute before termination from the service becomes final, by way of appeal either through OEO, the Civil Service Commission, or both.[7]

A different case might be put, of course, if the termination were for reasons of pure inefficiency, assuming such a general reason could be given, in which case it would be at least arguable that a hearing would serve no useful purpose and that judgments of this kind are best left to the discretion of administrative officials. This is not such a case, however, since Kennedy was terminated on specific charges of misconduct.

III

The second question which must be addressed is whether a hearing of some sort must be held *before* any "taking" of the employee's property interest in his job occurs, even if a full hearing is available before that taking becomes final. I must resolve this question because in my view a full hearing must be afforded at some juncture and the claim is that it must occur prior to termination. If the right to any hearing itself is a pure matter of property definition, as the plurality opinion suggests, then that question need not be faced, for any kind of hearing, or no hearing at all, would suffice. As I have suggested, the State may not dispense with the minimum procedures defined by due process, but different considerations come into play when deciding whether a pretermination hearing is required and, if it is, what kind of hearing must be had.

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[7] *Bailey* v. *Richardson,* 86 U. S. App. D. C. 248, 182 F. 2d 46 (1950), aff'd by an equally divided court, 341 U. S. 918 (1951), is not controlling. "The basis of this holding has been thoroughly undermined in the ensuing years" with the rejection of the "right-privilege" distinction. *Board of Regents* v. *Roth,* 408 U. S. 564, 571 n. 9 (1972).

In passing upon claims to a hearing before preliminary but nonfinal deprivations, the usual rule of this Court has been that a full hearing at some time suffices. "We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." *Ewing* v. *Mytinger & Casselberry,* 339 U. S., at 598, 599. See also *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597 (1931); *Scottish Union & National Insurance Co.* v. *Bowland,* 196 U. S. 611, 631–632 (1905); *Springer* v. *United States,* 102 U. S. 586, 593–594 (1881). This has seemingly been the rule whether the State was taking property from the person, as in the above-cited cases, or whether one person was taking it from another through the process of state courts. See *Ownbey* v. *Morgan,* 256 U. S. 94 (1921); *Coffin Brothers* v. *Bennett,* 277 U. S. 29 (1928); *McKay* v. *McInnes,* 279 U. S. 820 (1929).

In recent years, however, in a limited number of cases, the Court has held that a hearing must be furnished at the first stage of taking, even where a later hearing was provided. This has been true in the revocation of a state-granted license, *Bell* v. *Burson,* 402 U. S. 535 (1971), and in suits between private parties, where summary replevin procedures, *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), or garnishment procedures, *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969), were attacked, and when the State has sought to terminate welfare benefits, *Goldberg* v. *Kelly,* 397 U. S. 254 (1970).[8]

[8] *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), is not properly part of this quartet of cases, since no hearing was apparently ever provided to challenge the posting of one's name as an excessive drinker.

These conflicting lines of cases demonstrate, as the Court stated in *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S., at 895, that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah* v. *Larche*, 363 U. S. 420, 440, 442 (1960); *Goldberg* v. *Kelly*, *supra*, at 263. In assessing whether a prior hearing is required, the Court has looked to how the legitimate interests asserted by the party asserting the need for a hearing, and the party opposing it, would be furthered or hindered.

In many cases, where the claim to a pretermination hearing has been rejected, it appears that the legitimate interest of the party opposing the hearing might be defeated outright if such hearing were to be held.[9] For example, when the Government or a private party lays claim to property there is often the danger that the person in possession of the property may alienate or waste it, and the Government or private party may be without recourse. Thus, the Court has held that there is no need for a prior hearing where the Government has taken preliminary custody of alleged enemy property before actual title to the property is determined, *Central Trust Co.* v. *Garvan*, 254 U. S. 554 (1921); *Stoehr* v. *Wallace*, 255 U. S. 239 (1921), or where a private creditor has sought to attach property of a debtor. See *Ownbey* v. *Morgan*, *supra*; *Coffin Brothers* v. *Bennett*, *supra*; *McKay* v. *McInnes*, *supra*. Of course, such summary action must be authorized in such a manner as to minimize the possibilities of a mistaken deprivation, by a

[9] See generally Freedman, Summary Action by Administrative Agencies, 40 U. Chi. L. Rev. 1 (1972).

public official in the case of administrative action, or a judge where the processes of the court are used. *Fuentes* v. *Shevin, supra.*

The danger that the purpose of the action may be defeated, or made exceedingly difficult, by requiring a prior hearing, is illustrated by *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306 (1908), where the Court sustained the constitutionality of an Illinois statute permitting health inspectors to enter cold-storage houses and "forthwith seize, condemn and destroy" unfit food. The defendants in the action claimed that while it may be necessary to seize the food pending a hearing, surely destruction of that food could not be justified. Nonetheless, the Court observed:

> "If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and if so under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of the investigation, which would involve expense, and might not even then prove effectual." *Id.,* at 320.

Similar inabilities of the party claiming a right to a prior hearing, to make the moving party in the suit whole, have appeared where incompetence and malfeasance in the administration of a bank could precipitate a financial collapse in the community, which would go uncompensated, see *Fahey* v. *Mallonee,* 332 U. S., at 250, or where, in the absence of a jeopardy assessment by the Tax Commissioner, a taxpayer might waste or conceal his assets, see *Phillips* v. *Commissioner, supra.* In all

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such cases it is also significant that the party advancing the claim to a summary procedure stands ready to make whole the party who has been deprived of his property, if the initial taking proves to be wrongful, either by the credit of the public fisc or by posting a bond.

Of course, this principle cannot be applied with success to explain the Court's decisions in cases holding that a pretermination hearing is required; it is not true that the party entitled to the hearing stands ready to compensate the adversary for what may be the wrongful possession of the property in question during the pendency of the litigation. This is vividly illustrated in *Goldberg* v. *Kelly* where the Court observed that "the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment proof." 397 U. S., at 266. However, other considerations have proved decisive, such as: the risk that the initial deprivation may be wrongful; the impact on the claimant to a hearing of not having the property while he waits for a full hearing; the interest of the party opposing the prior hearing and asserting the need for immediate possession in not alerting the current possessor to the lawsuit; and the risk of leaving the property in possession of the current possessor between the time notice is supplied and the time of the preliminary hearing.

In *Goldberg* and *Sniadach,* the Court observed that there was a substantial chance that the claimant to the property, be it the State or garnishor, would lose in the ultimate resolution of the controversy. In *Goldberg,* the Court took note of the "welfare bureaucracy's difficulties in reaching correct decisions on eligibility." 397 U. S., at 264 n. 12. Since the time of the decision in *Goldberg,* at least one study has shown that decisions to terminate benefits have been reversed with a fair degree of fre-

quency.[10] Concern was also expressed with the use of garnishment in a vast number of cases where the debt was fraudulent. *Sniadach,* 395 U. S., at 341. In *Fuentes,* although no such empirical evidence was available, the risk of wrongful deprivations was unnecessarily increased by allowing a clerk, rather than a judge, to pass on the creditor's claim for summary replevin. In *Bell,* the Court held unconstitutional a state statute requiring summary suspension of a driver's license of any uninsured motorist who was unable after an accident to post security for the amount of the damages claimed against him. The only hearing held by the State on the issue of suspension excluded *any* consideration of fault, the standard on which the validity would ultimately turn. Without some kind of probable-cause determination of fault, it was obvious that many suspensions would prove to be unwarranted.

As for the impact on the current property possessor of not having an early pretermination hearing, the Court has held that without possession of the property a person may be unable to exist at even a minimum standard of decency. In *Goldberg,* where the person would have lost the last source of support available, aside from charity, the Court observed that "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate." 397 U. S., at 264. In fact, the magnitude of deprivation may be such as to prevent the welfare recipient from pursuing his right to a later full hearing. *Ibid.* In *Sniadach,* the seizure of an individual's wages could "as a practical

[10] See Handler, Justice for the Welfare Recipient: Fair Hearings in AFDC—The Wisconsin Experience, 43 Soc. Serv. Rev. 12, 22 (1969).

matter drive a wage-earning family to the wall." 395 U. S., at 341–342 (footnote omitted). In *Bell,* the petitioner was a clergyman whose ministry required him to travel by car to cover three rural Georgia communities, and he was "severely handicapped in the performance of his ministerial duties by a suspension of his licenses." 402 U. S., at 537. The impact of deprivation increases, of course, the longer the time period between the initial deprivation and the opportunity to have a full hearing. In *Goldberg,* the Court noted that although pertinent New York regulations provided that a "fair hearing" be held within 10 working days of the request, with decision within 12 working days thereafter, "[i]t was conceded in oral argument that these time limits are not in fact observed." 397 U. S., at 260 n. 5. In *Sniadach* and *Fuentes,* there was no indication of the speed with which a court ruling on garnishment and possession would be rendered, and of course the ultimate issues on the merits in such cases must wait for a still later determination. In *Bell,* the issue of liability might not be determined until full trial proceedings in court.

The last factor to be weighed in the balance is the danger to the party claiming possession occasioned by alerting the current possessor to the lawsuit, and then leaving the property in his hands pending the holding of the preliminary hearing. In *Goldberg* and *Sniadach,* the property right seized was a flow of income, in one case from the government, and in the other from the private employer, pending the preliminary hearing. The government ran no special risk by supplying notice in advance of the cutoff, since the government was in possession of the flow of income until it was turned over piecemeal to the welfare recipient. Further, though the government could assert in the welfare case that it would incur an uncompensated loss, that risk would only be

incurred from the time the last check is delivered until the pretermination hearing is held and the administrative agency certainly has the power to offer a speedy hearing before that time is reached. See *Goldberg* v. *Kelly, supra,* at 266. In *Sniadach,* while it was true that the inability to garnish wages could leave the creditor uncompensated, if the debtor proved judgment proof, this was a risk the creditor assumed at the outset by being unsecured. Further, notice to the debtor of the pendency of the lawsuit is not likely to increase the risk that the debtor will prove to be judgment proof, since the debtor is not likely to leave his job due to the pendency of the suit. Likewise, the risk to the creditor of the debtor's drawing on his wages between the time of notice and the availability of a court hearing on the claim in no way interferes with the creditor's claim to the future flow of earnings after the hearing has been held. The garnishor, therefore, asserts not only the right to take the debtor's wages, but to take them before the controversy has been resolved. In *Bell,* the risk to the State of supplying notice to the licensee and of leaving the person in possession of the license until the hearing, was not at issue, since the state statute provided for notice and a presuspension hearing. There were few costs attached to expanding the scope of that hearing to include a probable-cause determination of fault.

With the above principles in hand, is the tenured civil-service employee entitled to a pretermination hearing, such as that provided by the Lloyd-La Follette Act?

There would be a problem of uncompensated loss to the Government, if the employee were to draw wages without working for the period between notice of a discharge and a preliminary hearing. Yet, if the charge against the employee did not indicate that the employee should be

excluded from the workplace pending this hearing, some work could be exacted by the Government in exchange for its payment of salary. One must also consider another type of cost to the Government if preseparation hearings were provided—the necessity of keeping a person on the scene who might injure the public interest through poor service or might create an uproar at the workplace. However, suspension with pay would obviate this problem.

On the employee's side of the ledger, there is the danger of mistaken termination. Discharge decisions, made *ex parte,* may be reversed after full hearing. One study reveals that in fiscal year 1970, in agencies where full pretermination hearings were routine, employees contesting removal were successful almost 20% of the time. Merrill, Procedures for Adverse Actions Against Federal Employees, 59 Va. L. Rev. 196, 204 n. 35 (1973).

The impact on the employee of being without a job pending a full hearing is likely to be considerable because "[m]ore than 75 percent of actions contested within employing agencies require longer to decide than the 60 days prescribed by [Civil Service] Commission regulations. Over 50 percent take more than three months, and five percent are in process for longer than a year." *Id.,* at 206. Of course, the discharged civil servant, deprived of his source of income, can seek employment in the private sector and so cut or minimize his losses, opportunities largely unavailable to the welfare recipient in *Goldberg* or the debtor in *Sniadach.* Nonetheless, the employee may not be able to get a satisfactory position in the private sector, particularly a tenured one, and his marketability may be under a cloud due to the circumstances of his dismissal. See *Lefkowitz* v. *Turley,* 414 U. S. 70, 83–84 (1973). Cf. *Board of Regents* v. *Roth,* 408 U. S., at 574 n. 13. It should be stressed that

if such employment is unavailable the Government may truly be pursuing a partially counter-productive policy by forcing the employee onto the welfare rolls.

Finally, by providing a pretermination hearing, the Government runs no risk through providing notice, since the employee cannot run away with his job, and can surely minimize its risk of uncompensated loss by eliminating the provision for personal appearances and setting early dates for filing written objections. Altogether different considerations as to notice might be applicable, if the employee would be likely to do damage to the Government if provided with such notice. See 5 CFR § 752.202 (c)(2) (1972), providing that an agency may dispense with the 30-day notice requirement "[w]hen there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed."

Perhaps partly on the basis of some of these constitutional considerations, Congress has provided for pretermination hearings. Certainly the debate on the Lloyd-La Follette Act indicates that constitutional considerations were present in the minds of Congressmen speaking in favor of the legislation.[11] In any event, I conclude that the statute and regulations, to the extent they require 30 days' advance notice and a right to make

[11] Congressman Calder stated that the Act would "give assurance and confidence to the employees that they will at least get a square deal and will not permit of supervisory or executive officers filing charges of one kind against an employee and having him removed from the service or reduced in salary on evidence submitted on matters entirely foreign to the original charges that the employee has answered in writing." 48 Cong. Rec. 4654 (1912).

Congressman Konop stated:

"Any man in public service should have a right as a citizen to know why he is discharged from public duty, and as a citizen should certainly have a chance to be heard." *Id.*, at 5207.

a written presentation, satisfy minimum constitutional requirements.

IV

Appellee in this case not only asserts that he is entitled to a hearing at some time before his property interest is finally terminated, and to a pretermination hearing of some kind before his wages are provisionally cut off, which are currently provided to him, but also argues that he must be furnished certain procedures at this preliminary hearing not provided by Congress: an impartial hearing examiner, an opportunity to present witnesses, and the right to engage in cross-examination. In other words, his claim is not only to a pretermination hearing, but one in which full trial-type procedures are available.

A

The facts in this case show that the Regional Director, Verduin, who charged appellee Kennedy with making slanderous statements about him as to an alleged bribe offer, also ruled in the preliminary hearing that Kennedy should be terminated.

The "Notification of Proposed Adverse Action," signed by Verduin, charged that appellee had "made statements knowingly against officials of this agency which could harm or destroy their authority, official standing or reputation" and that appellee had engaged "in a course of conduct intended to produce public notoriety and conclusions on the part of the public, without any proof whatsover and in reckless disregard of the actual facts known to you [appellee], or reasonably discoverable by you [appellee], that officials of this agency had committed or attempted to commit acts of misfeasance, nonfeasance and malfeasance." Facts were marshaled to support the charges that appellee had spoken at a union

meeting "to the effect that [Verduin and his assistant] had attempted to bribe Mr. James White Eagle Stewart by offering him a $100,000 grant of OEO funds if he would sign a statement against you [appellee] and another employee," and that appellee had spoken of the bribe to a newspaper reporter and to a radio station.

After appellee had received this notice, he made no response to the merits of the charges, but instead wrote to Verduin requesting that he was entitled to certain procedural rights at the hearing, one of which was to have "a genuinely impartial hearing officer," thus furnishing Verduin with the opportunity to recuse himself and provide an alternative hearing examiner. This was not done.

In considering appellee's claim to have an impartial hearing examiner, we might start with a first principle: "[N]o man shall be a judge in his own cause." *Bonham's Case,* 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610). Verduin's reputation was certainly at stake in the charges brought against Kennedy. Indeed, the heart of the charge was that Kennedy had spoken of Verduin in reckless disregard of the truth. That Verduin almost seemed to be stating a libel complaint against Kennedy under *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), dramatizes the personal conflict which precipitated the proposed termination.

Our decisions have stressed, in situations analogous to the one faced here, that the right to an impartial decisionmaker is required by due process. The Court has held that those with a substantial pecuniary interest in legal proceedings should not adjudicate these disputes. *Tumey* v. *Ohio,* 273 U. S. 510 (1927); *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972). The Court has observed that disqualification because of interest has been extended with equal force to administrative adjudications. *Gibson* v. *Berryhill,* 411 U. S. 564, 579 (1973).

In the context of contempt before a judge, where a judge trying a defendant is the object of "efforts to denounce, insult, and slander the court," and "marked personal feelings were present on both sides," the Court has held that criminal contempt proceedings should be held before a judge other than the one reviled by the contemnor. *Mayberry* v. *Pennsylvania,* 400 U. S. 455, 462, 464 (1971). See *In re Oliver,* 333 U. S. 257 (1948); cf. *In re Murchison,* 349 U. S. 133 (1955).

We have also stressed the need for impartiality in administrative proceedings, stating in *Goldberg* v. *Kelly, supra,* that an "impartial decision maker is essential," 397 U. S., at 271. (Citations omitted.) To the same effect was *Morrissey* v. *Brewer,* 408 U. S. 471, 485–486 (1972), involving revocation of parole. In both *Goldberg* and *Morrissey,* this requirement was held to apply to pretermination hearings.[12]

It may be true that any hearing without an impartial hearing officer will reflect the bias of the adjudicator. The interest of the Government in not so providing would appear slim. Given the pretermination hearing, it would seem in the Government's interest to avoid lengthy appeals occasioned by biased initial judgments, and it would be reasonable to expect more correct decisions at the initial stage at little cost if the hearing officer is impartial.

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[12] In *Pickering* v. *Board of Education,* 391 U. S. 563, 579 n. 2 (1968), where the Court set aside a discharge by a Board of Education of a teacher for writing a letter to a newspaper attacking the Board, the trier of fact, the Board, was the same body that was the object of accusations in the letter. Although the Court did not rule on the due process question, since it was first raised here, it observed that "we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning *vis-à-vis* appellant," citing *Tumey* v. *Ohio,* 273 U. S. 510 (1927), and *In re Murchison,* 349 U. S. 133 (1955).

My view is a narrower one, however. Fairness and accuracy are not always threatened simply because the hearing examiner is the supervisor of an employee, or, as in this case, the Regional Director over many employees, including appellee. But here the hearing official was the object of slander that was the basis for the employee's proposed discharge. See *Mayberry* v. *Pennsylvania, supra.* In ruling that the employee was to be terminated, the hearing examiner's own reputation, as well as the efficiency of the service, was at stake; and although Mr. Verduin may have succeeded, in fact, in disassociating his own personal feelings from his decision as to the interests of OEO, the risk and the appearance that this was not the case were too great to tolerate. In such situations the official normally charged with the discharge decision need only recuse and transfer the file to a person qualified to make the initial decision. We need not hold that the Lloyd-La Follette Act is unconstitutional for its lack of provision for an impartial hearing examiner. Congress is silent on the matter. We would rather assume, because of the constitutional problems in not so providing, that, if faced with the question (at least on the facts of this case) Congress would have so provided. *Volkswagenwerk* v. *FMC,* 390 U. S. 261, 272 (1968). "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." *Greene* v. *McElroy,* 360 U. S., at 507 (citations omitted).[13]

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[13] We further note that appellants suggest that "the Act and regulations, fairly construed, require the determination of cause to be made without bias." Brief for Appellants 24 n. 12.

B

Appellee also claims a right to a full trial-type hearing at the pretermination stage, particularly asserting that he is denied due process, if not given the opportunity to present and cross-examine witnesses.

While fully realizing the value of a full trial-type hearing as a method for ultimate resolution of the facts, see *id.*, at 496–497, the pretermination hearing is not held for the purpose of making such an ultimate determination. This is provided for through the appeal procedure where the employee is afforded the procedural rights he now seeks at an earlier stage of the proceedings. The function of the pretermination hearing is, and no more is required by due process, to make a probable-cause determination as to whether the charges brought against the employee are or are not true. Where the Court has held that pretermination hearings are required, in past decisions, it has spoken sparingly of the procedures to be required. *Sniadach* was silent on the matter, and *Fuentes* merely required something more than an *ex parte* proceeding before a court clerk. In *Bell,* the Court held that the hearing must involve a probable-cause determination as to the fault of the licensee, and "need not take the form of a full adjudication of the question of liability," realizing that "[a] procedural rule that may satisfy due process in one context may not necessarily satisfy due process in every case." 402 U. S., at 540. Thus, "procedural due process [was to] be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee." *Ibid.* We think the clear implication of *Bell* to be that "full adjudication," including presentation of witnesses and cross-examination, need not be provided in every case where a pretermination

hearing of some kind is required by due process or provided by the statute.

In *Goldberg* v. *Kelly,* the Court struck a different note on procedures. Although stating that the only function of the pretermination hearing was "to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments," and seemingly adopting a probable-cause standard, the Court required cross-examination of witnesses relied upon by the department. The Court was careful to observe, however, that these procedural rules were "tailored to the capacities and circumstances of those who are to be heard." 397 U. S., at 267, 268–269. The decision to cut off AFDC welfare payments leaves the recipient literally without any means to survive or support a family. While this level of deprivation may not be insisted upon as a necessary condition for requiring some kind of pretermination hearing, it may well be decisive in requiring the Government to provide specific procedures at the pretermination stage. The greater the level of deprivation which may flow from a decision, the less one may tolerate the risk of a mistaken decision, cf. *Morrissey* v. *Brewer, supra,* and thus the Court in *Goldberg,* while maintaining that the pretermination hearing was in the nature of a probable-cause determination, was less willing to allow a margin of error as to probable cause. Rules of procedure are often shaped by the risk of making an erroneous determination. See *In re Winship,* 397 U. S. 358, 368 (1970) (Harlan, J., concurring). Indeed, all that was specifically not required in *Goldberg* was a complete record and a comprehensive opinion. 397 U. S., at 267.

In this case, the employee is not totally without prospect for some form of support during the period between the pretermination and final hearing on appeal, though it may not be equivalent in earnings or tenure

to his prior competitive service position. Although the employee may not be entitled to unemployment compensation, see *Christian* v. *New York Dept. of Labor,* 414 U. S. 614 (1974), since he has been terminated for cause he may get some form of employment in the private sector, and, if necessary, may draw on the welfare system in the interim. Given this basic floor of need, which the system provides, we should not hold that procedural due process is so inflexible as to require the Court to hold that the procedural protections, of a written statement and oral presentation to an impartial hearing examiner provided by regulation, are insufficient. The Court stated in *Richardson* v. *Wright,* 405 U. S. 208 (1972), that new regulations of the Department of Health, Education, and Welfare required that Social Security disability payments were not to be suspended in a pretermination hearing without "notice of a proposed suspension and the reasons therefor, plus an opportunity to submit rebuttal evidence," but could be without an oral presentation, since "[i]n the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise." Cf. *Torres* v. *New York State Department of Labor,* 333 F. Supp. 341 (SDNY 1971), aff'd, 405 U. S. 949 (1972). Necessarily, to some extent, the Court must share with Congress, in an area where one is called upon to judge the efficacy of particular procedures, a role in defining constitutional requirements, and Congress explicitly left it to the discretion of the agency as to whether such procedures were required. I would not upset that judgment in this case.

In accord with these views, I would affirm the judgment of the three-judge court, ordering reinstatement and backpay, due to the failure to provide an impartial hearing officer at the pretermination hearing. I would

reverse that part of the court's order enjoining the application of the statute on First Amendment vagueness and overbreadth grounds.

MR. JUSTICE DOUGLAS, dissenting.

The federal bureaucracy controls a vast conglomerate of people who walk more and more submissively to the dictates of their superiors. Our federal employees have lost many important political rights. *CSC* v. *Letter Carriers,* 413 U. S. 548, held that they could be barred from taking "an active part in political management or in political campaigns," a restriction that some of us thought to be unconstitutional, *id.,* at 595 *et seq.* (DOUGLAS, J., dissenting). Today's decision deprives them of other important First Amendment rights.

Heretofore, as my Brother MARSHALL has shown, we have insisted that before a vital stake of the individual in society is destroyed by government he be given a hearing on the merits of the government's claim. Among these personal and vital stakes are welfare benefits, *Goldberg* v. *Kelly,* 397 U. S. 254; the weekly wage of a worker, *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337; a person's driver's license, *Bell* v. *Burson,* 402 U. S. 535; repossession of household goods, *Fuentes* v. *Shevin,* 407 U. S. 67; the position of a tenured professor in a state educational institution, *Board of Regents* v. *Roth,* 408 U. S. 564; revocation of parole, *Morrissey* v. *Brewer,* 408 U. S. 471.

There is more than employment and a job at issue in this case. The stake of the federal employee is not only in a livelihood, but in his right to speak guaranteed by the First Amendment. He is charged with having stated that his superior and the superior's assistant had attempted to bribe a representative of a community action organization with whom the agency (OEO) had

dealings. He is charged with having stated that those men offered a bribe of $100,000 in OEO funds to that organization if its representative would sign a statement against appellee and another OEO employee. This statement in my view was on a subject in the public domain. We all know merely by living in Washington, D. C., the storms that have swept through that agency and its branches. It has dealt with inflammatory problems in the solution of which inflammatory utterances are often made. I realize that it is the tradition of the Court to "balance" the right of free speech against other governmental interests and to sustain the First Amendment right only when the Court deems that in a given situation its importance outweighs competing interests. That was the approach in *Pickering* v. *Board of Education,* 391 U. S. 563, where the Court deemed what a teacher said against the school board was more important than the board's sensibilities. The Court, however, reserved decision where the comments of an employee involved "either discipline by immediate superiors or harmony among coworkers," *id.,* at 570. That is one reason why Mr. Justice Black and I concurred in the result citing, *inter alia,* our opinion in *Time, Inc.* v. *Hill,* 385 U. S. 374. Mr. Justice Black said that the "balancing" or "weighing" doctrine "plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press. Though the Constitution requires that judges swear to obey and enforce it, it is not altogether strange that all judges are not always dead set against constitutional interpretations that expand their powers, and that when power is once claimed by some, others are loath to give it up," *id.,* at 399–400.

The fact that appellee in the present case inveighed

against his superior is irrelevant. The matter on which he spoke was in the public domain. His speaking may well have aroused such animosity in his superior as to disqualify him from being in charge of disciplinary proceedings; [1] and conceivably it could cause disharmony among workers. And these consequences are quite antagonistic to the image which agencies have built. Their dominant characteristic is the application of Peter's Inversion. See L. Peter & R. Hull, The Peter Principle 24–26 (Bantam ed. 1970). In a few words Peter's Inversion marks the incompetent cadre's interest in an employee's *input*, not his *output*.[2]

His *input* reflects his attitude toward the cadre, and toward his work. A pleasant manner, promotion of staff harmony, servility to the cadre, and promptness, civility, and submissiveness are what count. The result is a

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[1] A judge so reviled is normally not the one to sit in judgment in a criminal contempt proceeding. *Mayberry* v. *Pennsylvania*, 400 U. S. 455. Cf. *Goldberg* v. *Kelly*, 397 U. S. 254, 271.

[2] "The competence of an employee is determined *not by outsiders but by his superior in the hierarchy*. If the superior is still at a level of competence, he may evaluate his subordinates in terms of the performance of useful work—for example, the applying of medical services or information, the production of sausages or table legs or achieving whatever are the stated aims of the hierarchy. That is to say, *he evaluates output*.

"But if the superior has reached his level of incompetence, he will probably rate his subordinates in terms of institutional values; he will see competence as the behavior that supports the rules, rituals and forms of the status quo. Promptness, neatness, courtesy to superiors, internal paperwork, will be highly regarded. In short, such an official *evaluates input* . . .

"In such instances, *internal consistency is valued more highly than efficient service:* this is *Peter's Inversion*. A professional automaton may also be termed a 'Peter's Invert.' He has inverted the means-end relationship." L. Peter & R. Hull, The Peter Principle 25 (Bantam ed. 1970).

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great leveling of employees. They hear the beat of only one drum and march to it. These days employers have psychological tests by which they can separate the ingenious, offbeat character who may make trouble from the more subservient type. It is, of course, none of a court's problem what the employment policies may be.[3] But once an employee speaks out on a public issue and is punished for it, we have a justiciable issue. Appellee is in my view being penalized by the Federal Government for exercising his right to speak out. The excuse or pretense is an Act of Congress and an agency's regulations promulgated under it in the teeth of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Losing one's job with the Federal Government because of one's discussion of an issue in the public domain is certainly an abridgment of speech.

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

I would affirm the judgment of the District Court, both in its holding that a tenured Government employee must be afforded an evidentiary hearing prior to a dismissal for cause and in its decision that 5 U. S. C. § 7501 is unconstitutionally vague and overbroad as a regulation of employees' speech.

I

The first issue in this case is a relatively narrow one—whether a federal employee in the competitive service, entitled by statute to serve in his job without fear of

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[3] Apart from discrimination based on race, *Griggs* v. *Duke Power Co.*, 401 U. S. 424, or on other suspect classifications such as sex. See *id.*, at 436; 42 U. S. C. § 2000e–2; *Frontiero* v. *Richardson*, 411 U. S. 677, 682 *et seq.*

dismissal except for cause,[1] must be given an evidentiary hearing before he is discharged. We are hardly writing on a clean slate in this area. In just the last five years, the Court has held that such a hearing must be afforded before wages can be garnished, *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); welfare benefits terminated, *Goldberg* v. *Kelly,* 397 U. S. 254 (1970); a driver's license revoked, *Bell* v. *Burson,* 402 U. S. 535 (1971); consumer goods repossessed, *Fuentes* v. *Shevin,* 407 U. S. 67 (1972); parole revoked, *Morrissey* v. *Brewer,* 408 U. S. 471 (1972); or a tenured college professor fired by a public educational institution, *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Perry* v. *Sindermann,* 408 U. S. 593 (1972).

A

In the *Roth* and *Sindermann* cases, MR. JUSTICE STEWART established the framework for analysis to determine in what circumstances the Due Process Clause demands a hearing. He observed that although due process is a flexible concept, it is not unlimited in application. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Roth, supra,* at 569. Thus the first issue to be decided is whether appellee had an interest in his tenured Government employment such that his discharge amounts to a deprivation of liberty or property.

The decisions of this Court have given constitutional recognition to the fact that in our complex modern society, wealth and property take many forms.[2] We

[1] 5 U. S. C. § 7501 (a).

[2] One noted commentator has observed:

"Changes in the forms of wealth are not remarkable in themselves; the forms are constantly changing and differ in every culture. But today more and more of our wealth takes the form

have said that property interests requiring constitutional protection "extend well beyond actual ownership of real estate, chattels, or money." *Roth, supra,* at 572. They extend as well to "safeguard . . . the security of interests that a person has already acquired in specific benefits." *Id.,* at 576. The test for whether a protected interest has been infringed reflects this broad concept of "property":

> "To have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.,* at 577.

Accordingly, in *Goldberg* v. *Kelly, supra,* the Court found that public assistance recipients had such a claim of entitlement to welfare benefits grounded in the statute defining eligibility. In *Bell* v. *Burson, supra,* the Court held that a driver's license, once issued, becomes an important property interest because its "continued possession may become essential in the pursuit of a livelihood." 402 U. S., at 539. More to the point, in *Roth* the Court

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of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure." Reich, The New Property, 73 Yale L. J. 733, 738 (1964).

"Society today is built around entitlement [and m]any of the most important of these entitlements now flow from government . . . . Such sources of security . . . are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965).

surveyed the constitutional restraints applicable in the area of public employment:

> "[T]he Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education,* 350 U. S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff,* 344 U. S. 183, have interests in continued employment that are safeguarded by due process." 408 U. S., at 576–577.

See also *Connell* v. *Higginbotham,* 403 U. S. 207 (1971). In *Perry* v. *Sindermann, supra,* we found a property interest in the implied tenure policy of a state university.

We have already determined that a legitimate claim of entitlement to continued employment absent "sufficient cause" is a property interest requiring the protections of procedural due process.[3] Thus, there can be little doubt that appellee's tenured Government employment, from which he could not legally be dismissed except for cause, must also be a "property" interest for the purposes of the Fifth Amendment. The job security appellee enjoyed is clearly one of "those claims upon which people rely in their daily lives." *Roth, supra,* at 577. And appellee's interest in continued public employment encompassed more than just the periodic accrual of wages. His dismissal also affects his valuable statutory entitlements to retirement credits and benefits, 5 U. S. C. §§ 8301, 8311–8322, 8331–8348; periodic salary increases, 5 U. S. C. § 5335; and life and health insurance, 5 U. S. C. §§ 8701–8716, 8901–8913 (1970 ed. and Supp II).

We are in agreement that appellee does have a claim of entitlement to his Government job, absent proof of

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[3] *Board of Regents* v. *Roth,* 408 U. S. 564, 576–578 (1972); *Perry* v. *Sindermann,* 408 U. S. 593, 599–603 (1972).

specified misconduct. MR. JUSTICE REHNQUIST explains, however, that this claim is founded only in statute, and that the statute which guarantees tenure also provides that a hearing is not required before discharge. He concludes that "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest," *ante,* at 155, wryly observing that "a litigant in the position of appellee must take the bitter with the sweet," *ante,* at 154.

Courts once considered procedural due process protections inapplicable to welfare on much the same theory—that "in accepting charity, the appellant has consented to the provisions of the law under which charity is bestowed." [4] Obviously, this Court rejected that reasoning in *Goldberg, supra,* where we held that conditions under which public assistance was afforded, which did not include a pretermination hearing, were violative of due process.[5] In *Sindermann, supra,* the Court held that the Constitution required a hearing before dismissal even where the implicit grant of tenure did not encompass the right to such a hearing. In *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), the Court held that although the limited grant of liberty afforded by parole was conditioned by statute on the possibility of revocation without a prior evidentiary hearing, such a hearing was constitutionally required. In *Bell* v. *Burson, supra,* the

[4] *Wilkie* v. *O'Connor,* 261 App. Div. 373, 375, 25 N. Y. S. 2d 617, 620 (1941).

[5] The mechanism for welfare terminations is described in *Goldberg* v. *Kelly,* 397 U. S. 254, 258–260 (1970). In short, the procedure involved prior notice and an opportunity to respond in writing before termination as well as a full trial-type hearing before an independent state official after the termination had been effected. If the recipient prevailed at the later hearing he would be entitled to recover any funds wrongfully withheld.

state statute under which drivers' licenses were issued provided for the suspension of an uninsured motorist's license without a prior hearing. The Court nonetheless held that a hearing was required before the suspension could be effected. In none of these cases did the Court consider a statutory procedure to be an inherent limitation on the statutorily created liberty or property interest.[6] Rather, once such an interest was found, the Court determined whether greater procedural protections were required by the Due Process Clause than were accorded by the statute.

Applying that analysis here requires us to find that although appellee's property interest arose from statute, the deprivation of his claim of entitlement to continued employment would have to meet minimum standards of procedural due process regardless of the discharge procedures provided by the statute. Accordingly, a majority of the Court rejects MR. JUSTICE REHNQUIST'S argument that because appellee's entitlement arose from statute, it could be conditioned on a statutory limitation of procedural due process protections, an approach which would render such protection inapplicable to the deprivation of any statutory benefit—any "privilege" extended by Government—where a statute prescribed a termination procedure, no matter how arbitrary or unfair. It would amount to nothing less than a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process.[7]

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[6] Although *Perry* v. *Sindermann, supra,* did not involve a statutorily created interest, it is plainly analogous in that the *de facto* tenure program on which Sindermann's claim of entitlement was grounded did not explicitly include the right to a hearing.

[7] In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that procedural due

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We have repeatedly observed that due process requires that a hearing be held "at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1965), but it remains for us to give content to that general principle in this case by balancing the Government's asserted interests against those of the discharged employee. *Goldberg* v. *Kelly,* 397 U. S., at 263; see *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961).

The interests of a public employee in a secure Government job are as weighty as other interests which we have found to require at least the rudimentary protection of an evidentiary hearing as a precondition to termination.

> "This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. . . . Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life." *Roth,* 408 U. S., at 589 (MARSHALL, J., dissenting).

See *Perry* v. *Sindermann, supra; Connell* v. *Higginbotham,* 403 U. S. 207 (1971); *Keyishian* v. *Board of*

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process protections did not apply to Government employment because it was merely a privilege and not a right. *Bailey* v. *Richardson,* 86 U. S. App. D. C. 248, 182 F. 2d 46 (1950), aff'd by an equally divided Court, 341 U. S. 918 (1951). As we have previously observed, "[t]he basis of this holding has been thoroughly undermined in the ensuing years." *Board of Regents* v. *Roth,* 408 U. S., at 571 n. 9. "[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' . . . ." *Id.,* at 571. For example, the Court has found constitutional restraints applicable to disqualification for unemployment compensation, *Sherbert* v. *Verner,* 374 U. S. 398 (1963); denial of a tax exemption, *Speiser* v. *Randall,* 357 U. S. 513 (1958); termination of welfare benefits, *Goldberg* v. *Kelly, supra;* and dismissal from public employment, *e. g., Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956).

Regents, 385 U. S. 589 (1967); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 288 (1961); *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 185 (1951) (Jackson, J., concurring); *United States* v. *Lovett,* 328 U. S. 303, 316–317 (1946). The Court has recognized the vital importance of employment in related contexts. In *Sniadach* v. *Family Finance Corp.,* the Court expressed its particular concern that "garnishment [of wages] often meant the loss of a job," 395 U. S., at 340, and in *Bell* v. *Burson, supra,* we relied heavily on the fact that a driver's license may be "essential in the pursuit of a livelihood," 402 U. S., at 539. In *Greene* v. *McElroy,* 360 U. S. 474, 508 (1959), the Court construed federal security clearance regulations to avoid the constitutional issues that would be presented if the petitioner were deprived "of his job in a proceeding in which he was not afforded the safeguards of [procedural due process]." See *id.,* at 506–507; *Willner* v. *Committee on Character,* 373 U. S. 96, 103–104 (1963).

An exhaustive study by the United States Administrative Conference of the problem of agency dismissals led the author of the Conference's report to observe:

> "One cannot escape the conclusion, however, that the government employee who is removed from his job loses something of tremendous value that in a market of declining demand for skills may not be replaceable." [8]

And the report also observes:

> "[O]ne must acknowledge what seems to be an accepted, if regrettable, fact of life: Removal from government employment for cause carries a stigma

[8] Merrill, Report in Support of Recommendation 72–8, Procedures for Adverse Actions Against Federal Employees, in 2 Recommendations and Reports of the Administrative Conference of the United States 1007, 1015 (1972) (hereinafter Merrill).

> that is probably impossible to outlive. Agency personnel officers are generally prepared to concede . . . that it is difficult for the fired government worker to find employment in the private sector." [9]

Dismissal from public employment for cause may also, therefore, implicate liberty interests in imposing on the discharged employee a stigma of incompetence or wrongdoing that forecloses "his freedom to take advantage of other employment opportunities." *Roth, supra,* at 573; see *Wisconsin* v. *Constantineau,* 400 U. S. 433, 437 (1971).

Given the importance of the interest at stake, the discharged employee should be afforded an opportunity to test the strength of the evidence of his misconduct by confronting and cross-examining adverse witnesses and by presenting witnesses in his own behalf, whenever there are substantial disputes in testimonial evidence. See *Morrissey* v. *Brewer,* 408 U. S., at 487. A dismissal for cause often involves disputed questions of fact raised by accusations of misconduct. Mistakes of identity, distortions caused by the failure of information sources, faulty perceptions or cloudy memories, as well as fabrications born of personal antagonisms are among the factors which may undermine the accuracy of the factual determinations upon which dismissals are based. The possibility of error is not insignificant. Almost a fourth of all appeals from adverse agency actions result in reversal.[10]

In our system of justice, the right of confrontation

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[9] *Ibid.* The report of the Administrative Conference seems to bear out my Brother DOUGLAS' recent observation:

"Once there is a discharge from a . . . federal agency, dismissal may be a badge that bars the employee from other federal employment. The shadow of that discharge is cast over the area where private employment may be available." *Sampson* v. *Murray,* 415 U. S. 61, 95 (1974) (dissenting).

[10] Merrill 1014 n. 33.

provides the crucible for testing the truth of accusations such as those leveled by appellee's superior and strenuously denied by appellee. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly,* 397 U. S., at 269 (citations omitted).[11] The *Goldberg* Court's citation to a well-known passage from *Greene* v. *McElroy,* 360 U. S. 474 (1959), is equally applicable to a dismissal from public employment for cause as to a termination of welfare benefits.

> " 'Certain principles have remained immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.' " *Id.,* at 496–497, quoted in *Goldberg* v. *Kelly, supra,* at 270.

See also *Chambers* v. *Mississippi,* 410 U. S. 284, 295–298 (1973); *Pointer* v. *Texas,* 380 U. S. 400 (1965).

[11] This case presents no question as to the requirements of due process "where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues." *Goldberg* v. *Kelly,* 397 U. S., at 268 n. 15; see *Mills* v. *Richardson,* 464 F. 2d 995, 1001 (CA2 1972); cf. *FCC* v. *WJR,* 337 U. S. 265, 275–277 (1949); 1 K. Davis, Administrative Law Treatise 412 (1958).

This case and *Goldberg* involve the termination of income, whether in salary or public assistance payments, upon which the recipient may depend for basic sustenance. A person should not be deprived of his livelihood "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene, supra,* at 508; see *Jenkins* v. *McKeithen,* 395 U. S. 411, 423–429 (1969); *Willner* v. *Committee on Character,* 373 U. S., at 103. The stakes are just too high and the possibility of misjudgment too great to allow dismissal without giving the tenured public employee an opportunity to contest its basis and produce evidence in rebuttal. See *Goldberg, supra,* at 266.

It also seems clear that for the hearing to be meaningful, the hearing officer must be independent and unbiased and his decision be entitled to some weight. We addressed the importance of this element of due process in *Goldberg, supra,* where we found the requirements of due process were not met by the review of a welfare termination decision by the caseworker who was, in effect, also the complainant. 397 U. S., at 271. In *Morrissey* v. *Brewer, supra,* we held that an independent decisionmaker must determine whether reasonable grounds exist for parole revocation because an "officer directly involved in making recommendations cannot always have complete objectivity in evaluating them." 408 U. S., at 486. The need for an independent decisionmaker is particularly crucial in the public employment context, where the reason for the challenged dismissal may well be related to some personal antagonism between the employee and his superior, as appears to be the case here.[12] See *Pickering* v. *Board of Education,* 391 U. S. 563, 578–579, Appendix n. 2 (1968).

[12] See *ante,* at 137–138. Cf. T. Arnold, Fair Fights and Foul 151 (1965) (describing the potential abuse in a situation where the head

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A discharged federal worker in the competitive service is, in fact, guaranteed a full evidentiary hearing before an impartial decisionmaker whose report is entitled to considerable weight.[13] But the timing of the hearing is discretionary with the employing agency, see 5 CFR § 771.208 (a) (1972), and in many agencies, such as the OEO, the hearing comes long after the employee has been removed from the Government service and payroll. In a sense, then, the real issue is not whether appellee must be accorded an evidentiary hearing, but only whether that hearing should have been afforded *before* his discharge became effective. Although the nature of the hearing required by due process is determined by a balancing process, that hearing must be held at a meaningful time. Accordingly, the Court has embraced a general presumption that one who is constitutionally entitled to a hearing should be heard before the deprivation of his liberty or property takes place. Thus, in *Boddie* v. *Connecticut,* 401 U. S. 371 (1971), the Court observed that the fact that "the hearing . . . is not fixed in form does not affect its root require-

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of a department is the decisionmaker in a public employee discharge proceeding).

[13] The discharged employee is entitled to a full trial-type proceeding before a single examiner who may not occupy a position directly or indirectly under the jurisdiction of the official who proposed the dismissal or who bears ultimate responsibility for that decision. The examiner's decision is afforded substantial weight; if it is rejected, the rejection must be accompanied by a full statement of reasons that is subject to review. Both the employee and the agency may produce, examine, and cross-examine witnesses under oath or affirmation, and documentary evidence may also be introduced. Rigorous trial formality is avoided and care taken not to place an uncounseled employee at a disadvantage. See Merrill 1038–1040; 5 CFR §§ 771.209–771.211 (1972).

ment that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id.*, at 378–379. (Emphasis in orginal.) In *Bell* v. *Burson, supra,* we held that "except in emergency situations . . . due process requires that when a State seeks to terminate an [important property] interest . . . it must afford 'notice and opportunity for hearing . . .' *before* the termination becomes effective." 402 U. S., at 542 (emphasis in original) (footnote omitted). In *Goldberg* v. *Kelly, supra,* the Court found that an evidentiary hearing held after the termination of welfare benefits was inadequate to satisfy constitutional requirements.[14]

Even if we accept appellants' assertion that a subsequent hearing affords the discharged employee an opportunity to clear his name,[15] the worker still has a significant interest in retaining his job pending a full hearing.[16] Almost a fourth of all appeals from agency

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[14] The procedure in *Goldberg* also involved a pretermination right of reply and a full trial-type hearing after termination, see n. 5, *supra,* but the scheme was nonetheless found not to satisfy due process requirements and a full pretermination hearing was required. See O'Neil, Of Justice Delayed and Justice Denied; The Welfare Prior Hearing Cases, 1970 Sup. Ct. Rev. 161, 169.

[15] See n. 9, *supra,* and n. 19, *infra.*

[16] Both MR. JUSTICE REHNQUIST and MR. JUSTICE WHITE dismiss the need for a full prior hearing partially by reference to the Court's decision in *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961). That case is entirely inapposite. First, it involved not the dismissal for cause of a tenured civil service employee, but rather the withdrawal of the security clearance of the employee of a private contractor, which, in effect, barred the worker from her job in the commissary at a military base. The employer was prepared to employ the worker at another of his restaurants, so the withdrawal of her security clearance was not

dismissals result in a finding that the termination was illegal.[17] And, the delay from discharge to ultimate vindication at a hearing on appeal is far from insubstantial. More than 75% of adverse personnel actions take more than two months to process; over half take more than three months and a not insignificant number take more than a year.[18] The longer the period between the discharge and the hearing, the more devastating will be the impact of the loss of employment.

During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him.[19] Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful.[20]

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apt to cause the serious financial hardship that appellee's dismissal from public employment might entail. See *Board of Regents* v. *Roth,* 408 U. S., at 584–585 (DOUGLAS, J., dissenting). Moreover, the Court has since read *Cafeteria Workers* to be a case where the Government's "exceptional" interest in national security justified an abridgment of the right to a hearing. *Fuentes* v. *Shevin,* 407 U. S. 67, 91 n. 23 (1972); see *Boddie* v. *Connecticut,* 401 U. S. 371, 379 (1971).

[17] Merrill 1014 n. 33.

[18] *Id.,* at 1016.

[19] My Brother REHNQUIST argues that the stigma imposed by dismissal is only temporary in that the discharged employee can clear his name at the *post-hoc* hearing, hence does not "foreclose his freedom to take advantage of other employment opportunities." *Board of Regents* v. *Roth,* 408 U. S., at 573; see n. 9, *supra.* But the stigma of outstanding charges would nonetheless be borne by the employee in the interim period while he waits for his hearing and seeks alternative employment to tide himself over.

[20] See, *e. g.,* Hearings on Postal Labor Relations and Employee Morale before the Subcommittee on Postal Operations of the House

And in many States, including Illinois, where appellee resides, a worker discharged for cause is not even eligible for unemployment compensation.[21]

Many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. Few public employees earn more than enough to pay their expenses from month to month. See *Sampson* v. *Murray,* 415 U. S. 61, 97 (1974) (MARSHALL, J., dissenting). Like many of us, they may be required to meet substantial fixed costs on a regular basis and lack substantial savings to meet those expenses while not receiving a salary. The loss of income for even a few weeks may well impair their ability to provide the essentials of life—to buy food, meet mortgage or rent payments, or procure medical services. *Ricucci* v. *United States,* 192 Ct. Cl. 1, 9–11, 425 F. 2d 1252, 1256–1257 (1970) (Skelton, J., concurring). The plight of a discharged employee may not be far different from that of the welfare recipient in *Goldberg* who, "pending resolution of a controversy . . . may [be] deprive[d] . . . of the very means by which to live while he waits." 397 U. S., at 264. Appellee, although earning an annual salary of $16,000 before his dismissal, far above the mean salary for federal employees,[22] was nonetheless driven to the brink of financial ruin while he waited. He had to borrow money to support his family, his debts went unpaid, his family lost the protection of his health insurance and, finally, he was forced to apply for public

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Committee on Post Office and Civil Service, 91st Cong., 1st Sess. (1969); Kennedy, Adverse Actions in the Agencies—Words and Deeds—Postal Adverse Action Procedures, 19 Am. U. L. Rev. 398, 412 (1970).

[21] See, *e. g.,* Ill. Rev. Stat., c. 48, § 432 (1973); see *Christian* v. *New York Dept. of Labor,* 414 U. S. 614 (1974).

[22] See Mandate for Merit: 1972 Annual Report of the United States Civil Service Commission 64–65.

assistance. App. 128 *et seq.* In this context justice delayed may well be justice denied.

To argue that a dismissal from tenured Government employment is not a serious enough deprivation to require a prior hearing because the discharged employee may draw on the welfare system in the interim, is to exhibit a gross insensitivity to the plight of these employees. First, it assumes that the discharged employee will be eligible for welfare. Often welfare applicants must be all but stripped of their worldly goods before being admitted to the welfare roles, hence it is likely that the employee will suffer considerable hardship before becoming eligible. He may be required not only to exhaust his savings but also to convert many of his assets into cash for support before being able to fall back on public assistance. He may have to give up his home or cherished personal possessions in order to become eligible. The argument also assumes all but instant eligibility which is, sadly, far from likely even when all the employee's other sources of support have been depleted. Moreover, rightly or wrongly, many people consider welfare degrading and would decline public assistance even when eligible. Finally, the level of subsistence provided by welfare is minimal, certainly less than one is apt to expect from steady employment. The substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government employment cannot be so easily discounted.

Nor does the availability of backpay upon an ultimate

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finding that the dismissal was improper alleviate the compelling nature of the employee's plight. Cf. *Sampson* v. *Murray*, 415 U. S., at 97 (MARSHALL, J., dissenting). In *Sniadach* v. *Family Finance Corp., supra,* the Court recognized that the employee had an interest in the enjoyment of his wages as they accrued and noted that even a temporary loss of salary could put a wage earner below the poverty level or "drive a wage-earning family to the wall." 395 U. S., at 341–342. Thus, we held that a wage earner is entitled to a hearing prior to the garnishment of his wages even though he would ultimately get his frozen earnings back when and if he prevailed in a suit on the merits. See also, *id.*, at 343 (Harlan, J., concurring). And, in *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), the Court held that due process required a hearing before a seizure of property by writ of replevin, observing:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process had already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'" *Id.*, at 81–82.

The *Fuentes* Court, applying these considerations, albeit in dicta, observed that, "[i]n cases involving deprivations of other interests, such as government employment, the Court similarly has required an unusually important governmental need to outweigh the right to a prior hearing." *Id.*, at 91 n. 23.

The Court has recognized a number of instances where a vital governmental interest may outweigh the right to a prior hearing, including the need to seize property to "collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated foods." *Id.*, at 92 (footnotes omitted).[23] Such a vital interest is clearly lacking here.

The Government's asserted interests in not affording a predismissal hearing are twofold. First, appellants argue that the delay in holding the hearing makes the functioning of the agency more efficient. We rejected a similar rationale in *Goldberg,* 397 U. S., at 266, and observed in *Fuentes, supra:*

> "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions [or property] are about to be taken.
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> "'. . . [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre

[23] See, *e. g., Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 566 (1921); *Phillips* v. *Commissioner,* 283 U. S. 589, 597 (1931); *Ewing* v. *Mytinger & Casselberry,* 339 U. S. 594 (1950).

ones.' " 407 U. S., at 90–91, n. 22 (citations omitted).

Moreover, the Government's interest in efficiency in this case is entirely unconvincing. The applicable statute does not prohibit prior hearings but rather makes them discretionary with the agency. Nine federal agencies, including the FCC, NLRB, HUD, HEW, the Department of Justice, and the Civil Service Commission itself, regularly accord evidentiary hearings prior to the dismissal of a tenured employee.[24] The Administrative Conference of the United States, on the basis of its exhaustive study of federal agency proceedings for the dismissal of employees in the competitive service, strongly recommended that evidentiary hearings be held prior to discharge.[25]

The Administrative Conference found that the evidence, although inconclusive, indicates that the agencies that provided pretermination hearings closed adverse action proceedings more quickly than those which did not hold an evidentiary hearing until after the dismissal had been effected. It also found that the delays in closing cases involving hearings are typically caused not by the length of the hearings—almost all are completed within a day—but rather by scheduling difficulties. And those agencies which take three months or more to hold post-termination hearings have little incentive to decide dismissal cases more promptly, since the employee has already been discharged and he bears most of the costs of delay. If the hearing were required before termination, agencies would have a far greater incentive to decide

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[24] Merrill 1056.

[25] Recommendation 72–8, Adverse Actions Against Federal Employees, in 2 Recommendations and Reports of the Administrative Conference of the United States 73–75 (1972).

these cases expeditiously.[26] Finally, providing an evidentiary hearing before the discharge might well obviate the practical and constitutional need for a full post-termination proceeding.[27]

The Government also argues that if a supervisor were unable to effect an immediate removal of a troublesome employee from his agency, the discipline and efficiency of the whole office might be disrupted. Under the prevailing practice, an agency may not dismiss an employee until 30 days after he has received notice of the charges against him and has had an opportunity to reply. Thus, fellow workers and supervisors must now function with the threatened employee in their midst for at least a month, and there seems little reason why a hearing could not be held during that 30-day period.[28] If the employee actually threatens to disrupt the operation of the office, he could be put on administrative leave or temporarily assigned to a less sensitive position pending his hearing, as currently provided for by regulation. 5 CFR § 752.202 (d).

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[26] Merrill 1017, 1056–1057, 1060. Scheduling problems might be largely overcome by more skillful use of personnel. See *Goldberg* v. *Kelly,* 397 U. S., at 266.

[27] As we observed, *id.,* at 267 n. 14, due process does not, of course, require two hearings. Under current procedures, an employee is afforded one and sometimes two *post-hoc* evidentiary hearings (one before the agency and the other before the Civil Service Commission). See Merrill 1013, 1043. If an adequate review mechanism is maintained, a single pretermination hearing might obviate the need for these later proceedings.

[28] See, *e. g.,* U. S. Dept. of Justice, Adverse Action Hearings, Appeals and Grievance Policies and Regulations, c. 2 (Sept. 28, 1972); Recommendation 72–8, n. 25, *supra,* at ¶ B, 74. The notice requirement need not be any impediment to holding the hearing within the 30-day period. In *Goldberg* v. *Kelly, supra,* at 268, for example, the Court found a seven-day period between notice and termination hearing constitutionally permissible.

The only pretermination proceeding accorded appellee was a "right of reply," see 5 CFR § 752.202 (b), but the "right of reply" falls far short of being the meaningful hearing which, in my view, is constitutionally required. As the author of the Administrative Conference Report observed:

> "In most agencies . . . an employee's right to reply simply means that he may meet informally with a representative of the agency and advance oral representations that he hopes will sway the final decision. He has no right at this stage to present witnesses or to confront and cross-examine the agency's witnesses." [29] (Footnotes omitted.)

The agency official before whom the employee appears need not be the decisionmaker; he need only be able to recommend a decision. Moreover, the hearing examiner or the person responsible for the decision to discharge the employee may well be the complainant or his direct subordinate. In the case before us, for example, the decision as to whether appellee should be discharged was made by the OEO Regional Director whom appellee had accused of misconduct. The Regional Director assembled the evidence against appellee, proposed the dismissal, then decided it should be effected; he acted as complaining witness, prosecutor, and judge. The meaningless bureaucratic paper shuffling afforded appellee before his discharge would surely not alone satisfy the stringent demands of due process when such an important interest is at stake.

The decisions of this Court compel the conclusion that a worker with a claim of entitlement to public employment absent specified cause has a property interest protected by the Due Process Clause and there-

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[29] Merrill 1033.

fore the right to an evidentiary hearing before an impartial decisionmaker prior to dismissal. Accordingly, I would affirm the decision of the court below that appellee had been discharged in violation of his procedural due process rights.

II

The court below also held that the provision of the Lloyd-La Follette Act which authorizes dismissal of tenured Government employees for "such cause as will promote the efficiency of the service" is unconstitutionally vague and overbroad.[30]

There is no dispute that the phrase " 'such cause as will promote the efficiency of the service' as a standard of employee job protection is without doubt intended to authorize dismissal for speech," *ante,* at 160. The majority finds this permissible because in *Pickering* v. *Board of Education,* 391 U. S. 563, 568 (1968), we observed that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general." But, the majority seems to have ignored the passage in *Pickering* that directly precedes the quoted material:

> "[T]o suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights

[30] Other cases in this area hardly provide substantial guidance as to what speech is or is not protected. See, *e. g., Pickering* v. *Board of Education,* 391 U. S. 563, 570 n. 3 (1968). Nor do the extant regulations provide substantial guidance; they merely repeat the language of the statute and provide examples as unelucidating as the particular regulation relevant to this case which proscribed "any action . . . which might result in, or create the appearance of . . . (c) [i]mpeding Government efficiency or economy . . . [or] (f) [a]ffecting adversely the confidence of the public in the integrity of the Government." 5 CFR § 735.201a; see 45 CFR § 1015.735–1.

> they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, . . . proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. *E. g., Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Shelton* v. *Tucker,* 364 U. S. 479 (1960); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967)." 391 U. S., at 568.

The importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors, must be self-evident in these times. In *Pickering,* this Court specifically upheld the right of a public employee to criticize the conduct of his superiors. *Id.,* at 573–574. In fact, it appears that one of the primary purposes of the Lloyd-La Follette Act was to protect such criticism from official retribution. Senator La Follette gave the following example of an abuse sought to be cured by the bill:

> "The cause for [the employee's] dismissal was that he gave publicity to the insanitary conditions existing in some part of the post-office building in Chicago where the clerks were required to perform their services.... [H]e furnished some facts to the press of Chicago, and the publication was made of the conditions. They were simply horrible .... The public health officers of Chicago, as soon as their attention was called to the conditions, condemned the situation as they found it; and yet this young man, one of the brightest fellows I have met, was removed from the service because, he had given publicity to these outrageous conditions." 48 Cong. Rec. 10731 (1912).

The "efficiency of the service" standard would appear to bring within its reach, as permissible grounds for dismissal, even truthful criticism of an agency that in any way tends to disrupt its operation. One can be sure, for example, that the young man's criticism in Senator La Follette's example disrupted the operation of the Chicago Post Office. It seems clear that the standard could be construed to punish such protected speech.

The majority purports to solve this potential overbreadth problem merely by announcing that the standard in the Act "excludes protected speech." Nonetheless, it leaves the statutory standard intact and offers no guidance other than general observation as to what conduct is or is not punishable.[31] The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious.

The majority misunderstands the overbreadth principle which concerns the potential deterrent effect on constitutionally protected speech of a statute that is overbroad or vague on its face. The focus of the doctrine is not on the individual actor before the court but on others who may forgo protected activity rather than run afoul of the statute's proscriptions. Hence, the Court has reversed convictions where the subject speech could have been punished under a more narrowly drawn statute because the statute as drawn purported to cover, and

[31] The Administrative Conference Report reserved particularly harsh criticism for the "efficiency of the service" standard, terming it "deficient both as a guide to agency management and as a warning to employees of the sorts of behavior that will get them in trouble," warning that it is "an invitation to arbitrary action by government agencies." Merrill 1054; see *id.*, at 1053.

might deter others from engaging in, protected speech. The Court explained this vagueness-overbreadth relationship in *Keyishian* v. *Board of Regents,* 385 U. S., at 603–604:

> "We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 438; '[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *Id.,* at 432–433. . . . When one must guess what conduct or utterances may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . . .' *Speiser* v. *Randall,* 357 U. S. 513, 526. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.' *N. A. A. C. P.* v. *Button, supra,* at 433. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [public employees] what is being proscribed."

By the uncertainty of its scope, the standard here creates the very danger of a chilling effect that concerned the Court in *Keyishian.*[32] Employees are likely to limit

[32] Further refinement of the statutory "efficiency of the service" standard, is not, as the majority implies, impossible. The Administrative Conference points out that the agencies and the Civil Service Commission "have developed a large, still essentially secret body of law on the meaning of 'efficiency.'" Merrill 1054. Reference to this body of precedent might well serve as a basis for the amplification of the statutory standard. Relevant guidelines might, for example, distinguish between statements made in an official as opposed to a private capacity, see *Pickering* v. *Board of Education,* 391 U. S. 563 (1968); between knowingly false statements and those

their behavior to that which is unquestionably safe, for "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U. S., at 574. The dismissal standard hangs over their heads like a sword of Damocles, threatening them with dismissal for any speech that might impair the "efficiency of the service." That this Court will ultimately vindicate an employee if his speech is constitutionally protected is of little consequence—for the value of a sword of Damocles is that it hangs—not that it drops. For every employee who risks his job by testing the limits of the statute, many more will choose the cautious path and not speak at all.

The District Court found that "[b]ecause employees faced with the standard of 'such cause as will promote the efficiency of the service' can only guess as to what utterances may cost them their jobs, there can be little question that they will be deterred from exercising their First Amendment rights to the fullest extent." I agree with that characterization of the effect of the standard and would, therefore, uphold the conclusion of the District Court that the statute is unconstitutionally vague and overbroad.

I respectfully dissent.

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which are reasonably believed to be true, see, *e. g.*, *Pickering, supra,* at 569; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964); cf. *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971); and between statements which pertain to a legitimate subject of public comment and those which disclose confidential Government information, see *Pickering, supra,* at 570 n. 3 and 571–572; cf. *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967).

SCHEUER, ADMINISTRATRIX *v.* RHODES, GOVERNOR OF OHIO, ET AL.

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

No. 72–914. Argued December 4, 1973—Decided April 17, 1974*

Petitioners, the personal representatives of the estates of students who were killed on the campus of a state-controlled university, brought these damages actions under 42 U. S. C. § 1983 against the Governor, the Adjutant General of the Ohio National Guard, various other Guard officers and enlisted members, and the university president, charging that those officials, acting under color of state law, "intentionally, recklessly, willfully and wantonly" caused an unnecessary Guard deployment on the campus and ordered the Guard members to perform allegedly illegal acts resulting in the students' deaths. The District Court dismissed the complaints for lack of jurisdiction without the filing of any answer and without any evidence other than the Governor's proclamations and brief affidavits of the Adjutant General and his assistant, holding that respondents were being sued in their official capacities and that the actions were therefore in effect against the State and barred by the Eleventh Amendment. The Court of Appeals affirmed on that ground and on the alternative ground that the common-law doctrine of executive immunity was absolute and barred action against respondent state officials. *Held:*

1. The Eleventh Amendment does not in some circumstances bar an action for damages against a state official charged with depriving a person of a federal right under color of state law, and the District Court acted prematurely and hence erroneously in dismissing the complaints as it did without affording petitioners any opportunity by subsequent proof to establish their claims. Pp. 235–238.

2. The immunity of officers of the executive branch of a state government for their acts is not absolute but qualified and of varying degree, depending upon the scope of discretion and

*Together with No. 72–1318, *Krause, Administrator, et al.* v. *Rhodes, Governor of Ohio, et al.*, also on certiorari to the same court.

responsibilities of the particular office and the circumstances existing at the time the challenged action was taken. Pp. 238–249.

471 F. 2d 430, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except DOUGLAS, J., who took no part in the decision of the cases.

Michael E. Geltner argued the cause for petitioner in No. 72–914. With him on the briefs were *Leonard J. Schwartz, Melvin L. Wulf, Joel M. Gora, Nelson G. Karl, Niki Z. Schwartz,* and *Walter S. Haffner. Steven A. Sindell* argued the cause for petitioners in No. 72–1318. With him on the brief were *Joseph M. Sindell* and *Joseph Kelner.*

Charles E. Brown argued the cause for respondents in No. 72–914. With him on the brief were *Robert F. Howarth, Jr., Delmar Christensen,* and *C. D. Lambros. R. Brooke Alloway* argued the cause for respondents in No. 72–1318. With him on the brief was *John M. McElroy.*†

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

We granted certiorari [1] in these cases to resolve whether the District Court correctly dismissed civil damage actions, brought under 42 U. S. C. § 1983, on the ground that these actions were, as a matter of law, against the State of Ohio, and hence barred by the

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†Briefs of *amici curiae* urging reversal in both cases were filed by *Mario G. Obledo* and *Sanford Jay Rosen* for the Mexican American Legal Defense and Educational Fund, and by *David E. Engdahl* for the National Council of the Churches of Christ in the U. S. A. et al. *Carl J. Character* filed a brief for the National Bar Assn. as *amicus curiae* urging reversal in No. 72–1318.

[1] 413 U. S. 919 (1973).

Eleventh Amendment to the Constitution and, alternatively, that the actions were against state officials who were immune from liability for the acts alleged in the complaints. These cases arise out of the same period of alleged civil disorder on the campus of Kent State University in Ohio during May 1970 which was before us, in another context, in *Gilligan* v. *Morgan,* 413 U. S. 1 (1973).

In these cases the personal representatives of the estates of three students who died in that episode seek damages against the Governor, the Adjutant General, and his assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the president of Kent State University. The complaints in both cases allege a cause of action under the Civil Rights Act of 1871, 17 Stat. 13, now 42 U. S. C. § 1983. Petitioner Scheuer also alleges a cause of action under Ohio law on the theory of pendent jurisdiction. Petitioners Krause and Miller make a similar claim, asserting jurisdiction on the basis of diversity of citizenship.[2]

The District Court dismissed the complaints for lack of jurisdiction over the subject matter on the theory that these actions, although in form against the named individuals, were, in substance and effect, against the State of Ohio and thus barred by the Eleventh Amendment. The Court of Appeals affirmed the action of the District Court, agreeing that the suit was in legal effect one against the State of Ohio and, alternatively, that the common-law doctrine of executive immunity barred ac-

[2] The Krause complaint states that the plaintiff is a citizen of Pennsylvania and expressly invokes federal diversity jurisdiction under 28 U. S. C. § 1332. The Miller complaint states that the plaintiff is a citizen of New York. While the complaint does not specifically refer to jurisdiction under 28 U. S. C. § 1332, it alleges facts which clearly support diversity jurisdiction. App. in No. 72–1318, p. 85. See Fed. Rule Civ. Proc. 8 (a)(1).

tion against the state officials who are respondents here. 471 F. 2d 430 (1972). We are confronted with the narrow threshold question whether the District Court properly dismissed the complaints. We hold that dismissal was inappropriate at this stage of the litigation and accordingly reverse the judgments and remand for further proceedings. We intimate no view on the merits of the allegations since there is no evidence before us at this stage.

I

The complaints in these cases are not identical but their thrust is essentially the same. In essence, the defendants are alleged to have "intentionally, recklessly, willfully and wantonly" caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints allege that the action was taken "under color of state law" and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office.

The complaints were dismissed by the District Court for lack of jurisdiction without the filing of an answer to any of the complaints. The only pertinent documentation [3] before the court in addition to the complaints were two proclamations issued by the respondent

[3] In the *Krause* case, the Adjutant General and his assistant also filed brief affidavits. These seem basically directed to the motion for a change of venue and, in any event, make no substantial contribution to the jurisdictional or immunity questions.

Governor. The first proclamation ordered the Guard to duty to protect against violence arising from wildcat strikes in the trucking industry; the other recited an account of the conditions prevailing at Kent State University at that time. In dismissing these complaints for want of subject matter jurisdiction at that early stage, the District Court held, as we noted earlier, that the defendants were being sued in their official and representative capacities and that the actions were therefore in effect against the State of Ohio. The primary question presented is whether the District Court acted prematurely and hence erroneously in dismissing the complaints on the stated ground, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim.

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U. S. 41, 45–46 (1957) (footnote omitted).

See also *Gardner* v. *Toilet Goods Assn.,* 387 U. S. 167, 172 (1967).

II

The Eleventh Amendment to the Constitution of the United States provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. *Edelman* v. *Jordan,* 415 U. S. 651 (1974); *Poindexter* v. *Greenhow,* 114 U. S. 270, 287 (1885); *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446 (1883). Its applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *Ex parte New York,* 256 U. S. 490, 500 (1921).

However, since *Ex parte Young,* 209 U. S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he

> "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.,* at 159–160. (Emphasis supplied.)

Ex parte Young, like *Sterling* v. *Constantin,* 287 U. S. 378 (1932), involved a question of the federal courts'

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injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, *Edelman* v. *Jordan, supra; Kennecott Copper Corp.* v. *State Tax Comm'n,* 327 U. S. 573 (1946); *Ford Motor Co.* v. *Dept. of Treasury,* 323 U. S. 459 (1945); *Great Northern Life Insurance Co.* v. *Read,* 322 U. S. 47 (1944), damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. *Myers* v. *Anderson,* 238 U. S. 368 (1915). See generally *Monroe* v. *Pape,* 365 U. S. 167 (1961); *Moor* v. *County of Alameda,* 411 U. S. 693 (1973). In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.

Analyzing the complaints in light of these precedents, we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim—but have not yet established by proof—was a deprivation of federal rights by these defendants under color of state law. Whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in dismissing the complaints for lack of jurisdiction.

III

The Court of Appeals relied upon the existence of an absolute "executive immunity" as an alternative ground for sustaining the dismissal of the complaints by the District Court. If the immunity of a member of the execu-

tive branch is absolute and comprehensive as to all acts allegedly performed within the scope of official duty, the Court of Appeals was correct; if, on the other hand, the immunity is not absolute but rather one that is qualified or limited, an executive officer may or may not be subject to liability depending on all the circumstances that may be revealed by evidence. The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King can do no wrong"—did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.[4] This

[4] In England legislative immunity was secured after a long struggle, by the Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," 1 W. & M., Sess. 2, c. 2. See *Stockdale* v. *Hansard,* 9 Ad. & E. 1, 113–114, 112 Eng. Rep. 1112, 1155–1156 (Q. B. 1839). The English experience, of course, guided the drafters of our "Speech or Debate" Clause. See *Tenney* v. *Brandhove,* 341 U. S. 367, 372–375 (1951); *United States* v. *Johnson,* 383 U. S. 169, 177–178, 181 (1966); *United States* v. *Brewster,* 408 U. S. 501 (1972).

In regard to judicial immunity, Holdsworth notes: "In the case of courts of record . . . it was held, certainly as early as Edward III's reign, that a litigant could not go behind the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction." 6 W. Holdsworth, A History of English Law 235 (1927). The modern concept owes much to the elaboration and restatement of Coke and other judges of the sixteenth and early seventeenth centuries. *Id.,* at 234 *et seq.* See *Floyd* v. *Barker,* 12 Co. Rep. 23, 77 Eng. Rep. 1305 (K. B. 1607). The immunity of the Crown has traditionally been of a more limited nature. Officers of the Crown were at first insulated from responsibility since the King could claim the act as his own. This absolute insulation was gradually eroded. Statute of Westminster I, 3 Edw. 1, c. 24 (1275) (re-

official immunity apparently rested, in its genesis, on two mutually dependent rationales: [5] (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

In this country, the development of the law of immunity for public officials has been the product of constitutional provision as well as legislative and judicial processes. The Federal Constitution grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report, or action done in session. Art. I, § 6. See *Gravel* v. *United States,* 408 U. S. 606 (1972); *United States* v. *Brewster,* 408 U. S. 501 (1972); and *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881). This provision was intended to secure for the Legislative Branch of the Government the freedom from executive and judicial encroachment which

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pealed); Statute of Westminster II, 13 Edw. 1, c. 13 (1285) (repealed). The development of liability, especially during the times of the Tudors and Stuarts, was slow; see, *e. g.,* Public Officers Protection Act, 7 Jac. 1, c. 5 (1609) (repealed). With the accession of William and Mary, the liability of officers saw what Jaffe has termed "a most remarkable and significant extension" in *Ashby* v. *White,* 1 Bro. P. C. 62, 1 Eng. Rep. 417 (H. L. 1704), reversing 6 Mod. 45, 87 Eng. Rep. 808 (Q. B. 1703). Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 14 (1963); A. Dicey, The Law of the Constitution 193–194 (10th ed. 1959) (footnotes omitted). See generally *Barr* v. *Matteo,* 360 U. S. 564 (1959). Good-faith performance of a discretionary duty has remained, it seems, a defense. See Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 216 (1963). See also *Spalding* v. *Vilas,* 161 U. S. 483, 493 *et seq.* (1896).

[5] Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev., at 223.

had been secured in England in the Bill of Rights of 1689 and carried to the original Colonies.[6] In *United States* v. *Johnson,* 383 U. S. 169, 182 (1966), Mr. Justice Harlan noted:

> "There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause."

Immunity for the other two branches—long a creature of the common law—remained committed to the common law. See, *e. g., Spalding* v. *Vilas,* 161 U. S. 483, 498–499 (1896).

Although the development of the general concept of immunity, and the mutations which the underlying rationale has undergone in its application to various positions are not matters of immediate concern here, it is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating "it is not a tort for government to govern." *Dalehite* v. *United States,* 346 U. S. 15, 57 (1953) (dissenting opinion). Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when

[6] Mr. Justice Frankfurter noted in *Tenney* v. *Brandhove,* 341 U. S., at 373: "The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege." See *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808). See also *Kilbourn* v. *Thompson,* 103 U. S. 168, 202 (1881).

they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices.[7] Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. In *Barr* v. *Matteo,* 360 U. S. 564, 572–573 (1959), the Court observed, in the somewhat parallel context of the privilege of public officers from defamation actions: "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." See also *Spalding* v. *Vilas,* 161 U. S., at 498–499.

For present purposes we need determine only whether there is an absolute immunity, as the Court of Appeals determined, governing the specific allegations of the complaint against the chief executive officer of a State, the senior and subordinate officers and enlisted personnel of that State's National Guard, and the president of a state-controlled university. If the immunity is qualified,

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[7] For example, in *Floyd* v. *Barker, supra,* Coke emphasized that judges "are only to make an account to God and the King" since a contrary rule "would tend to the scandal and subversion of all justice. And those who are the most sincere, would not be free from continual calumniations . . . ." 12 Co. Rep., at 25, 77 Eng. Rep., at 1307. See also *Yaselli* v. *Goff,* 12 F. 2d 396, 399 (CA2 1926), aff'd *per curiam,* 275 U. S. 503 (1927). In *Spalding* v. *Vilas,* 161 U. S., at 498, the Court noted:

"In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

not absolute, the scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions, or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U. S. C. § 1983. In neither of these inquiries do we write on a clean slate. It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe* v. *Pape, supra,* MR. JUSTICE DOUGLAS, writing for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." 365 U. S., at 172. Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.,* at 171–172.

Since the statute relied on thus included within its scope the " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,' " *id.,* at 184 (quoting *United States* v. *Classic,* 313 U. S. 299, 326 (1941)), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed, as the Court also indicated in *Monroe* v. *Pape, supra,* the legislative history indicates that there is no absolute immunity. Soon after *Monroe* v. *Pape,* Mr. Chief Justice Warren noted in *Pierson* v. *Ray,* 386 U. S. 547 (1967), that the "legislative record [of § 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities," *id.,* at 554. The Court had

previously recognized that the Civil Rights Act of 1871 does not create civil liability for legislative acts by legislators "in a field where legislators traditionally have power to act." *Tenney* v. *Brandhove,* 341 U. S. 367, 379 (1951). Noting that "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," *id.,* at 372, the Court concluded that it was highly improbable that "Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language . . ." of this statute. *Id.,* at 376.

In similar fashion, *Pierson* v. *Ray, supra,* examined the scope of judicial immunity under this statute. Noting that the record contained no "proof or specific allegation," 386 U. S., at 553, that the trial judge had "played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court," *ibid.,* the Court concluded that, had the Congress intended to abolish the common-law "immunity of judges for acts within the judicial role," *id.,* at 554, it would have done so specifically. A judge's

> "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Ibid.*

The *Pierson* Court was also confronted with whether immunity was available to that segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry and, hence, most frequently exposed to situations which can give rise to claims under § 1983—the local

police officer. Mr. Chief Justice Warren, speaking for the Court, noted that the police officers

> "did not defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the ['white only'] waiting room. Rather, they claimed and attempted to prove that . . . [they arrested them] solely for the purpose of preventing violence. They testified, in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact [without probable cause and] unconstitutional." *Id.,* at 557.

The Court noted that the "common law has never granted police officers an absolute and unqualified immunity," *id.,* at 555, but that "the prevailing view in this country [is that] a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved," *ibid.;* the Court went on to observe that a "policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Ibid.* The Court then held that

> "the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Id.,* at 557.

When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause."

Ibid. In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. In common with police officers, however, officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act.[8] When a condition of civil disorder in fact exists, there is obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others. While both federal and state laws plainly contemplate the use of force when the necessity arises, the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights—government by elected civilian leaders, freedom of expression, of assembly, and of association. Decisions in such situations are more likely

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[8] In *Spalding* v. *Vilas*, 161 U. S., at 498, the Court, after discussing the early principles of judicial immunity in the country, cf. *Randall* v. *Brigham*, 7 Wall. 523, 535 (1869), *Bradley* v. *Fisher*, 13 Wall. 335 (1872), and *Yates* v. *Lansing*, 5 Johns. 282 (N. Y. 1810), noted the similarity in the controlling policy considerations in the case of high-echelon executive officers and judges:

"We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts."

than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no consensus as to the appropriate remedy. In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. In a context other than a § 1983 suit, Mr. Justice Harlan articulated these considerations in *Barr* v. *Matteo, supra:*

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas, supra,* at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U. S., at 573–574.

These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light

of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. Mr. Justice Holmes spoke of this, stating:

> "No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event." *Moyer* v. *Peabody,* 212 U. S. 78, 85 (1909). (Citations omitted.)

Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." *Sterling* v. *Constantin,* 287 U. S., at 397. In *Sterling,* Mr. Chief Justice Hughes put it in these terms:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a con-

> clusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." *Id.*, at 397–398.

Gilligan v. *Morgan,* by no means indicates a contrary result. Indeed, there we specifically noted that we neither held nor implied "that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief." 413 U. S., at 11–12. (Footnote omitted.) See generally *Laird* v. *Tatum,* 408 U. S. 1, 15–16 (1972); *Duncan* v. *Kahanamoku,* 327 U. S. 304 (1946).

IV

These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, do they permit a determination as to the applicability of the foregoing principles to the respondents here. The District Court acted before answers were filed and without any evidence other than the copies of the proclamations issued by respondent Rhodes and brief affidavits of the Adjutant General and his assistant. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that "mob rule existed at Kent State University." There was no opportunity afforded petitioners to contest

the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed. We can readily grant that a declaration of emergency by the chief executive of a State is entitled to great weight but it is not conclusive. *Sterling* v. *Constantin, supra.*

The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good-faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved.

The judgments of the Court of Appeals are reversed and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Syllabus

SHEA, EXECUTIVE DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF COLORADO, ET AL. *v.* VIALPANDO

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

No. 72–1513. Argued February 26, 1974—Decided April 23, 1974

Section 402 (a)(7) of the Social Security Act requires state agencies in administering the Aid to Families with Dependent Children (AFDC) program to "take into consideration . . . any expenses reasonably attributable to the earning of . . . income." Such expenses are deducted from an AFDC applicant's income in determining eligibility for assistance. Colorado's AFDC regulations, which previously had permitted the deduction from income of all expenses reasonably attributable to employment, including transportation expenses, were amended in 1970 to subject work-related expenses (with certain exceptions) to a uniform allowance of $30 per month. This substantially reduced respondent's monthly deductions for work-related transportation expenses and the corresponding increase in her monthly net income made her ineligible for continued AFDC assistance. She then brought this action for injunctive and declaratory relief, claiming, *inter alia*, that Colorado's standardized work-expense allowance violated § 402 (a)(7). The District Court granted summary judgment for respondent, and the Court of Appeals affirmed. *Held:* The Colorado regulation conflicts with § 402 (a)(7) and is therefore invalid. Pp. 258–266.

(a) In light of the statute's legislative history and the normal meaning of the term "any," the language of § 402 (a)(7) requiring the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance is to be interpreted as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon recognition of work-related expenses, and hence a fixed work-expense allowance that does not permit deductions for expenses exceeding that standard directly contravenes the language of the statute. P. 260.

(b) Standardized treatment of work-related expenses without provision for showing actual and reasonable expenses exceeding the standard amount threatens to defeat the purpose of the

mandatory work-expense recognition provision of § 402 (a) (7) of encouraging AFDC recipients to secure and retain employment, since by limiting work expenses to $30 per month the Colorado regulation results in a disincentive to seek or retain employment for all recipients whose reasonable work-related expenses exceed or would exceed that amount. Pp. 263–265.

(c) It is not the adoption of a standardized work-expense allowance *per se* that violates § 402 (a) (7), but the fact that the standard is in effect a maximum or absolute limitation upon the recognition of such expenses. P. 265.

475 F. 2d 731, affirmed.

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

Douglas D. Doane and *Charles B. Lennahan,* Special Assistant Attorneys General of Colorado, argued the cause for petitioners. With them on the brief were *John P. Moore,* Attorney General, *John E. Bush,* Deputy Attorney General, and *Norman A. Palermo.*

Tom W. Armour argued the cause for respondent. With him on the brief were *James W. Kin, Steven J. Cole,* and *Henry A. Freedman.*

MR. JUSTICE POWELL delivered the opinion of the Court.

In administering the Aid to Families with Dependent Children (AFDC) program of the Social Security Act of 1935, as amended (Act), 42 U. S. C. § 601 *et seq.,* state agencies are required by § 402 (a) (7) of the Act, 81 Stat. 881, 42 U. S. C. § 602 (a) (7), to "take into consideration . . . any expenses reasonably attributable to the earning of . . . income." Such employment-related expenses are deducted from an AFDC applicant's income in the process of determining eligibility for assistance. We granted certiorari, 414 U. S. 999 (1973), to determine whether, in light of § 402 (a) (7), a State may adopt a standardized allowance for expenses attributable to the

earning of income which does not allow an applicant to deduct expenses that exceed the standard. We hold that it may not.

I

The AFDC program is designed to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them. A principal purpose of the program, as indicated by 42 U. S. C. § 601, is to help such parents and relatives "to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." The program "is based on a scheme of cooperative federalism," *King* v. *Smith,* 392 U. S. 309, 316 (1968). It is financed in large measure by the Federal Government on a matching-fund basis, and participating States must submit AFDC plans in conformity with the Act and the regulations promulgated thereunder by the Department of Health, Education, and Welfare (HEW). The program is, however, administered by the States, which are given broad discretion in determining both the standard of need and the level of benefits. See *Jefferson* v. *Hackney,* 406 U. S. 535, 541 (1972); *Rosado* v. *Wyman,* 397 U. S. 397, 408–409 (1970); *Dandridge* v. *Williams,* 397 U. S. 471, 478 (1970); *King* v. *Smith, supra,* at 318–319.

Under HEW regulations all AFDC plans must specify a statewide standard of need, which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level. Both eligibility for AFDC assistance and the amount of benefits to be granted an individual applicant are based on a comparison of the State's standard of need with the income and resources available to that applicant. 45 CFR § 233.20 (a)(2)(i). The "income and resources" attributable to an applicant, defined in 45 CFR §§ 233.20 (a)(6) (iii–viii),

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consist generally of "only such net income as is actually available for current use on a regular basis . . . and only currently available resources." 45 CFR § 233.20 (a) (3) (ii)(c). See also HEW, Simplified Methods for Consideration of Income and Resources (1965). In determining net income, any expenses reasonably attributable to the earning of income are deducted from gross income. 42 U. S. C. § 602 (a)(7). If, taking into account these deductions and other deductions not at issue in the instant case, the net amount of "earned income" is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference. 45 CFR §§ 233.20 (a)(3)(ii)(a) and (c).

Prior to May 1970, Colorado's AFDC regulations permitted the deduction from income of all expenses reasonably attributable to employment, including but not limited to the actual cost of transportation, if "essential to retain employment." [1] Child care expenses and mandatory payroll deductions were also treated as employment-related expenses, and all such expenses were computed on an individualized basis. In May 1970, this policy was changed by the establishment of a maximum transportation work-expense allowance of either $30 per month, if the use of a car was essential, or the actual

[1] Section 4313.13, vol. 4, Colorado Division of Public Welfare Staff Manual (effective March 1970), provided in part:

"Employment expenses which are deducted from the gross amount received by an employed recipient include, but are not restricted to:

"Transportation expenses:

"Public transportation to and from work is allowed at actual cost. When the recipient must use his own car as transportation to and from work, 5¢ a mile is allowed, plus parking fees if required. Purchase, repair, or upkeep of a vehicle, providing it is essential to retain employment and the plan therefore is approved by the county department."

expense of public transportation. Effective July 1, 1970, the Colorado work-expense allowance regulation was again amended to provide that in addition to mandatory payroll deductions and child care expenses:

> "For employment expenses such as transportation, special clothing, union dues, special education or training costs, telephone, additional food or personal needs, etc., which are an obligation due to the employment, an allowance of $30 per month is made for such costs." [2]

Thus, while Colorado continued to allow individualized treatment of mandatory payroll deductions and child care costs, all other work-related expenses were subjected to a uniform allowance of $30, even if an applicant could prove actual expenses in excess of that figure. The Regional Commissioner of the Social and Rehabilitation Service of HEW thereafter accepted the incorporation of this provision into Colorado's AFDC plan.[3]

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[2] Section 4313.13, vol. 4, Colorado Division of Public Welfare Staff Manual (effective July 1970). The $30 standardized figure is an average based upon a statewide statistical survey of work expenses incurred by persons in the AFDC program in Colorado. It was calculated by examining the work expenses of every AFDC recipient in Colorado for the last month of each quarter of the year from March 1969 to March 1970. The expenses included transportation, union dues, uniforms and tools, telephone, and general items, but excluded the cost of child care. The statewide average varied from a low of $30.55 in June 1969 to a high of $36.93 in March 1970.

[3] According to HEW, 20 States, including Colorado, presently employ a standard work-expense allowance in combination with actual child care expenses, and in some cases mandatory payroll deductions, and an additional 15 States use other systems of mandatory standard allowances for one or more major items of work expense. Brief for United States as *Amicus Curiae* 5. These standard allowances have often been the subject of litigation. A number have been held invalid. See *Anderson* v. *Graham,* 492

When this suit was commenced in July 1970, Mrs. Vialpando was employed some eight miles from the small Colorado community in which she resided with her two-year-old daughter. Since no public transportation was available, respondent traveled to and from work each day in a used automobile she had purchased for that purpose. In making the requisite eligibility and assistance determinations under the Colorado AFDC program, Mrs. Vialpando had been permitted to deduct $47.30 in mileage costs and $63.81 in car payments [4]

F. 2d 986 (CA8 1973) (Nebraska $25 standard work-expense allowance); *Connecticut State Dept. of Pub. Welfare* v. *HEW,* 448 F. 2d 209 (CA2 1971) (Connecticut regulation limiting the types of deductible work-related expenses); *Adams* v. *Parham,* Civil Action No. 16041 (ND Ga. Apr. 14, 1972) (unpublished) (Georgia $35 standard work-expense allowance); *Campagnuolo* v. *White,* Civil Action No. 13968 (Conn. June 22, 1972) (unpublished) (Connecticut $60 standard allowance for full-time employment expenses and $40 standard allowance for part-time employment expenses); *Williford* v. *Laupheimer,* 311 F. Supp. 720 (ED Pa. 1969) (Pennsylvania $50 maximum allowance for work expenses); *County of Alameda* v. *Carleson,* 5 Cal. 3d 730, 488 P. 2d 953 (1971), appeal dismissed, 406 U. S. 913 (1972) (California work-expense regulation providing for standard deductions ranging from $6 to $25 per month). In *X* v. *McCorkle,* 333 F. Supp. 1109 (N. J. 1970), modified on other grounds, *sub nom. Engelman* v. *Amos,* 404 U. S. 23 (1971), the court approved in dicta New Jersey's $50 standard work-expense allowance. In *Conover* v. *Hall,* 104 Cal. Rptr. 77 (1972), decision vacated pending appeal in California Supreme Court, the court upheld California's $50 standard allowance.

[4] Colorado did not make it a statewide practice to allow AFDC recipients to deduct installment payments on the purchase of a car. Consistent with the reasonableness requirement of 42 U. S. C. § 602 (a)(7), such determinations were, quite correctly, made on a case-by-case basis. As counsel for the State commented at oral argument: "This was an individual decision in an individual case in El Paso County, Colorado. The same facts could have been presented to an eligibility technician in another part of Colorado, who would have made a decision . . . that the car was a personal expense, that a

from her monthly gross income. These deductions of approximately $110 per month, coupled with child care and mandatory payroll deductions, entitled her to an AFDC grant of $74 per month for herself and her daughter. The effect of the July 1970 amendment of the Colorado AFDC regulations was to reduce respondent's monthly deductions for transportation expenses related to employment from $110 to $30. The corresponding increase in her monthly net earned income rendered her ineligible for continued AFDC assistance.[5]

Respondent thereupon brought this class action in the United States District Court for the District of Colorado under 42 U. S. C. § 1983 and 28 U. S. C. §§ 1343 (3) and (4). She sought the convening of a three-judge District Court, and requested injunctive relief and a declaratory judgment that the Colorado standardized work-expense allowance violated § 402 (a)(7) of the Act and the Equal Protection Clause of the Fourteenth Amendment. Named as defendants were the Executive Director of the Colorado Department of Social Services and other state

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job was available closer to the home of the recipient or that she could use public transportation." Tr. of Oral Arg. 33–34.

Respondent correctly concedes the State's responsibility for inquiring into whether claimed deductions are excessive or are truly attributable to the earning of income. Brief for Respondent 4. No doubt a State should scrutinize with particular care claimed expenses for automobiles or other items that in large measure are capital expenditures which will also be used for personal purposes unrelated to employment. Recognizing that States in administering AFDC programs must determine the reasonableness of work-related expenses does not, however, resolve the issue before us—whether States may ban all such expenses, no matter how reasonable and necessary, above a fixed cutoff figure.

[5] Another effect of the change in the State's AFDC regulation was to terminate respondent's eligibility for participation in Colorado's medical assistance program under Title XIX of the Social Security Act, 42 U. S. C. § 1396a (a)(10).

officers involved in administering Colorado's AFDC program. Upon stipulated facts and in reliance upon § 402 (a)(7) of the Act, the District Court in an unreported order granted respondent's motion for summary judgment and enjoined enforcement of the challenged regulation.[6] Finding the pendent federal statutory claim dispositive, the District Court properly did not reach the constitutional issue and properly did not convene a three-judge court. *Hagans* v. *Lavine,* 415 U. S. 528 (1974).

The United States Court of Appeals for the Tenth Circuit affirmed. 475 F. 2d 731 (1973). Relying on the language and the legislative history of § 402 (a)(7) and on other provisions of the Act, the court interpreted the words "any expenses" in § 402 (a)(7) to mean "all actual expenses," and held that the standardized allowance did not meet this requirement. The court reasoned that the statute could be read to permit the use of a standardized allowance for employment expenses, but only where such an allowance was adequate to cover all actual expenses. We agree.

II

The Social Security Act of 1935, as originally enacted, 49 Stat. 620, did not expressly require that States allow AFDC beneficiaries to deduct from gross income expenses incurred in connection with the earning of income. The precursor to § 402 (a)(7), which appeared in the 1939

[6] While the case was pending in the District Court, respondent terminated her employment and again received an AFDC grant. Prior to the summary judgment hearing, she returned to work, again incurring work-related expenses substantially in excess of the $30 allowance. Although respondent continued to receive a grant despite her renewed employment, the amount was significantly lower than it would have been if she had been permitted to deduct work expenses in full.

amendments to the Act, 53 Stat. 1379, provided simply that

> "the State agency shall, in determining need, take into consideration any other income and resources of any child claiming aid to dependent children."

The Social Security Board, the federal entity then overseeing the categorical public assistance programs, soon recognized that under the predecessor of the AFDC program [7] recipient families with working members incurred certain employment-related expenses that reduced available income but were not taken into account by the States in determining eligibility for AFDC assistance. In keeping with the Act's purpose of encouraging employment even when the income produced thereby did not eliminate entirely the need for public assistance, the Board recognized that a failure to consider work-related expenses could result in a disincentive to seek or retain employment. Accordingly, the States were permitted but not required to allow credit for work-related expenses in determining eligibility.[8]

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[7] The AFDC program was originally known as "Aid to Dependent Children." 49 Stat. 627. In 1962, the name of the program was changed to "Aid and Services to Needy Families with Children," and the name of the assistance provided under the program changed to "Aid to Families with Dependent Children." Pub. L. 87–543, 76 Stat. 185, §§ 104 (a)(1) and 104 (a)(2).

[8] Section 3140 of the HEW Handbook of Public Assistance Administration, Part IV (1957), thus provided in part:

"A State public assistance agency may establish a reasonable minimum money amount to represent the combined additional cost of three items—food, clothing, and personal incidentals—for all employed persons. The State plan may provide that other items of work expense will be allowed when there is a determination that such expenses do, in fact, exist in the individual case."

See also Social Security Board, Bureau of Public Assistance, State Letter No. 4 (Apr. 30, 1942); HEW, State Letter No. 291 (Mar. 11, 1957) (indicating agency approval of such deductions).

As part of a general amendment of the Act in 1962, Pub. L. 87–543, 76 Stat. 185, Congress made mandatory the widespread but then optional practice of deducting employment expenses from total income in determining eligibility for assistance. Section 402 (a)(7) of the Act as thus amended provided in relevant part:

> "[T]he State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, *as well as any expenses reasonably attributable to the earning of any such income* . . . ." (Emphasis added.)

By its terms, § 402 (a)(7) requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any," we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income. Accordingly, a fixed work-expense allowance which does not permit deductions for expenses in excess of that standard is directly contrary to the language of the statute.

Petitioners, relying upon the "take into consideration" phrase of § 402 (a)(7), argue that the requirement of "consideration" is satisfied by the use of a statistical average of the actual expenses of all AFDC participants in the State. But this argument ignores the fact that the phrase "take into consideration" modifies "income and resources . . . *as well as* any expenses reasonably attributable to the earning of any such income" (emphasis added). Thus, it seems inescapable that whatever treatment is accorded income must also be extended to expenses attributable to the earning of income. And, it has consistently been the practice to compute the income of an AFDC applicant on an individual basis.

From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered.[9] Congress has been careful to ensure that *all* of the income and resources properly attributable to a particular applicant be taken into account, and this individualized approach has been reflected in the implementing regulations. For example, HEW's broad definition of "earned income" as "income in cash or in kind earned by a needy individual through the receipt of wages, salary, commissions, or profit from activities in which he is enagaged as a self-employed individual or as an employee," 45 CFR § 233.20 (a)(6)(iii), and its more specific descriptions of commissioned, salaried, and self-employment derived income in 45 CFR §§ 233.20 (a)(6)(iv–viii),[10] demonstrate its view that the determination

[9] See generally 42 U. S. C. § 601; H. R. Doc. No. 81, 74th Cong., 1st Sess. (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess. (1935); S. Rep. No. 628, 74th Cong., 1st Sess. (1935); E. Witte, The Development of the Social Security Act 163–164 (1962).

[10] Title 45 CFR § 233.20 (a)(6) provides in part:

. . . . . .

"(iv) With reference to commissions, wages, or salary, the term 'earned income' means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

"(v) With respect to self-employment, the term 'earned income' means the total profit from business enterprise, farming, etc., resulting from a comparison of the gross income received with the 'business expenses,' i. e., total cost of the production of the income. Personal expenses, such as income-tax payments, lunches, and transportation to and from work, are not classified as business expenses.

"(vi) The definition shall exclude the following from 'earned income': Returns from capital investment with respect to which the

of need in each case is to be based upon an assessment of the particular individual's available income and resources. Moreover, individualized consideration of available income and resources is clearly contemplated by HEW regulations providing for the exclusion of such items as scholarship funds and loans, see 45 CFR §§ 233.20 (a)(3)(ii–vii), and requiring that certain items such as food stamps be deducted, 45 CFR § 233.20 (a)(4). Thus, if income and expenses related to the production of income are to be treated alike, as the terms of § 402 (a)(7) appear to require, both must be considered on an individualized basis.[11]

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individual is not himself actively engaged, as in a business (for example, under most circumstances, dividends and interest would be excluded from 'earned income'); benefits (not in the nature of wages, salary, or profit) accruing as compensation, or reward for service, or as compensation for lack of employment . . . .

"(vii) With regard to the degree of activity, earned income is income produced as a result of the performance of services by a recipient; in other words, income which the individual earns by his own efforts, including managerial responsibilities, would be properly classified as earned income, such as management of capital investment in real estate. Conversely, for example, in the instance of capital investment wherein the individual carries no specific responsibility, such as where rental properties are in the hands of rental agencies and the check is forwarded to the recipient, the income would not be classified as earned income.

"(viii) Reserves accumulated from earnings are given no different treatment than reserves accumulated from any other sources."

[11] Petitioners claim that HEW has permitted the use of standard work-expense allowances in recognition of the practical necessities of administration and that the Department's construction of its own regulations is entitled to great weight. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969); *Udall* v. *Tallman*, 380 U. S. 1 (1965). But the sound principle of according deference to administrative practice normally applies only where the relevant statutory language is unclear or susceptible of differing interpretations. See, *e. g.*, *Townsend* v. *Swank*, 404 U. S. 282, 286 (1971). In view of the literal requirements of § 402 (a)(7), which accord with the

The literal import of § 402 (a)(7) is confirmed by the statute's legislative history. The congressional purpose in requiring the States to take into consideration employment expenses was clearly set forth in S. Rep. No. 1589, 87th Cong., 2d Sess., 17–18 (1962), which explained:

> "Under present law . . . States are permitted, but not required, to take into consideration the expenses an individual has in earning any income (this practice is not uniform in the country and in a substantial number of States full consideration of such expenses is not given). The committee believes that it is only reasonable for the States to take these expenses *fully* into account. *Under existing law if these work expenses are not considered in determining need, they have the effect of providing a disincentive to working since that portion of the family budget spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter.* The bill has, therefore, added a provision in all assistance titles requiring the States to give consideration to any expenses reasonably attributable to the earning of income." (Emphasis added.)

Virtually identical language appears in the House Report. See H. R. Rep. No. 1414, 87th Cong., 2d Sess., 23 (1962).

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federal policy underlying its enactment, we need not look to agency practice in this case. Moreover, HEW itself has not adhered to a uniform practice. Although in recent years HEW has construed § 402 (a)(7) to permit standardization of some items, in 1964 it required that "[i]tems of work expenses must be allowed when there is a determination that such expenses do, in fact, exist in the individual case." HEW, Handbook of Public Assistance Administration, Part IV, § 1340 (1964).

Congress thus sought to encourage AFDC recipients to secure and retain employment by requiring the States to take into account fully any expenses attributable to the earning of income in determining eligibility for assistance. Such expenses reduce the level of actually available income, and if not deducted from gross income will not produce a corresponding increase in AFDC assistance. Failing to allow the deduction of reasonable expenses might well discourage the applicant from seeking or retaining employment whereby such expenses are incurred. Section 402 (a)(7) was aimed at removing this disincentive. As then-Secretary of HEW Ribicoff explained the legislation in testimony before the Senate:

> "[W]e are trying to do . . . everything we can to encourage people to get a job and work and we feel it is important to encourage the States. By having this provision, the State will take into account these expenses so people will get jobs. I believe that the State should give them an allowance for those items that are necessary for them to get the job." Hearings on the Public Assistance Act of 1962 before the Senate Committee on Finance, 87th Cong., 2d Sess., 152 (1962).[12]

Standardized treatment of employment-related expenses without provision for demonstrating actual and reasonable expenses in excess of that standard amount,

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[12] Our interpretation of § 402 (a)(7) is also supported by the disinclination of the Congress to amend the section to permit the use of various standardized allowances. See H. R. 16311, 91st Cong., 2d Sess., § 101 (1970); H. R. 1, 92d Cong., 1st Sess., § 401 (1971). In explaining the latter bill, which would have replaced the present work-expense provision with an increase in the earned income disregard of § 402 (a)(8)(A)(ii), the Committee on Ways and Means observed that it "would eliminate the open-ended work expense exclusion . . . ." H. R. Rep. No. 92–231, p. 177 (1971). See also S. 2311 and H. R. 3153, 93d Cong., 1st Sess. (1973).

such as Colorado has adopted, threatens to defeat the goal Congress sought to achieve in adopting the mandatory work-expense recognition provisions of § 402 (a)(7). By limiting employment expenses to $30 per month, the Colorado regulation results in a disincentive to seek or retain employment for all recipients whose reasonable work-related expenses exceed or would exceed that amount. Accordingly, the Colorado regulation conflicts with federal law and is therefore invalid.

It is, of course, not the adoption of a standardized work-expense allowance *per se* which we hold to be violative of § 402 (a)(7) of the Act, but the fact that the standard used by Colorado is in effect a maximum or absolute limitation upon the recognition of such expenses. As the Court of Appeals correctly observed, a standard allowance would be permissible, and would substantially serve petitioners' interests in administrative efficiency, if it provided for individualized consideration of expenses in excess of the standard amount. See 475 F. 2d, at 735. See also *Anderson* v. *Graham,* 492 F. 2d 986 (CA8 1973); *Adams* v. *Parham,* Civ. No. 16041 (ND Ga. Apr. 14, 1972) (unpublished); and *Campagnuolo* v. *White,* Civ. No. 13968 (Conn. June 22, 1972) (unpublished). Such a standard allowance would comport fully with the statutory requirement that any reasonable work expenses be considered, and would allow individualized treatment where necessary.[13]

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[13] The Court's observation in *Rosado* v. *Wyman,* 397 U. S. 397, 419 (1970), that "[w]e do not, of course, hold that New York may not, consistently with the federal statutes, consolidate items on the basis of statistical averages," was in no sense intended as a blanket approval of the principle of averaging under AFDC programs without regard to what is being averaged. In that case, the Court found a New York statute fixing maximum AFDC allowances per family and eliminating a "special grants" program, to be in contravention of § 402 (a)(23) of the Act. In holding that New

As the Court has previously observed, the AFDC program is an area in which Congress at times "has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." *Rosado* v. *Wyman,* 397 U. S., at 412. But as to reasonable expenses attributable to the earning of income, Congress has spoken with firmness and clarity.

The judgment is affirmed.

It is so ordered.

York could not completely eliminate such items from the standard of need, the Court noted that the State could, consistently with the statute, include them through the use of statistical averages. A statewide standard of need is, however, but an estimate by state welfare officials of the minimum financial requirements of a hypothetical family, and by its very nature is susceptible of computation through the use of statistical averages. Moreover, the discretion granted the States by Congress in determining need, see *King* v. *Smith,* 392 U. S. 309, 318 n. 14 (1968), contrasts sharply with the statutory requirement of § 402 (a)(7) that any expenses reasonably attributable to the earnings of income be considered. In the face of that statutory command and the clear statement of congressional purpose, we must also reject petitioners' claims of administrative efficiency or convenience. See *Rosado* v. *Wyman, supra,* at 417.

We also note that Colorado's use of a standard work-expense allowance is not justified by its undisputed power to set the level of benefits under the AFDC program. See *Rosado* v. *Wyman, supra; Jefferson* v. *Hackney,* 406 U. S. 535 (1972). Although Colorado may adjust the percentage of need which it has agreed to pay all recipients through its power to determine AFDC funding, see *King* v. *Smith, supra,* it may not do so in a manner that violates a specific requirement of the Act. See *Connecticut State Dept. of Pub. Welfare* v. *HEW,* 448 F. 2d 209 (CA2 1971).

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* BELL AEROSPACE COMPANY, DIVISION OF TEXTRON, INC.

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

No. 72–1598. Argued January 14, 1974—Decided April 23, 1974

On a petition by a labor union for a representation election, the National Labor Relations Board (NLRB) held that the buyers employed by respondent company constituted an appropriate collective-bargaining unit and directed an election. The NLRB stated that even though the buyers might be "managerial employees" they were nevertheless covered by the National Labor Relations Act (NLRA) in the absence of any showing that union organization of the buyers would create a conflict of interest in labor relations. Subsequently the buyers voted for the union, and the NLRB certified it as their exclusive bargaining representative. The company refused to bargain, however, and was found guilty of an unfair labor practice and ordered to bargain. The Court of Appeals denied enforcement on the grounds that (1) it was not certain that the NLRB's decision rested on a factual determination that the buyers were not true "managerial employees" rather than on a new, and in the court's view, erroneous holding that the NLRB was free to regard all managerial employees as covered by the Act unless their duties met the conflict-of-interest touchstone, and (2) in view of its previous contrary decisions, the NLRB was required to proceed by rulemaking rather than by adjudication in determining whether buyers are "managerial employees." *Held:*

1. Congress intended to exclude from the protections of the NLRA all employees properly classified as "managerial," not just those in positions susceptible to conflicts of interest in labor relations. This is unmistakably indicated by the NLRB's early decisions, the purpose and legislative history of the Taft-Hartley amendments to the NLRA in 1947, the NLRB's subsequent construction of the Act for more than two decades, and the decisions of the courts of appeals. Pp. 274–290.

2. The NLRB is not required to proceed by rulemaking, rather

than by adjudication, in determining whether buyers or some types of buyers are "managerial employees." Pp. 290–295.

(a) The NLRB is not precluded from announcing new principles in an adjudicative proceeding, and the choice between rulemaking and adjudication initially lies within the NLRB's discretion. *SEC* v. *Chenery Corp.*, 332 U. S. 194; *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759. P. 294.

(b) In view of the large number of buyers employed in manufacturing, wholesale, and retail units, and the wide variety of buyers' duties, depending on the company or industry, any generalized standard would have no more than marginal utility, and the NLRB thus has reason to proceed with caution and develop its standards in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company. P. 294.

475 F. 2d 485, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion dissenting in part, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 295.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin,* and *Linda Sher.*

Richard E. Moot argued the cause and filed a brief for respondent.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents two questions: first, whether the National Labor Relations Board properly determined

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**John Fillion, Stephen Schlossberg, Abe F. Levy, Victor Van Bourg, Charles K. Hackler,* and *Jack Levine* filed a brief for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America as *amicus curiae* urging reversal.

Milton Smith, Gerard C. Smetana, and *Jerry Kronenberg* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

that all "managerial employees," except those whose participation in a labor organization would create a conflict of interest with their job responsibilities, are covered by the National Labor Relations Act; [1] and second, whether the Board must proceed by rulemaking rather than by adjudication in determining whether certain buyers are "managerial employees." We answer both questions in the negative.

I

Respondent Bell Aerospace Co., Division of Textron, Inc. (company), operates a plant in Wheatfield, New York, where it is engaged in research and development in the design and fabrication of aerospace products. On July 30, 1970, Amalgamated Local No. 1286 of the United Automobile, Aerospace and Agricultural Implement Workers of America (union) petitioned the National Labor Relations Board (Board) for a representation election to determine whether the union would be certified as the bargaining representative of the 25 buyers in the purchasing and procurement department at the company's plant. The company opposed the petition on the ground that the buyers were "managerial employees" and thus were not covered by the Act.

The relevant facts adduced at the representation hearing are as follows. The purchasing and procurement department receives requisition orders from other departments at the plant and is responsible for purchasing all of the company's needs from outside suppliers. Some items are standardized and may be purchased "off the shelf" from various distributors and suppliers. Other items must be made to the company's specifications, and the requisition orders may be accompanied by detailed blueprints and other technical plans. Requisitions often designate a particular vendor, and in some instances the

[1] As amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*

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buyer must obtain approval before selecting a different one. Where no vendor is specified, the buyer is free to choose one.

Absent specific instructions to the contrary, buyers have full discretion, without any dollar limit, to select prospective vendors, draft invitations to bid, evaluate submitted bids, negotiate price and terms, and prepare purchase orders. Buyers execute all purchase orders up to $50,000. They may place or cancel orders of less than $5,000 on their own signature. On commitments in excess of $5,000, buyers must obtain the approval of a superior, with higher levels of approval required as the purchase cost increases. For the Minute Man missile project, which represents 70% of the company's sales, purchase decisions are made by a team of personnel from the engineering, quality assurance, finance, and manufacturing departments. The buyer serves as team chairman and signs the purchase order, but a representative from the pricing and negotiation department participates in working out the terms.

After the representation hearing, the Regional Director transferred the case to the Board. On May 20, 1971, the Board issued its decision holding that the company's buyers constituted an appropriate unit for purposes of collective bargaining and directing an election. 190 N. L. R. B. 431. Relying on its recent decision in *North Arkansas Electric Cooperative, Inc.*, 185 N. L. R. B. 550 (1970), the Board first stated that even though the company's buyers might be "managerial employees," [2] they

[2] The opinion revealed that Board Member Jenkins did not view the company's buyers as exercising managerial functions and therefore considered them "employees" under the Act to the same extent as production and maintenance employees. 190 N. L. R. B., at 431 n. 2. A majority of the Board, however, apparently accepted the company's contention that the buyers were managerial employees. *Id.*, at 432 n. 3.

were nevertheless covered by the Act and entitled to its protections. The Board then rejected the company's alternative contention that representation should be denied because the buyers' authority to commit the company's credit, select vendors, and negotiate purchase prices would create a potential conflict of interest between the buyers as union members and the company. In essence, the company argued that buyers would be more receptive to bids from union contractors and would also influence "make or buy" decisions in favor of "make," thus creating additional work for sister unions in the plant. The Board thought, however, that any possible conflict was "unsupported conjecture" since the buyers' "discretion and latitude for independent action must take place within the confines of the general directions which the Employer has established" and that "any possible temptation to allow sympathy for sister unions to influence such decisions could effectively be controlled by the Employer." 190 N. L. R. B., at 431.

On June 16, 1971, a representation election was conducted in which 15 of the buyers voted for the union and nine against. On August 12, the Board certified the union as the exclusive bargaining representative for the company's buyers. That same day, however, the Court of Appeals for the Eighth Circuit denied enforcement of another Board order in *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602, and held that "managerial employees" were not covered by the Act and were therefore not entitled to its protections.[3] *Id.*, at 610.

Encouraged by the Eighth Circuit's decision, the company moved the Board for reconsideration of its earlier

[3] As mentioned, the Board had relied on its *North Arkansas* decision in the present case. The Eighth Circuit's earlier opinion concerning a related issue in the same case is reported at 412 F. 2d 324 (1969).

order. The Board denied the motion, 196 N. L. R. B. 827 (1972), stating that it disagreed with the Eighth Circuit and would adhere to its own decision in *North Arkansas*. In the Board's view, Congress intended to exclude from the Act only those "managerial employees" associated with the "formulation and implementation of labor relations policies." *Id.*, at 828. In each case, the "fundamental touchstone" was "whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." *Ibid.* Turning to the present case, the Board reiterated its prior finding that the company had not shown that union organization of its buyers would create a conflict of interest in labor relations.

The company stood by its contention that the buyers, as "managerial employees," were not covered by the Act and refused to bargain with the union. An unfair labor practice complaint resulted in a Board finding that the company had violated §§ 8 (a)(5) and (1) of the Act, 29 U. S. C. §§ 158 (a)(5) and (1), and an order compelling the company to bargain with the union. 197 N. L. R. B. 209 (1972). Subsequently, the company petitioned the United States Court of Appeals for the Second Circuit for review of the order and the Board cross-petitioned for enforcement.

The Court of Appeals denied enforcement. 475 F. 2d 485 (1973). After reviewing the legislative history of the Taft-Hartley Act of 1947, 61 Stat. 136, and the Board's decisions in this area, the court concluded that Congress had intended to exclude all true "managerial employees" from the protection of the Act. It explained

that this "exclusion embraced not only an employee 'so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other' but also one who is 'formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties,' Illinois State Journal-Register, Inc. v. NLRB, 412 F. 2d 37, 41 (7 Cir. 1969)." 475 F. 2d, at 494. The court added, however, that "the Board would [not] be precluded, on proper proceedings, from determining that buyers, or some types of buyers, are not true 'managerial employees' and consequently come within the protection of § 8 (a)(5) and (1)." *Ibid.*

Turning to the merits of the present case, the court acknowledged that there was substantial evidence that the company's buyers were not sufficiently high in the managerial hierarchy to constitute true "managerial employees." Nevertheless, the court denied enforcement for two reasons. First, it was not certain that the Board's decision rested on a factual determination that these buyers were not true "managerial employees" rather than on "its new, and in our view, erroneous holding that it was free to regard *all* managerial employees as covered by the Act unless their duties met" the conflict-of-interest touchstone. *Id.*, at 494–495. Second, although the Board was not precluded from holding that buyers, or some types of buyers, were not "managerial employees," the court thought that, in view of the Board's long line of cases holding the contrary, it could not accomplish this change of position by adjudication. Rather, the Board should conduct a rulemaking proceeding in conformity with § 6 of the Act, 29 U. S. C. § 156. The court therefore remanded the case to the Board for such a proceeding.

We granted the Board's petition for certiorari. 414 U. S. 816.

II

We begin with the question whether all "managerial employees," rather than just those in positions susceptible to conflicts of interest in labor relations, are excluded from the protections of the Act.[4] The Board's early decisions, the legislative history of the Taft-Hartley Act of 1947, 61 Stat. 136, and subsequent Board and court decisions provide the necessary guidance for our inquiry. In examining these authorities, we draw on several established principles of statutory construction. In addition to the importance of legislative history, a court may

[4] Section 2 (3) of the Act defines the term "employee" as follows:

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." 29 U. S. C. § 152 (3).

Supervisory employees are expresssly excluded from the protections of the Act. That term is defined in § 2 (11):

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment." 29 U. S. C. § 152 (11).

accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration.[5] This is especially so where Congress has re-enacted the statute without pertinent change.[6] In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.[7] We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight.[8] Application of these principles leads us to conclude, as did the Court of Appeals, that Congress intended to exclude from the protections of the Act all employees properly classified as "managerial."

A

The Wagner Act, 49 Stat. 449, did not expressly mention the term "managerial employee." After the Act's passage, however, the Board developed the concept of "managerial employee" in a series of cases involving the appropriateness of bargaining units. The first cases established that "managerial employees" were not to be included in a unit with rank-and-file employees. In

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[5] *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969); *Zemel* v. *Rusk,* 381 U. S. 1, 11–12 (1965); *Udall* v. *Tallman,* 380 U. S. 1, 16–18 (1965); *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315 (1933).

[6] *Zemel* v. *Rusk, supra,* at 11–12; *Commissioner* v. *Noel Estate,* 380 U. S. 678, 682 (1965); *NLRB* v. *Gullett Gin Co.,* 340 U. S. 361, 365–366 (1951); *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U. S. 110, 114–115 (1939); *Norwegian Nitrogen Co.* v. *United States, supra,* at 313.

[7] *Zemel* v. *Rusk, supra,* at 11–12; *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345 (1932); *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 472–473 (1915).

[8] *Red Lion Broadcasting Co.* v. *FCC, supra,* at 380–381; *FHA* v. *Darlington, Inc.,* 358 U. S. 84, 90 (1958).

Freiz & Sons, 47 N. L. R. B. 43, 47 (1943), for example, the Board excluded expediters from a proposed unit of production and maintenance workers because they were "closely related to the management." Similarly, in *Spicer Mfg. Corp.,* 55 N. L. R. B. 1491, 1498 (1944), expediters were again excluded from a unit containing office, technical, clerical, and professional employees because "the authority possessed by [the expediters] to exercise their discretion in making commitments on behalf of the Company stamps them as managerial." This rationale was soon applied to buyers. See, *e. g., Hudson Motor Car Co.,* 55 N. L. R. B. 509, 512 (1944); *Vulcan Corp.,* 58 N. L. R. B. 733, 736 (1944); *Barrett Division, Allied Chem. & Dye Corp.,* 65 N. L. R. B. 903, 905 (1946); *Electric Controller & Mfg. Co.,* 69 N L. R. B. 1242, 1245–1246 (1946). The Board summarized its policy on "managerial employees" in *Ford Motor Co.,* 66 N. L. R. B. 1317, 1322 (1946):

> "We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine and effectuate management policies. These employees we have considered and still deem to be 'managerial,' in that they express and make operative the decisions of management."

Whether the Board regarded all "managerial employees" as entirely outside the protection of the Act, as well as inappropriate for inclusion in a rank-and-file bargaining unit, is less certain. To be sure, at no time did the Board certify even a separate unit of "managerial employees" or state that such was possible. The Board was cautious, however, in determining which employees were "managerial." For example, in *Dravo Corp.,* 54 N. L. R. B. 1174, 1177 (1944), the Board excluded buyers and expediters from a unit of office and clerical em-

ployees, but reserved the question whether all such employees were to be considered "managerial":

> "This is not to say, however, that buyers and expediters are to be denied the right to self-organization and to collective bargaining under the Act. The precise relationship of the buyers and expediters to management here is not now being determined by us."

During this period the Board's policy with respect to the related but narrower category of "supervisory employees" manifested a progressive uncertainty. The Board first excluded supervisors from units of rank-and-file employees, *e. g., Mueller Brass Co.,* 39 N. L. R. B. 167, 171 (1942), but in *Union Collieries Coal Co.,* 41 N. L. R. B. 961, supplemental decision, 44 N. L. R. B. 165 (1942), it certified a separate unit composed of supervisors who were to be represented by an independent union. Shortly thereafter, in *Godchaux Sugars, Inc.,* 44 N. L. R. B. 874 (1942), the Board approved a unit of supervisors whose union was affiliated with a union of rank-and-file employees. This trend was soon halted, however, by *Maryland Drydock Co.,* 49 N. L. R. B. 733 (1943), where the Board held that supervisors, although literally "employees" under the Act, could not be organized in any unit. And in *Yale & Towne Mfg. Co.,* 60 N. L. R. B. 626, 628–629 (1945), the Board further held that timestudy men, whose " 'interests and functions' " were " 'sufficiently akin to those of management,' " should neither be included in a unit with other employees, nor be established as a separate unit."

Maryland Drydock, supra, was subsequently overruled in *Packard Motor Car Co.,* 61 N. L. R. B. 4, 64 N. L. R. B. 1212 (1945), where the Board held that foremen could constitute an appropriate unit for collective bargaining. The Board's position was upheld 5–4 by this Court in

Packard Co. v. *NLRB,* 330 U. S. 485 (1947). In view of the subsequent legislative reversal of the *Packard* decision, the dissenting opinion of MR. JUSTICE DOUGLAS is especially pertinent. *Id.,* at 493. He stated:

> "The present decision . . . tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industrial hierarchy. It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. The industrial problem as so defined comes down to a contest over a fair division of the gross receipts of industry between these two groups. The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership.
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> "I do not believe this is an exaggerated statement of the basic policy questions which underlie the present decision. For if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application. But once vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a solid phalanx than separate factions in warring camps.
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> . . . . .
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> "[I]f Congress, when it enacted the National Labor

> Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none." *Id.*, at 494–495.

MR. JUSTICE DOUGLAS also noted that the Wagner Act was intended to protect "laborers" and "workers" whose right to organize and bargain collectively had not been recognized by industry, resulting in strikes, strife, and unrest. By contrast, there was no similar history with respect to foremen, managers, superintendents, or vice presidents. *Id.*, at 496–497. Furthermore, other legislation indicated that where Congress desired to include managerial or supervisory personnel in the category of employees, it did so expressly. See, *e. g.*, Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C. § 151; Merchant Marine Act, 1936, as amended, 52 Stat. 953, 46 U. S. C. § 1101 *et seq.;* Social Security Act, § 1101, 49 Stat. 647.

B

The *Packard* decision was a major factor in bringing about the Taft-Hartley Act of 1947, 61 Stat. 136. The House bill, H. R. 3020, 80th Cong., 1st Sess. (1947),[9] provided for the exclusion of

[9] Section 2 (12) of the House bill defined the term "supervisor" as follows:

"The term 'supervisor' means any individual—

"(A) who has authority, in the interest of the employer—

"(i) to hire, transfer, suspend, lay off, recall, promote, demote, discharge, assign, reward, or discipline any individuals employed by the employer, or to adjust their grievances, or to effectively recommend any such action; or

"(ii) to determine, or make effective recommendations with respect to, the amount of wages earned by any individuals employed by the employer, or to apply, or to make effective recommendations with respect to the application of, the factors upon the basis of which the wages of any individuals employed by the employer are deter-

"supervisors," a category broadly defined to include any individual who had authority to hire, transfer, promote, discharge, reward, or discipline other employees or effectively to recommend such action. It also excluded (i) those who had authority to determine or effectively recommend the amount of wages earned by other employees; (ii) those employed in labor relations, personnel, and employment departments, as well as police and time-study personnel; and (iii) confidential employees. The Senate version of the bill, S. 1126, 80th Cong., 1st Sess. (1947),[10] also excluded supervisors, but defined that category more narrowly than the House version, distinguishing between "straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management

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mined, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment;

"(B) who is employed in labor relations, personnel, employment, police, or time-study matters or in connection with claims matters of employees against employers, or who is employed to act in other respects for the employer in dealing with other individuals employed by the employer, or who is employed to secure and furnish to the employer information to be used by the employer in connection with any of the foregoing; or

"(C) who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer."

[10] Section 2 (11) of the Senate bill contained the following definition of the term "supervisor":

"The term 'supervisor' means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). It was the Senate's view that employees such as "straw bosses," who had only minor supervisory duties, should be included within the Act's protections.

Significantly, both the House Report and the Senate Report voiced concern over the Board's broad reading of the term "employee" to include those clearly within the managerial hierarchy. Focusing on MR. JUSTICE DOUGLAS' dissent in *Packard,* the Senate Report specifically mentioned that even vice presidents might be unionized under the Board's decision. *Ibid.* It also noted that unionization of supervisors had hurt productivity, increased the accident rate, upset the balance of power in collective bargaining, and tended to blur the line between management and labor. *Id.,* at 4–5. The House Report echoed the concern for reduction of industrial output and noted that unionization of supervisors had deprived employers of the loyal representations to which they were entitled.[11] And in criticizing the

[11] The Report also makes evident that Congress was concerned with more than just the possibility of a conflict of interest in labor relations if supervisors were unionized:

"Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security.' It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the leveling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism. (*J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332 (1944).) It is wrong for the foremen, for it discourages

Board's expansive reading of the Act's definition of the term "employees," the House Report noted that "[w]hen Congress passed the Labor Act, we were concerned, as we said in its preamble, with the welfare of 'workers' and 'wage earners,' not of the boss." H. R. Rep. No. 245, 80th Cong., 1st Sess., 13 (1947).

The Conference Committee adopted the Senate version of the bill. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947). The House Managers' statement in explanation of the Conference Committee Report stated:

> "The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel, the special provisions of the Senate amendment . . . applicable with respect to professional employees will cover many of this category. In the case of guards, the conference agreement does not permit the

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the things in them that made them foremen in the first place. For the same reason, that it discourages those best qualified to get ahead, it is wrong for industry, and particularly for the future strength and productivity of our country." H. R. Rep. No. 245, 80th Cong., 1st Sess., 16–17 (1947).

certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards." *Id.*, at 35–36.

The legislative history of the Taft-Hartley Act of 1947 may be summarized as follows. The House wanted to include certain persons within the definition of "supervisors," such as straw bosses, whom the Senate believed should be protected by the Act. As to these persons, the Senate's view prevailed. There were other persons, however, who both the House and the Senate believed were plainly outside the Act. The House wanted to make the exclusion of certain of these persons explicit. In the conference agreement, representatives from both the House and the Senate agreed that a specific provision was unnecessary since the Board had long regarded such persons as outside the Act. Among those mentioned as impliedly excluded were persons working in "labor relations, personnel and employment departments," and "confidential employees." But assuredly this did not exhaust the universe of such excluded persons. The legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary. For example, in its discussion of confidential employees, the House Report noted that "[m]ost of the people who would qualify as 'confidential' employees are *executives and are excluded from the act in any event.*" H. R. Rep. No. 245, p. 23 (emphasis added).[12] We think

[12] The Report stated in reference to "confidential employees": "These are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally. *Most of the*

the inference is plain that "managerial employees" were paramount among this impliedly excluded group. The Court of Appeals in the instant case put the issue well:

> "Congress recognized there were other persons so much more clearly 'managerial' that it was inconceivable that the Board would treat them as employees. Surely Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be. In other words, Congress failed to enact the portion of MR. JUSTICE DOUGLAS' *Packard* dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary." 475 F. 2d, at 491–492.[13] (Footnote omitted.)

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people who would qualify as 'confidential' employees are executives and are excluded from the act in any event.

"The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." *Ibid.* (Emphasis added.)

In 1946 in *Ford Motor Co.*, 66 N. L. R. B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those who exercised " 'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

[13] The dissenting opinion first asserts that the Act is "very plain on its face" and covers all employees except those expressly excluded *post*, at 297, but later concedes that the "Conference Committee implied that certain groups of employees were to be excluded." *Post*, at 305. The dissent then argues that "managerial employees" were not among those impliedly excluded because "no such explicit direction was set forth." *Ibid.* This overlooks the fact that, as in the case of "confidential employees" and those working in "labor relations, personnel and employment departments," no explicit ex-

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Following the passage of the Taft-Hartley Act, the Board itself adhered to the view that "managerial employees" were outside the Act. In *Denver Dry Goods*, 74 N. L. R. B. 1167, 1175 (1947), assistant buyers, who

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clusionary provision was necessary in 1947 because the Board had never approved the organization of "managerial employees" in either a separate unit or as part of a rank-and-file unit. Indeed, every prior Board decision had resulted in the exclusion of such employees as "managerial."

Moreover, it cannot be denied that Congress thought that "executives" were excluded from the Act, for the House Report so stated in express terms. See n. 12, *supra*. And the congressional debates, along with the Senate Report, evinced a concern over the possible extension of the Act to cover corporate vice presidents and other executives who were part of management. See, *e. g.*, 93 Cong. Rec. 3443, 4136, 5014.

In addition, the dissent completely ignores the fundamental change in industrial philosophy which would be accomplished through unionization of "managerial employees." As MR. JUSTICE DOUGLAS explained in his *Packard* dissent, the Wagner Act was designed to protect "laborers" and "workers," not vice presidents and others clearly within the managerial hierarchy. Extension of the Act to cover true "managerial employees" would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.

The dissent also relies upon the specific inclusion of "professional employees" within the Act to support its assertion that "managerial employees" were to be similarly treated. *Post*, at 297–298. See 29 U. S. C. § 152 (12). "Professional employees," however, are plainly not the same as "managerial employees." As the Conference Committee Report explained, the term "professional employees" refers to "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36. In contrast to "managerial employees," they are not defined in terms of their authority "to formulate, determine and effectuate management policies." *Ford Motor Co.*, 66 N. L. R. B., at 1322.

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were required to set good sales records as examples to sales employees, to assist buyers in the selection of merchandise, and to assume the buyer's duties when the latter was not present, were excluded by the Board on the ground that "the interests of these employees are more closely identified with those of management." The Board reiterated this reading of the Act in *Palace Laundry Dry Cleaning*, 75 N. L. R. B. 320, 323 n. 4 (1947):

> "The determination of 'managerial,' like the determination of 'supervisory,' is to some extent necessarily a matter of the degree of authority exercised. We have in the past, and before the passage of the recent amendments to the Act, recognized and defined as 'managerial' employees, executives who formulate and effectuate management policies by expressing and making operative decisions of their employer, and have excluded such managerial employees from bargaining units. We believe that the Act, as amended, contemplates the continuance of this practice." (Citations omitted.)

Buyers and assistant buyers were again excluded in *Denton's, Inc.*, 83 N. L. R. B. 35, 37 (1949), because their "interests . . . are more closely identified with management . . . ." And in *American Locomotive Co.*, 92 N. L. R. B. 115, 116–117 (1950), the Board held that buyers could neither be included in a unit of office and clerical employees nor placed in a separate unit, stating:

> "The Employer maintains that the buyers are representatives of management. As it appears that the buyers are authorized to make substantial purchases for the Employer, we find that they are representatives of management, and as such may not be accorded bargaining rights under the Act."

Buyers, who were authorized to bind the employer without prior approval, were also excluded from a unit in

Curtiss-Wright Corp., 103 N. L. R. B. 458, 464 (1953), because "they are representatives of management and as such may not be accorded bargaining rights under the Act."

Finally, in *Swift & Co.,* 115 N. L. R. B. 752, 753–754 (1956), the Board reaffirmed its long-held understanding of the scope of the Act. In refusing to approve a unit of procurement drivers who were found to be representative of management, the Board declared:

> "It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act . . . ." (Footnotes omitted.)

Until its decision in *North Arkansas* in 1970, the Board consistently followed this reading of the Act.[14] It never

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[14] See, *e. g., Eastern Camera & Photo Corp.,* 140 N. L. R. B. 569, 571 (1963); *AFL–CIO,* 120 N. L. R. B. 969, 973 (1958); *General Tel. Co. of Ohio,* 112 N. L. R. B. 1225, 1229 (1955).

The cases excluding buyers or those exercising buyers' functions from other units are legion. See, *e. g., Ed's Foodland of Springfield, Inc.,* 159 N. L. R. B. 1256, 1260 (1966); *Albuquerque Div., ACF Ind., Inc.,* 145 N. L. R. B. 403, 414–415 (1963); *Weaver Motors,* 123 N. L. R. B. 209, 215–216 (1959); *Kearney & Trecker Corp.,* 121 N. L. R. B. 817, 822 (1958); *Temco Aircraft Corp.,* 121 N. L. R. B. 1085, 1089 (1958); *Federal Tel. & Radio Co.,* 120 N. L. R. B. 1652, 1653–1654 (1958).

Surprisingly, the dissent maintains that the Board "actually held only twice" that "managerial employees" were not covered by the Act. *Post,* at 309. This is difficult to reconcile with the undisputed fact that until its decision in *North Arkansas* the Board had never even certified a separate unit of "managerial employees" and had stated in case after case that managerial employees were not to be accorded bargaining rights under the Act. *E. g., Palace Laundry*

certified any unit of "managerial employees," separate or otherwise, and repeatedly stated that it was Congress' intent that such employees not be accorded bargaining rights under the Act. And it was this reading which was permitted to stand when Congress again amended the Act in 1959. 73 Stat. 519.

The Board's exclusion of "managerial employees" defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer," [15] has also been approved by courts without exception. See, *e. g., Westinghouse Electric Corp.* v. *NLRB,* 424 F. 2d 1151, 1158 (CA7), cert. denied, 400 U. S. 831 (1970); *Illinois State Journal-Register, Inc.* v. *NLRB,* 412 F. 2d 37, 41 (CA7 1969); *Continental Insurance Co.* v. *NLRB,* 409 F. 2d 727, 730 (CA2), cert. denied, 396 U. S. 902 (1969); *Retail Clerks International Assn.* v. *NLRB,* 125 U. S. App. D. C. 63, 65–66, 366 F. 2d 642, 644–645 (1966) (Burger, J.), cert. denied, 386 U. S. 1017 (1967); [16] *International Ladies'*

Dry Cleaning, 75 N. L. R. B. 320 (1947); *American Locomotive Co.,* 92 N. L. R. B. 15 (1950); *Curtiss-Wright Corp.,* 103 N. L. R. B. 458 (1953); *Swift & Co.,* 115 N. L. R. B. 752 (1956), and cases cited above.

[15] *Palace Laundry Dry Cleaning, supra,* at 323 n. 4. See *Ford Motor Co.,* 66 N. L. R. B., at 1322.

[16] In *Retail Clerks International Assn.* v. *NLRB, supra,* MR. CHIEF JUSTICE (then Circuit Judge) BURGER explained the Board's policy on "managerial employees":

"The Board also excludes from the protections of the Act, as *managerial employees,* 'those who formulate, determine, and effectuate an employer's policies,' *AFL–CIO,* [120 N. L. R. B. 969, 973 (1958)], and those who have discretion in the performance of their jobs, but not if the discretion must conform to an employer's established policy, Eastern Camera and Photo Corp., 140 N. L. R. B. 569, 571 (1963) (store managers who could set prices are not managerial). The rationale for this Board policy, though unarticulated, seems to be the reasonable belief that Congress intended to ex-

Garment Workers' Union v. *NLRB*, 339 F. 2d 116, 123 (CA2 1964) (Marshall, J.).[17] And in *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602 (1971), the Eighth Circuit reviewed the history of the Act and specifically disapproved the Board's departure from its earlier position.

D

In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that "managerial employees" are not covered by the Act.[18] We agree with the Court of Appeals below that the Board "is not now free" to read a new and more restrictive meaning into the Act. 475 F. 2d, at 494.

In view of our conclusion, the case must be remanded to permit the Board to apply the proper legal standard

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clude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection." 366 F. 2d, at 645. (Emphasis added.)

[17] In *International Ladies' Garment Workers' Union* v. *NLRB*, *supra*, MR. JUSTICE (then Circuit Judge) MARSHALL explained that "[a]lthough the Act makes no special provision for 'managerial employees,' under a Board policy of long duration, this category of personnel has been excluded from the protection of the Act." 339 F. 2d, at 123.

[18] The contrary interpretation of the Act urged by the dissent would have far-reaching results. Although a shop foreman would be excluded from the Act, a wide range of executives would be included. A major company, for example, may have scores of executive officers who formulate and effectuate management policies, yet have no supervisory responsibility or identifiable conflict of interest in labor relations. If Congress intended the unionization of such executives, it most certainly would have made its design plain. See n. 13, *supra*.

in determining the status of these buyers.[19] *SEC* v. *Chenery Corp.*, 318 U. S. 80, 85 (1943); *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972). We express no opinion as to whether these buyers fall within the category of "managerial employees." [20]

III

The Court of Appeals also held that, although the Board was not precluded from determining that buyers or some types of buyers were not "managerial employees," it could do so only by invoking its rulemaking procedures under § 6 of the Act, 29 U. S. C. § 156.[21] We disagree.

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[19] The Board has had ample experience in defining the term "managerial" in the manner which we think the Act contemplates. See, *e. g.*, *Eastern Camera & Photo Corp.*, *supra*, at 571. Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are "managerial" must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management.

[20] To be sure, it would also be appropriate for the Board to exclude employees from a unit on the ground that their participation in a labor organization would create a conflict of interest with their job responsibilities. *New England Telephone*, 90 N. L. R. B. 639 (1950). See also *Retail Clerks International Assn.* v. *NLRB*, 125 U. S. App. D. C., at 65–66, 366 F. 2d, at 644–645. In this respect, respondent has suggested that it was never afforded fair notice and an opportunity to introduce evidence relating specifically to the possibility of a conflict of interest in labor relations. Tr. of Oral Arg. 33–35, 43, 47. At the representation hearing, the hearing officer did not indicate that the conflict-of-interest standard was relevant, and respondent proceeded on the assumption that the only question was whether the buyers were "managerial employees." App. 8, 83.

The present record may well be adequate for purposes of this determination. However, if new and relevant information on this point is tendered on remand, the Board should consider reopening the record for purposes of its admission.

[21] Section 6 provides:

"The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Pro-

At the outset, the precise nature of the present issue must be noted. The question is not whether the Board should have resorted to rulemaking, or in fact improperly promulgated a "rule," when in the context of the prior representation proceeding it held that the Act covers all "managerial employees" except those meeting the new "conflict of interest in labor relations" touchstone. Our conclusion that the Board applied the wrong legal standard makes consideration of that issue unnecessary. Rather, the present question is whether on remand the Board must invoke its rulemaking procedures if it deter-

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cedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." 29 U. S. C. § 156.

The Administrative Procedure Act (APA) defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U. S. C. § 551 (4). The rulemaking requirements include publication in the Federal Register of notice of the proposed rulemaking and hearing; an opportunity for interested persons to participate; a statement of the basis and purpose of the proposed rule; and publication in the Federal Register of the rule as adopted.

The APA defines "adjudication" as "agency process for the formulation of an order," and "order" is defined as "the whole or a part of a final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U. S. C. §§ 551 (7), (6). Proceedings for "the certification of worker representatives" are exempted from the Act's procedural requirements for an "adjudication." 5 U. S. C. §§ 554 (a)(6), 556 (a), 557 (a).

Sections 9 (c)(1) and (2) of the National Labor Relations Act (NLRA) empower the Board to investigate petitions involving questions of unit representation, to conduct hearings on such petitions, to direct representation elections, and to certify the results thereof. 29 U. S. C. §§ 159 (c)(1) and (2). Board determinations on such representation questions would appear to constitute "orders" within the meaning of the APA. See 5 U. S. C. §§ 551 (6), (7).

The NLRA does not specify in what instances the Board must resort to rulemaking.

mines, in light of our opinion, that these buyers are not "managerial employees" under the Act. The Court of Appeals thought that rulemaking was required because *any* Board finding that the company's buyers are not "managerial" would be contrary to its prior decisions [22] and would presumably be in the nature of a general rule designed "to fit all cases at all times."

A similar issue was presented to this Court in its second decision in *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947) (*Chenery II*).[23] There, the respondent corporation argued that in an adjudicative proceeding the Commission could not apply a general standard that it had formulated for the first time in that proceeding. Rather, the Commission was required to resort instead to its rulemaking procedures if it desired to promulgate a new standard that would govern future conduct. In rejecting this contention, the Court first noted that the Commission had a statutory duty to decide the issue at hand in light of the proper standards and that this duty remained "regardless of whether those standards previously had been spelled out in a general rule or regulation." *Id.*, at 201. The Court continued:

> "The function of filling in the interstices of the [Securities] Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which

[22] A number of Board decisions have excluded buyers from units of rank-and-file employees. See n. 14, *supra*. But *American Locomotive Co.* and *Swift & Co.* appear to be the only cases in which the Board has held that buyers are not entitled to organize in a separate unit.

[23] *Chenery II* did not involve § 4 of the APA, 5 U. S. C. § 553, but is nevertheless analogous.

> arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. *In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.*
>
> "In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. *Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.* In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards." *Id.*, at 202–203. (Emphasis added.)

The Court concluded that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*, at 203.

And in *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759 (1969), the Court upheld a Board order enforcing an election list requirement first promulgated in an earlier adjudicative proceeding in *Excelsior Underwear Inc.*, 156 N. L. R. B. 1236 (1966). The plurality opinion of Mr.

Justice Fortas, joined by The Chief Justice, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, recognized that "[a]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein," and that such cases "generally provide a guide to action that the agency may be expected to take in future cases." *NLRB* v. *Wyman-Gordon Co., supra,* at 765–766. The concurring opinion of Mr. Justice Black, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, also noted that the Board had both adjudicative and rulemaking powers and that the choice between the two was "within its informed discretion." *Id.,* at 772.

The views expressed in *Chenery II* and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion. Indeed, there is ample indication that adjudication is especially appropriate in the instant context. As the Court of Appeals noted, "[t]here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." 475 F. 2d, at 496. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company. The Board's judgment that adjudication best serves this purpose is entitled to great weight.

The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result. It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here. In any event, concern about such consequences is largely speculative, for the Board has not yet finally determined whether these buyers are "managerial."

It is true, of course, that rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues. Those most immediately affected, the buyers and the company in the particular case, are accorded a full opportunity to be heard before the Board makes its determination.

The judgment of the Court of Appeals is therefore affirmed in part and reversed in part, and the cause remanded to that court with directions to remand to the Board for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting in part.

I concur in Part III of the Court's opinion insofar as it holds that the Board was not required to resort to rulemaking in deciding this case, but I dissent from its hold-

ing in Part II that managerial employees as a class are not "employees" within the meaning of the National Labor Relations Act.

Section 7 of the Act, 29 U. S. C. § 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ." Section 8 (a)(1), 29 U. S. C. § 158 (a)(1), makes it an unfair labor practice to interfere with the rights guaranteed in § 7, and under § 8 (a)(5), 29 U. S. C. § 158 (a)(5), it is an unfair practice for the employer to refuse to bargain collectively with representatives of his "employees." For the purposes of the foregoing sections, the term "employee" as defined in § 2 (3) of the Act, means "any employee" of the employer,

> "but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . ." 29 U. S. C. § 152 (3).

The issue in this case is whether the term "employee" excludes not only those specifically excluded by § 2 but also the broad category of "managerial" employees who, although literally "employees" of the employer and not expressly excluded by § 2, are nevertheless not to be considered employees for the purposes of the Act because they make and implement managerial policies. The Court holds that no managerial employee is an employee for the purposes of the Act. I cannot agree with this conclusion.

The Act is very plain on its face—"any employee," with specified exclusions, is entitled to the benefits of the Act. Each of the exclusions is a narrow and precisely defined class, and none of them mentions managerial employees. "Supervisors" are excluded, but a precise definition of that class, much narrower than the class of managerial employees, is provided in § 2 (11):

> "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U. S. C. § 152 (11).

Without more, it could not be concluded that Congress meant to exclude a whole category of employees in addition to those expressly excepted in § 2 (3). To infer that all managerial employees are not employees for purposes of the Act because a specified managerial subgroup, supervisors, was expressly excluded, is unwarranted, at least where Congress was careful to define precisely what employees were within the scope of the supervisory exclusion.

What is more, Congress in § 2 (12), 29 U. S. C. § 152 (12), has defined a special subclass of professional employees having special skills and duties "involving the consistent exercise of discretion and judgment in" the performance of their work. These employees are obviously "employees" for the purposes of the Act; and in § 9, 29 U. S. C. § 159, after investing the Board with the powers necessary to decide the units appropriate for collective bargaining, it is provided

that the Board shall not hold any bargaining unit to be appropriate "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." It is apparent, it seems to me, that there are many professional employees who would qualify as managerial employees; yet the Act clearly treats them as employees for purposes of the Act and Congress assumed they would have full organizational and bargaining rights unless it was provided otherwise in accordance with congressional desires. Hence § 9 (b).

Insofar as the face of the Act is concerned, and as compared with an across-the-board exclusion of "managerial" employees, the present ruling of the Board, which excludes only those managerial employees whose work may involve them in a conflict of interest if they are permitted to bargain collectively, is a far narrower exclusion adhering much more closely to the rationale of the supervisory exclusion and to the apparent intent of Congress. The Court nevertheless not only holds that the term employee *may* be construed to exclude managerial employees but also that it *must* be so construed. No narrower exclusion, it is said, in addition to those expressly provided for, will satisfy the Act.

Although it would appear to be a difficult and questionable feat to rewrite the statute so substantially, the Court purports to find license for its result in the legislative history of the 1947 amendments to the Act, read in the light of previous and subsequent Board and court decisions. It is true that the exclusion of supervisors from the definition of employees first occurred in 1947, but, with all respect, I find no basis in the history of these amendments, read in the light of prior Board cases, for concluding that Congress intended to exclude all

managerial employees, in addition to supervisors, from the benefits of the Act.

As I understand its decisions, the Board at no time prior to 1947 completely excluded the broad category of managerial employees from the class of employees protected by the Act. The Court concedes that the Board's cases during this period involved only the exclusion of managerial employees from bargaining units of rank-and-file workers. Some of the Board's statements may have been ambiguous, but no Board case held or had occasion to hold that managerial employees as a group would not be protected by the Act. As the Court acknowledges, the Board, in one decision excluding buyers and expediters from a unit of office and clerical employees, pointedly expressed the caveat that "[t]his is not to say, however, that buyers and expediters are to be denied the right to self-organization and to collective bargaining under the Act." *Dravo Corp.*, 54 N. L. R. B. 1174, 1177 (1944). In *Hudson Motor Car Co.*, 55 N. L. R. B. 509, 512 (1944), where the Board excluded buyers from a bargaining unit of office and clerical employees, the reason given for the exclusion was "that their duties are closely allied to management, differing materially from those of the other clerical employees." And in *Vulcan Corp.*, 58 N. L. R. B. 733, 736 (1944), the Board excluded a buyer from a production and maintenance employees' unit, not because a managerial employee could not be accorded bargaining rights, but "[b]ecause of the responsibility of his position and his peculiar relationship to management, and in view of the fact that his interests are apparently different from those of the production and maintenance employees." This line of Board decisions addressed the question whether certain managerial employees had sufficient community of interest with rank-and-file employees to be included in the same bargaining unit with them, and the Board was exercising its power to designate

appropriate bargaining units under § 9. It is clear that the Board at no time held managerial employees to be outside the scope of the Act during the period prior to the Taft-Hartley amendments.

The Board's position with respect to supervisors, as a class, vacillated during this time, the Board first excluding supervisors from rank-and-file units but recognizing units confined to supervisory employees, then refusing to recognize any bargaining units of supervisors and finally returning to its earlier rule. But even when the Board determined for a short period that supervisors should not be permitted to organize either with other employees or in separate units, it never went as far as to hold supervisors not to be "employees" under the Act. This was the Court's understanding of the Board's position in *Packard Co.* v. *NLRB*, 330 U. S. 485, 492 n. 3 (1947), the very case which prompted the 80th Congress to go further than the Board had ever gone and exclude supervisors entirely from the category of employees accorded bargaining rights under the Act.[1] In *Maryland Drydock Co.*, 49 N. L. R. B. 733, 738, 740 (1943), the Board was "no longer convinced that from the mere determina-

[1] "The Board had held that supervisory employees may organize in an independent union, *Union Collieries Coal Co.*, 41 N. L. R. B. 961, 44 N. L. R. B. 165; and in an affiliated union, *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874. Then it held that there was no unit appropriate to the organization of supervisory employees. *Maryland Drydock Co.*, 49 N. L. R. B. 733; *Boeing Aircraft Co.*, 51 N. L. R. B. 67; *Murray Corp. of America*, 51 N. L. R. B. 94; *General Motors Corp.*, 51 N. L. R. B. 457. In this case, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; in *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298; *Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, 71 N. L. R. B. 1261; and in *California Packing Corp.*, 66 N. L. R. B. 1461, the Board re-embraced its earlier conclusions with the same progressive boldness it had shown in the *Union Collieries* and *Godchaux Sugars* cases. In none of this series of cases did the Board hold that supervisors were not employees. See *Soss Manufacturing Co.*, 56 N. L. R. B. 348."

tion that a supervisor is an employee it follows that supervisors may constitute appropriate bargaining units" because "the benefits which supervisory employees might achieve through being certified as collective-bargaining units would be outweighed not only by the dangers inherent in the commingling of management and employee functions, but also in its possible restrictive effect upon the organizational freedom of rank and file employees." Shortly thereafter, the Board, faced with a claim by the employer that foremen are not employees within the meaning of the Act, did not address this possible ground of decision but held instead that it was "not persuaded that the factors militating against the establishment of units of supervisory employees, set forth in . . . the *Maryland Drydock* case, are obviated by the circumstance that the union seeking to represent such employees is an independent, unaffiliated union." *General Motors Corp.*, 51 N. L. R. B. 457, 460 (1943). Moreover, the Board held in *Soss Mfg. Co.*, 56 N. L. R. B. 348 (1944), that while a bargaining unit of supervisory employees might not be appropriate, a supervisor, like other employees, was nonetheless protected against an unfair labor practice: "We conclude that supervisors are 'employees' and that supervisory status does not by its own force remove an employee from the protection of Section 8 (1) and (3)" of the Act. *Id.*, at 353. Ultimately, in the *Packard* cases, 61 N. L. R. B. 4, 64 N. L. R. B. 1212 (1945), the Board reverted to its earlier rule that bargaining units of supervisors were entitled to recognition under the Act as long as they included no rank-and-file members.

When Congress undertook to amend the Act following this Court's decision in *Packard* upholding the Board's inclusion of supervisors as employees under the Act, it was acting in light of a renewed Board policy to

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permit supervisory employees to organize in separate units under the mantle of the Act's protection, an enduring Board policy not to exclude supervisors from the statutory definition of employees, and a further policy which excluded managerial employees from rank-and-file units but had never denied them the right to establish separate bargaining units or placed them outside the Act's definition of "employee." The amendments adopted by Congress in 1947 in light of this pattern of Board practice clearly intended to do away with the *Packard* decision approving the Board's authority to grant recognition to unions of supervisors. The House and the Senate both proposed to exclude supervisors from the individuals defined as employees for purposes of the Act. The Senate definition of "supervisor" was limited to individuals with authority, in the employer's interest, to take or recommend action involving the employment of other employees, if the exercise of such authority required the use of independent judgment, S. 1126 § 2 (11). But the proposed House definition would also have identified as excluded "supervisors" (a) those who could determine or effectively recommend the wages to be paid other employees, (b) employees with responsibility in the area of labor relations, personnel, employment, police, or time-study matters, and (c) confidential employees, H. R. 3020 § 2 (12). Neither of these proposals sought to exclude in express terms the entire category of "managerial employees," *i. e.*, those who are in a position to formulate, determine, and effectuate management policies beyond the area of labor relations, whether by defining such persons as "supervisors" or by proposing a separate exclusion for "managerial employees." Such a step could easily have been taken had Congress intended to exclude these individuals from the protection of the Act. But it was not, despite the fact that the Board had recently considered whether

certain employees should be denied organizational rights, either because they were supervisory or, separately, because their job responsibilities involved the exercise of managerial discretion. See, *e. g., Ford Motor Co.,* 66 N. L. R. B. 1317, 1322 (1946); *Electric Controller & Mfg. Co.,* 69 N. L. R. B. 1242 (1946). One would expect that if Congress had intended to eliminate the Board's authority to accord bargaining rights to managerial employees, as well as supervisors, it would have said so, particularly as Board practice had treated these two categories separately and differently.

The Court would fill this gap by referring to the House Managers' statement accompanying the Conference Committee Report and explaining the adoption of the narrower Senate definition of excluded "supervisors." This report is indeed instructive, but it indicates even more clearly, in my opinion, that Congress did not contemplate the exclusion of managerial employees from the coverage of the Act:

> "The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential employees as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel,

> the special provisions of the Senate amendment . . . applicable with respect to professional employees will cover many in this category. In the case of guards, the conference agreement does not permit the certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards. The provision dealing with the certification of bargaining units for guards is dealt with in section 9 (b) of the conference agreement . . . ." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35–36 (1947).

The Court emphasizes that the statutory language adopted in the 1947 amendments did not expressly exclude persons working in labor relations, personnel, or employment departments, or confidential employees, but that these were "impliedly excluded" from the Act's coverage by dint of the House Managers' statements just quoted. From this premise, the Court proceeds to assume that other categories of employees, similarly not excluded under the express terms of the amended definition of "employee," were also impliedly excluded from the Act. In my view, there is no warrant for the assumption that groups of employees, which the statute, or express legislative statements, do not address, are to be excluded from the Act; nor is there any legislative debate whatsoever which can reasonably be construed as expressing an authoritative intent to exclude managerial employees as a class.

The House Managers' statement accompanying the Conference Committee Report explains that the Act was not amended expressly to exclude labor relations and confidential employees from coverage under the Act, because it was already prevailing Board practice to exclude these employees. This was not an entirely accu-

rate representation of Board practice, which seemed to hold only that such employees should not be included in rank-and-file bargaining units, and not necessarily that they would have no protections under the Act, see, *e. g., Murray Ohio Mfg. Co.,* 61 N. L. R. B. 47 (1945); *Ford Motor Co.,* 66 N. L. R. B. 1317 (1946), but even accepting the House Managers' statement as an authoritative direction that these workers were not to be considered employees within the meaning of § 2, it does not follow that other groups of employees, regarding whom no such explicit direction was set forth and whom the Board had not treated in such a manner, were also intended to be excluded. Such statement implied that certain groups of employees were to be excluded, but it also noted that some timestudy personnel could qualify as professional employees and could therefore organize in units which a majority of them approved, and that guards were not wholly excluded from the Act, but were restricted to units composed solely of other guards. § 9 (b), 29 U. S. C. § 159 (b). Given that Congress made specific provision for timestudy and plant protection employees, who were to be entitled to bargaining rights, and that it expressed a desire to exclude only labor relations and confidential employees whom it thought the Board had previously held outside the Act, there is no reason to suppose from the further congressional silence that special provisions, whether of inclusion or exclusion, were intended with respect to other categories of employees. If it be argued that the absence of any express treatment of managerial employees by Congress was somehow intended to codify prior Board practice, then the unavoidable fact is that Board decisions had not held that managerial employees were unprotected by the Act. They had only been excluded from rank-and-file bargaining units. Moreover, there is no indication in the legislative history as to what

Congress might have perceived the Board's rule to be with respect to managerial employees as a class.[2]

Nor is the Court's position much advanced by the few passing references in the House Report and in the floor debates, which the Court cites, *ante,* at 283, and nn. 12 and 13, for the assumption that "executives" would be excluded from the Act apart from whether they were confidential employees or not, and for the discussion of supervisors as representatives of management whom the amendments sought to exclude. In none of the cited passages was the category of "managerial employees," as the Board had defined it, ever addressed, and the focus of these remarks is clearly directed at the exclusion of supervisors as defined in the proposed amendments. Perhaps it was clear to Congress that a confidential secretary's superior would be excluded by the Act, but such an individual would either be a confidential employee himself, or a supervisor, or both. We are referred to

[2] The majority argues that "no explicit exclusionary provision was necessary in 1947 because the Board had never approved the organization of 'managerial employees' in either a separate unit or as part of a rank-and-file unit." *Ante,* at 284–285, n. 13. It does not dispute, however, that the Board had never disapproved their organization either, and admits that the Board had stated in *Dravo Corp.,* 54 N. L. R. B. 1174 (1944), that by excluding buyers from a clerical employees unit it did not mean to say they would be denied bargaining rights under the Act. The Board had not held managerial employees excluded prior to 1947, and Congress did not address itself to the class of "managerial employees" by that term or by reference to the Board's definition. There is, therefore, no justification for excluding from the statutory designation of "any employee" an entire class that the Board had not previously excluded and that Congress did not expressly deal with in its amendments to the Act or in the legislative materials surrounding their adoption. If Congress had intended to exclude managerial employees, it would have said *something* about them, since it took such great pains to discuss supervisors and labor relations, confidential, time-study, and plant protection employees.

nothing in the debates or other congressional materials where the category of managerial employees, as distinguished from the class of supervisory employees, a distinction the Board had previously drawn, is discussed.[3]

Finally, if we are to consider the 1947 amendments as intending to enact the views of the dissenting Justices in *Packard,* it should be noted that the dissent interpreted the National Labor Relations Act to "put in the employer category all those who acted for management not only in formulating but also in executing *its labor policies.*" 330 U. S., at 496. (Emphasis supplied.) See also *id.,* at 500. Limiting the exclusion of managerial employees to those who are charged with the formulation or implementation of labor relations policies, as the Board has now done in the case before us, is

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[3] The majority expresses concern that extending organizational and bargaining rights to managerial employees would permit the extension of the Act to vice presidents and other high level executives, thereby blurring the distinction between management and labor. The concern is overblown; for most, if not all, executives will obviously be "super" supervisors, confidential employees, professionals or within the Board's definition of those employees whose organization would result in a conflict of interest with respect to the company's labor policies. If there are remaining executives outside these categories who should also be excluded, the Board should be told to exclude that particular group, rather than to exclude the managerial class that would reach not only vertically, but laterally, to deny "hundreds of thousands," 475 F. 2d 485, 496, of buyers and other relatively low-level management employees the organizational benefits and other protections of the Act otherwise available to "any employee."

To argue, as the majority does, that had Congress intended to include managerial employees, it would have said so expressly, ignores the fact that the Act covers "any employee" and that the burden properly falls on those who would exclude managerial employees to demonstrate that it was the intent of Congress to exclude this category when it legislated directly to exclude supervisory employees.

entirely consistent with this view and with the purposes of the Act. As the Senate Report noted, its concern in changing the law with respect to supervisory employees, as construed by *Packard,* was that the balance of power in the collective-bargaining process had been upset by "the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." S. Rep. No. 105, 80th Cong., 1st Sess., 3 (1947). See also H. R. Rep. No. 245, 80th Cong., 1st Sess., 13 (1947); 93 Cong. Rec. 3553. Where an employee may be deemed managerial because of the nature of his duties apart from supervision of other employees, however, there is no reason to suppose that union affiliation, at least in separate units, would raise the same labor relations concern.

Following the Taft-Hartley amendments in 1947, the Board continued to hold, as it had frequently held before, that buyers, and others with managerial interests, were to be excluded from bargaining units of other employees. *Denver Dry Goods,* 74 N. L. R. B. 1167 (1947); *Palace Laundry Dry Cleaning,* 75 N. L. R. B. 320 (1947); *Denton's, Inc.,* 83 N. L. R. B. 35, 37 (1949); *Wise, Smith & Co.,* 83 N. L. R. B. 1019, 1021 n. 6 (1949); *Westinghouse Electric Corp.,* 89 N. L. R. B. 8, 14 (1950). But in 1950, in *American Locomotive Co.,* 92 N. L. R. B. 115, 117, the Board, in rejecting the inclusion of buyers in an office and clerical employees unit or their placement in a separate bargaining unit, said that "[a]s it appears that the buyers are authorized to make substantial purchases for the Employer, we find that they are representatives of management, and as such may not be accorded bargaining rights under the Act." Reliance for this

statement was placed on the *Wise, Smith & Co.* case and *Westinghouse Electric* case which involved the appropriateness of placing the managerial employees in a particular bargaining unit. In *Swift & Co.,* 115 N. L. R. B. 752 (1956), the Board held that a proposed unit of procurement drivers could not be accorded bargaining rights, even in a separate unit. There, the Board flatly asserted that it was "the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management." *Id.,* at 753–754. The sole support for this statement, which the Board has now repudiated, was a reference to the statutory definitions of "employee" and "employer" and to the Conference Committee Report's explanation of the term "supervisors," as quoted above and reprinted in the Congressional Record.

The Board thereafter continued to exclude managerial employees from bargaining units of other employees, occasionally citing *Swift, e. g., Copeland Refrigeration Corp.,* 118 N. L. R. B. 1364, 1365 n. 2 (1957); *AFL–CIO,* 120 N. L. R. B. 969 (1958), but more frequently excluding managerial employees from particular units without citing that case or suggesting that the excluded workers were not protected employees. *E. g., Mack Trucks, Inc.,* 116 N. L. R. B. 1576, 1577–1578 (1956); *Diana Shop,* 118 N. L. R. B. 743, 745 (1957); *Federal Tel. & Radio Co.,* 120 N. L. R. B. 1652, 1654 (1958); *Kearney & Trecker Corp.,* 121 N. L. R. B. 817, 822 (1958); *Weaver Motors,* 123 N. L. R. B. 209, 216 (1959); *Eastern Camera & Photo Corp.,* 140 N. L. R. B. 569, 572 (1963).

Until the Board overruled *Swift* in *North Arkansas Electric Cooperative, Inc.,* 185 N. L. R. B. 550 (1970), it had thus actually held only twice that managerial employees could not be afforded protection under the Act, and its support for that conclusion was without any persuasive appeal. It is true, of course, that the Board had not held to the contrary either, and that

various courts of appeals interpreted and deferred to the Board's position as one of total exclusion of managerial employees from the scope of the Act, although in none of these cases was that conclusion necessary to the result reached. But the Board has now rejected this broad exclusion, and the question is whether the current view should be sustained. That the Board now refuses to follow its prior precedents is no reason to overturn it, for we have frequently sustained Board decisions overruling its prior interpretations of the Act. *E. g., Golden State Bottling Co.* v. *NLRB,* 414 U. S. 168 (1973); *Packard Co.* v. *NLRB,* 330 U. S. 485 (1947). And the face of the Act and the events of 1947 demonstrate that the Board's present decision is a permissible construction of the statute.

Nor did Congress in 1959, when it again amended the statute, expressly or impliedly enact or approve the statutory interpretation announced in *Swift & Co.* The 1959 amendments dealt with secondary boycotts and picketing, and we are cited to nothing suggesting that the attention of Congress at that time was directed to or focused on the question whether managerial employees were covered or excluded in the statute. Congressional silence does not imply legislative approval of all Board rulings theretofore made. As the Court noted in *Boys Markets* v. *Retail Clerks Union,* 398 U. S. 235, 241–242 (1970), which overruled *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195 (1962):

> "Nor can we agree that the conclusive weight should be accorded to the failure of Congress to respond to *Sinclair* on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' *Girouard* v.

> *United States,* 328 U. S. 61, 69 (1946). Therefore, in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of *Sinclair,* the mere silence of Congress is not a sufficient reason for refusing to consider the decision."

See also *Commissioner* v. *Glenshaw Glass Co.,* 348 U. S. 426, 431 (1955). Similarly, from the congressional silence in 1959 concerning *Swift*'s exclusion of managerial employees from the protection of the Act, it should not be assumed that Congress intended to approve of *Swift* and foreclose the possibility of the Board's reconsidering *Swift* and overruling it on further and more examining reflection. *NLRB* v. *Seven-Up Co.,* 344 U. S. 344, 350–352 (1953).

The Board's decisions in this area have not established a cohesive and precise pattern of rulings. It is often difficult to tell whether an individual decision is based on the propriety of excluding certain employees from a particular bargaining unit or whether the worker under consideration is thought to be outside the scope of the Act. But this Court has consistently said that it will accept the Board's determination of whether a particular individual is an "employee" under the Act if that determination "has 'warrant in the record' and a reasonable basis in law," *NLRB* v. *Hearst Publications, Inc.,* 322 U. S. 111, 131 (1944); *NLRB* v. *United Insurance Co.,* 390 U. S. 254, 260 (1968). There is no reason here to hamstring the Board and deny a broad category of employees those protections of the Act which neither the statutory language nor its legislative history requires simply because the Board at one time interpreted the Act—erroneously it seems to me—to exclude all managerial as well as supervisory employees.

I respectfully dissent.

DeFUNIS ET AL. *v.* ODEGAARD ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 73–235. Argued February 26, 1974—Decided April 23, 1974

After being denied admission to a state-operated law school, petitioner brought this suit on behalf of himself alone for injunctive relief, claiming that the school's admissions policy racially discriminated against him in violation of the Equal Protection Clause of the Fourteenth Amendment. The trial court agreed and ordered the school to admit him in the fall of 1971. The Washington Supreme Court reversed, holding that the school's admissions policy was not unconstitutional. MR. JUSTICE DOUGLAS, as Circuit Justice, stayed that judgment pending this Court's final disposition of the case, with the result that petitioner was in his final school year when this Court considered his petition for certiorari. After oral argument, the Court was informed that petitioner had registered for his final quarter. Respondents have assured the Court that this registration is fully effective regardless of the ultimate disposition of the case. *Held:* Because petitioner will complete law school at the end of the term for which he has registered regardless of any decision this Court might reach on the merits, the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues, and the case is moot.

(a) Mootness here does not depend upon a "voluntary cessation" of the school's admissions practices but upon the simple fact that petitioner is in his final term, and the school's fixed policy to permit him to complete the term.

(b) The case presents no question that is "capable of repetition, yet evading review," since petitioner will never again have to go through the school's admissions process, and since it does not follow that the issue petitioner raises will in the future evade review merely because this case did not reach the Court until the eve of petitioner's graduation.

82 Wash. 2d 11, 507 P. 2d 1169, vacated and remanded.

Josef Diamond argued the cause for petitioners. With him on the briefs was *Lyle L. Iversen.*

Slade Gorton, Attorney General of Washington, argued the cause for respondents. With him on the brief was *James B. Wilson,* Senior Assistant Attorney General.*

*Briefs of *amici curiae* urging reversal were filed by *Milton A. Smith, Gerard C. Smetana,* and *Jerry Kronenberg* for the Chamber of Commerce of the United States; by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations; by *Theodore R. Mann* for the American Jewish Congress; by *David I. Caplan* for the Jewish Rights Council; by *Anthony J. Fornelli, Thaddeus L. Kowalski,* and *Samuel Rabinove* for the Advocate Society et al.; and by *Alexander M. Bickel, Philip B. Kurland, Larry M. Lavinsky,* and *Arnold Forster* for the Anti-Defamation League of B'nai B'rith.

Briefs of *amici curiae* urging affirmance were filed by *William J. Brown,* Attorney General, and *Andrew J. Ruzicho, Earl M. Manz,* and *Stephen J. Simmons,* Assistant Attorneys General, for the State of Ohio; by *John P. Harris* for the city of Seattle; by *Fletcher N. Baldwin, Jr.,* and *Chesterfield Smith* for the American Bar Assn.; by *Archibald Cox, James N. Bierman, James A. Sharaf,* and *Daniel Steiner* for the President and Fellows of Harvard College; by *J. Harold Flannery* for the Center for Law and Education, Harvard University; by *Frank Askin* and *Norman Amaker* for the Board of Governors of Rutgers, the State University of New Jersey, et al.; by *Edgar S. Cahn* and *Jean Camper Cahn* for the Deans of the Antioch School of Law; by *Erwin N. Griswold* and *Clifford C. Alloway* for the Association of American Law Schools; by *John Holt Myers* for the Association of American Medical Colleges; by *Howard A. Glickstein* for a Group of Law School Deans; by *Harry B. Reese* and *Peter Martin* for the Law School Admission Council; by *Sanford Jay Rosen, Herbert Teitelbaum,* and *Melvin L. Wulf* for the Mexican American Legal Defense and Educational Fund et al.; by *Cruz Reynoso* and *Robert B. McKay* for the Council on Legal Education Opportunity; by *Roswell B. Perkins, Kenneth C. Bass III, David S. Tatel,* and *R. Stephen Browning* for the Lawyers' Committee for Civil Rights Under Law; by *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Jeffry A. Mintz, Louis H. Pollak,* and *John Baker* for the NAACP Legal Defense and Educational Fund, Inc.; by *Derrick A. Bell, Jr.,* for the National Conference of Black Lawyers; by *Bruce R. Greene* and *Herbert Becker* for the American Indian Law Students Assn., Inc., et al.; by *Clifford Sweet, C. Lyonel*

PER CURIAM.

In 1971 the petitioner Marco DeFunis, Jr.,[1] applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September 1971, on the ground that the Law School admissions policy had resulted in the unconstitutional denial of his application for admission. The trial court agreed with his claim and granted the requested relief.

Jones, Dennis R. Yeager, E. Richard Larson, Nathaniel R. Jones, Michael H. Terry, Joseph A. Matera, and *C. Christopher Brown* for the Legal Aid Society of Alameda County et al.; by *Peter Van N. Lockwood, David Bonderman, Sylvia Roberts,* and *David Rubin* for the National Organization for Women Legal Defense and Education Fund, Inc., et al.; and by *Joseph L. Rauh, Jr.,* for the National Council of Jewish Women et al.

[1] Also included as petitioners are DeFunis' parents and his wife. Hereafter, the singular form "petitioner" is used.

DeFunis was, accordingly, admitted to the Law School and began his legal studies there in the fall of 1971. On appeal, the Washington Supreme Court reversed the judgment of the trial court and held that the Law School admissions policy did not violate the Constitution. By this time DeFunis was in his second year at the Law School.

He then petitioned this Court for a writ of certiorari, and MR. JUSTICE DOUGLAS, as Circuit Justice, stayed the judgment of the Washington Supreme Court pending the "final disposition of the case by this Court." By virtue of this stay, DeFunis has remained in law school, and was in the first term of his third and final year when this Court first considered his certiorari petition in the fall of 1973. Because of our concern that DeFunis' third-year standing in the Law School might have rendered this case moot, we requested the parties to brief the question of mootness before we acted on the petition. In response, both sides contended that the case was not moot. The respondents indicated that, if the decision of the Washington Supreme Court were permitted to stand, the petitioner could complete the term for which he was then enrolled but would have to apply to the faculty for permission to continue in the school before he could register for another term.[2]

We granted the petition for certiorari on November 19, 1973. 414 U. S. 1038. The case was in due course orally argued on February 26, 1974.

In response to questions raised from the bench during the oral argument, counsel for the petitioner has informed the Court that DeFunis has now registered "for his final

[2] By contrast, in their response to the petition for certiorari, the respondents had stated that DeFunis "will complete his third year [of law school] and be awarded his J. D. degree at the end of the 1973–74 academic year regardless of the outcome of this appeal."

quarter in law school." Counsel for the respondents have made clear that the Law School will not in any way seek to abrogate this registration.[3] In light of DeFunis' recent registration for the last quarter of his final law school year, and the Law School's assurance that his registration is fully effective, the insistent question again arises whether this case is not moot, and to that question we now turn.

The starting point for analysis is the familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U. S. 244 246 (1971). The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.,* 375 U. S. 301, 306 n. 3 (1964); see also *Powell* v. *McCormack,* 395 U. S. 486, 496 n. 7 (1969); *Sibron* v. *New York,* 392 U. S. 40, 50 n. 8 (1968). Although as a matter of Washington state law it appears that this case would be saved from mootness by "the great public interest in the continuing issues raised by this appeal," 82 Wash. 2d 11, 23 n. 6, 507 P. 2d 1169, 1177 n. 6 (1973), the fact remains that under Art. III "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." *North Carolina* v. *Rice, supra,* at 246.

The respondents have represented that, without regard to the ultimate resolution of the issues in this case,

[3] In their memorandum on the question of mootness, counsel for the respondents unequivocally stated: "If Mr. DeFunis registers for the spring quarter under the existing order of this court during the registration period from February 20, 1974, to March 1, 1974, that registration would not be canceled unilaterally by the university regardless of the outcome of this litigation."

DeFunis will remain a student in the Law School for the duration of any term in which he has already enrolled. Since he has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case. In short, all parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and to receive his degree from that institution. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it. DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937).

It matters not that these circumstances partially stem from a policy decision on the part of the respondent Law School authorities. The respondents, through their counsel, the Attorney General of the State, have professionally represented that in no event will the status of DeFunis now be affected by any view this Court might express on the merits of this controversy. And it has been the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision. See *Gerende* v. *Election Board,* 341 U. S. 56 (1951); *Whitehill* v. *Elkins,* 389 U. S. 54, 57–58 (1967); *Ehlert* v. *United States,* 402 U. S. 99,

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107 (1971); cf. *Law Students Research Council* v. *Wadmond,* 401 U. S. 154, 162–163 (1971).

There is a line of decisions in this Court standing for the proposition that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.,* does not make the case moot." *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 308–310 (1897); *Walling* v. *Helmerich & Payne, Inc.,* 323 U. S. 37, 43 (1944); *Gray* v. *Sanders,* 372 U. S. 368, 376 (1963); *United States* v. *Phosphate Export Assn.,* 393 U. S. 199, 202–203 (1968). These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of a unilateral change in the *admissions procedures* of the Law School. For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance "that 'there is no reasonable expectation that the wrong will be repeated.'" *United States* v. *W. T. Grant Co., supra,* at 633. Otherwise, "[t]he defendant is free to return to his old ways," *id.,* at 632, and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." *Ibid.* But mootness in the present case depends not at all upon a "voluntary cessation" of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled.

It might also be suggested that this case presents a question that is "capable of repetition, yet evading

review," *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911); *Roe* v. *Wade,* 410 U. S. 113, 125 (1973), and is thus amenable to federal adjudication even though it might otherwise be considered moot. But DeFunis will never again be required to run the gantlet of the Law School's admission process, and so the question is certainly not "capable of repetition" so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged,[4] there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. This case, therefore, in no way presents the exceptional situation in which the *Southern Pacific Terminal* doctrine might permit a departure from "[t]he usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade, supra,* at 125; *United States* v. *Munsingwear, Inc.,* 340 U. S. 36 (1950).

Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of

[4] In response to an inquiry from the Court, counsel for the respondents has advised that some changes have been made in the admissions procedures "for the applicants seeking admission to the University of Washington law school for the academic year commencing September, 1974." The respondents' counsel states, however, that "[these] changes do not affect the policy challenged by the petitioners . . . in that . . . special consideration still is given to applicants from 'certain ethnic groups.'"

Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.[5] Accordingly, the judgment of the Supreme Court of Washington is vacated, and the cause is remanded for such proceedings as by that court may be deemed appropriate.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that this case is not moot, and because of the significance of the issues raised I think it is important to reach the merits.

I

The University of Washington Law School received 1,601 applications for admission to its first-year class beginning in September 1971. There were spaces available for only about 150 students, but in order to enroll this number the school eventually offered admission to 275 applicants. All applicants were put into two groups, one of which was considered under the minority admissions program. Thirty-seven of those offered admission had indicated on an optional question on their application that their "dominant" ethnic origin was either black, Chicano, American Indian, or Filipino, the four groups included in the minority admissions program. Answers to this optional question were apparently the sole basis

[5] It is suggested in dissent that "[a]ny number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term." *Post,* at 348. "But such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide," *Hall* v. *Beals,* 396 U. S. 45, 49 (1969), in the absence of "evidence that this is a prospect of 'immediacy and reality.'" *Golden* v. *Zwickler,* 394 U. S. 103, 109 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273 (1941).

upon which eligibility for the program was determined. Eighteen of these 37 actually enrolled in the Law School.

In general, the admissions process proceeded as follows: An index called the Predicted First Year Average (Average) was calculated for each applicant on the basis of a formula combining the applicant's score on the Law School Admission Test (LSAT) and his grades in his last two years in college.[1] On the basis of its experience with previous years' applications, the Admissions Committee, consisting of faculty, administration, and students, concluded that the most outstanding applicants were those with averages above 77; the highest average of any applicant was 81. Applicants with averages above 77 were considered as their applications arrived by random distribution of their files to the members of the Committee who would read them and report their recommendations back to the Committee. As a result of the first three Committee meetings in February, March, and April 1971, 78 applicants from this group were admitted, although virtually no other applicants were offered admission this early.[2] By the final conclusion of

[1] The grades are calculated on a conventional 4.0 scale, and the LSAT is scored on a scale ranging from 200 to 800. A Writing Test given on the same day as the LSAT and administered with it is also included in the formula; it is scored on a scale of 20 to 80. The Admissions Committee combines these scores into the Average by calculating the sum of 51.3, 3.4751 × the grade-point average, .0159 × LSAT score, and .0456 × the Writing Test score. App. 24. For a brief discussion of the use of the LSAT in combination with undergraduate grades to predict law school success, see Winterbottom, Comments on "A Study of the Criteria for Legal Education and Admission to the Bar," An Article by Dr. Thomas M. Goolsby, Jr., 21 J. Legal Ed. 75 (1968).

[2] The only other substantial group admitted at this point were 19 "military" applicants. These were students who had previously been admitted to the school but who had either been unable to come, or forced to leave during their tenure, because of the draft. They were

the admissions process in August 1971, 147 applicants with averages above 77 had been admitted, including all applicants with averages above 78, and 93 of 105 applicants with averages between 77 and 78.

Also beginning early in the admissions process was the culling out of applicants with averages below 74.5. These were reviewed by the Chairman of the Admissions Committee, who had the authority to reject them summarily without further consideration by the rest of the Committee. A small number of these applications were saved by the Chairman for Committee consideration on the basis of information in the file indicating greater promise than suggested by the Average. Finally during the early months the Committee accumulated the applications of those with averages between 74.5 and 77 to be considered at a later time when most of the applications had been received and thus could be compared with one another. Since DeFunis' average was 76.23, he was in this middle group.

Beginning in their May meeting the Committee considered this middle group of applicants, whose folders had been randomly distributed to Committee members for their recommendations to the Committee. Also considered at this time were remaining applicants with averages below 74.5 who had not been summarily rejected, and some of those with averages above 77 who had not been summarily admitted, but instead held for further consideration. Each Committee member would consider the applications competitively, following rough guide-

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given preferential treatment upon reapplication after completing their military obligation. Since neither party has raised any issue concerning this group of applicants, the remaining consideration of the admissions procedure will not discuss them. Four minority applicants were also admitted at this time, although none apparently had scores above 77. App. 31. Their admission was presumably pursuant to the procedure for minority applicants described below.

lines as to the proportion who could be offered admission. After the Committee had extended offers of admission to somewhat over 200 applicants, a waiting list was constructed in the same fashion, and was divided into four groups ranked by the Committee's assessment of their applications. DeFunis was on this waiting list, but was ranked in the lowest quarter. He was ultimately told in August 1971 that there would be no room for him.

Applicants who had indicated on their application forms that they were either black, Chicano, American Indian, or Filipino were treated differently in several respects. Whatever their Averages, none were given to the Committee Chairman for consideration of summary rejection, nor were they distributed randomly among Committee members for consideration along with the other applications. Instead, all applications of black students were assigned separately to two particular Committee members: a first-year black law student on the Committee, and a professor on the Committee who had worked the previous summer in a special program for disadvantaged college students considering application to the Law School.[3] Applications from among the other three minority groups were assigned to an assistant dean who was on the Committee. The minority applications, while considered competitively with one another, were never directly compared to the remaining applications, either by the subcommittee or by the full Committee. As in the admissions process generally, the Committee sought to find "within the minority category, those persons who we thought had the highest probability of

[3] This was a Council on Legal Education Opportunities program, federally funded by the Office of Economic Opportunity and sponsored by the American Bar Association, the Association of American Law Schools, the National Bar Association, and the Law School Admissions Council.

succeeding in Law School." [4] In reviewing the minority applications, the Committee attached less weight to the Average "in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school." 82 Wash. 2d 11, 21, 507 P. 2d 1169, 1175. In its publicly distributed Guide to Applicants, the Committee explained that "[a]n applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions." [5]

Thirty-seven minority applicants were admitted under this procedure. Of these, 36 had Averages below DeFunis' 76.23, and 30 had Averages below 74.5, and thus would ordinarily have been summarily rejected by the Chairman. There were also 48 nonminority applicants admitted who had Averages below DeFunis. Twenty-three of these were returning veterans, see n. 2, *supra,* and 25 were others who presumably were admitted because of other

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[4] Testimony of the Chairman of the Admissions Committee, Statement of Facts 353.

[5] The Guide to Applicants explained:

"We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

"An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.

"We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions." 82 Wash. 2d 11, 18–19, 507 P. 2d 1169, 1174.

factors in their applications that made them attractive candidates despite their relatively low Averages.

It is reasonable to conclude from the above facts that while other factors were considered by the Committee, and were on occasion crucial, the Average was for most applicants a heavily weighted factor, and was at the extremes virtually dispositive.[6] A different balance was apparently struck, however, with regard to the minority applicants. Indeed, at oral argument, the respondents' counsel advised us that were the minority applicants considered under the same procedure as was generally used, none of those who eventually enrolled at the Law School would have been admitted.

The educational policy choices confronting a university admissions committee are not ordinarily a subject for judicial oversight; clearly it is not for us but for the law school to decide which tests to employ, how heavily to weigh recommendations from professors or undergraduate grades, and what level of achievement on the chosen criteria are sufficient to demonstrate that the candidate is qualified for admission. What places this case in a special category is the fact that the school did not choose one set of criteria but two, and then determined which to apply to a given applicant on the basis of his race. The

[6] The respondents provided the following table in response to an interrogatory during the proceedings in the state court:

Predicted First Year Averages	Number of Applications Received	Number Accepted
81	1	1
80	2	2
79	11	11
78	42	42
77	105	93
76	169	53
75	210	22

App. 34.

Committee adopted this policy in order to achieve "a reasonable representation" of minority groups in the Law School. 82 Wash. 2d, at 20, 507 P. 2d, at 1175. Although it may be speculated that the Committee sought to rectify what it perceived to be cultural or racial biases in the LSAT or in the candidates' undergraduate records, the record in this case is devoid of any evidence of such bias, and the school has not sought to justify its procedures on this basis.

Although testifying that "[w]e do not have a quota . . ." the Law School dean explained that "[w]e want a reasonable representation. We will go down to reach it if we can," without "taking people who are unqualified in an absolute sense . . . ." Statement of Facts 420. By "unqualified in an absolute sense" the dean meant candidates who "have no reasonable probable likelihood of having a chance of succeeding in the study of law . . . ." *Ibid.* But the dean conceded that in "reaching," the school does take "some minority students who at least, viewed as a group, have a less such likelihood than the majority student group taken as a whole." *Id.*, at 423.

> "Q. Of those who have made application to go to the law school, I am saying you are not taking the best qualified?
>
> "A. In total?
>
> "Q. In total.
>
> "A. In using that definition, yes." *Id.*, at 423–424.

It thus appears that by the Committee's own assessment, it admitted minority students who, by the tests given, seemed less qualified than some white students who were not accepted, in order to achieve a "reasonable representation." In this regard it may be pointed out that for the year 1969–1970—two years before the class to which DeFunis was seeking admission—the Law School

reported an enrollment of eight black students out of a total of 356.[7] Defendants' Ex. 7. That percentage, approximately 2.2%, compares to a percentage of blacks in the population of Washington of approximately 2.1%.[8]

II

There was a time when law schools could follow the advice of Wigmore, who believed that "the way to find out whether a boy has the makings of a competent lawyer is to see what he can do in a first year of law studies." Wigmore, Juristic Psychopoyemetrology—Or, How to Find Out Whether a Boy Has the Makings of a Lawyer, 24 Ill. L. Rev. 454, 463–464 (1929). In those days there were enough spaces to admit every applicant who met minimal credentials, and they all could be given the opportunity to prove themselves at law school. But by the 1920's many law schools found that they could not admit all minimally qualified applicants, and some selection process began.[9] The pressure to use some kind of admissions test mounted, and a number of schools instituted them. One early precursor to the modern day LSAT was the Ferson-Stoddard Law Aptitude examination. Wigmore conducted his own study of that test with 50 student volunteers, and concluded that it "had no substantial practical value." *Id.*, at 463. But his conclusions were not accepted, and the harried law

[7] Although there is apparently no evidence in point in the record, respondents suggest that at least some of these eight students were also admitted on a preferential basis. Brief for Respondents 40 n. 27.

[8] United States Bureau of the Census, Census of Population: 1970, General Population Characteristics, Washington, Final Report PC (1)—B49, Table 18.

[9] For a history of gradual acceptance among law schools of standardized tests as an admission tool, see Ramsey, Law School Admissions: Science, Art, or Hunch?, 12 J. Legal Ed. 503 (1960).

schools still sought some kind of admissions test which would simplify the process of judging applicants, and in 1948 the LSAT was born. It has been with us ever since.[10]

The test purports to predict how successful the applicant will be in his first year of law school, and consists of a few hours' worth of multiple-choice questions. But the answers the student can give to a multiple-choice question are limited by the creativity and intelligence of the test-maker; the student with a better or more original understanding of the problem than the test-maker may realize that none of the alternative answers are any good, but there is no way for him to demonstrate his understanding. "It is obvious from the nature of the tests that they do not give the candidate a significant opportunity to express himself. If he is subtle in his choice of answers it will go against him; and yet there is no other way for him to show any individuality. If he is strong-minded, nonconformist, unusual, original, or creative—as so many of the truly important people are—he must stifle his impulses and conform as best he can to the norms that the multiple-choice testers set up in their unimaginative, scientific way. The more profoundly gifted the candidate is, the more his resentment will rise against the mental strait jacket into which the testers would force his mind." B. Hoffmann, The Tyranny of Testing 91–92 (1962).

Those who make the tests and the law schools which use them point, of course, to the high correlations between the test scores and the grades at law school the first year. *E. g.,* Winterbottom, Comments on "A Study of the Criteria for Legal Education and Admission to the

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[10] For a survey of the use of the LSAT by American law schools as of 1965, see Lunneborg & Radford, The LSAT: A Survey of Actual Practice, 18 J. Legal Ed. 313 (1966).

Bar," An Article by Dr. Thomas M. Goolsby, Jr., 21 J. Legal Ed. 75 (1968). Certainly the tests do seem to do better than chance. But they do not have the value that their deceptively precise scoring system suggests. The proponents' own data show that, for example, most of those scoring in the bottom 20% on the test do better than that in law school—indeed six of every 100 of them will be in the *top* 20% of their law school class. *Id.*, at 79. And no one knows how many of those who were not admitted because of their test scores would in fact have done well were they given the chance. There are many relevant factors, such as motivation, cultural backgrounds of specific minorities that the test cannot measure, and they inevitably must impair its value as a predictor.[11] Of course, the law school that admits only those with the highest test scores finds that on the average they do much better, and thus the test is a convenient tool for the admissions committee. The price is paid by the able student who for unknown reasons did not achieve that high score—perhaps even the minority with a different cultural background. Some tests, at least in the past, have been aimed at eliminating Jews.

The school can safely conclude that the applicant with a score of 750 should be admitted before one with a score of 500. The problem is that in many cases the choice will be between 643 and 602 or 574 and 528. The numbers create an illusion of difference tending to overwhelm other factors. "The wiser testers are well aware of the defects of the multiple-choice format and the danger of placing reliance on any one method of assessment to the exclusion of all others. What is distressing is how little their caveats have impressed the people who succumb to the propaganda of the test-

[11] Rock, Motivation, Moderators, and Test Bias, 1970 U. Tol. L. Rev. 527, 535.

makers and use these tests mechanically as though they were a valid substitute for judgment." Hoffmann, *supra,* at 215.

Of course, the tests are not the only thing considered; here they were combined with the prelaw grades to produce a new number called the Average. The grades have their own problems; one school's A is another school's C. And even to the extent that this formula predicts law school grades, its value is limited. The law student with lower grades may in the long pull of a legal career surpass those at the top of the class. "[L]aw school admissions criteria have operated within a hermetically sealed system; it is now beginning to leak. The traditional combination of LSAT and GPA [undergraduate grade point average] may have provided acceptable predictors of likely performance in law school in the past. . . . [But] [t]here is no clear evidence that the LSAT and GPA provide particularly good evaluators of the intrinsic or enriched ability of an individual to perform as a law student or lawyer in a functioning society undergoing change. Nor is there any clear evidence that grades and other evaluators of law school performance, and the bar examination, are particularly good predictors of competence or success as a lawyer." Rosen, Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria, 1970 U. Tol. L. Rev. 321, 332–333.

But, by whatever techniques, the law school must make choices. Neither party has challenged the validity of the Average employed here as an admissions tool, and therefore consideration of its possible deficiencies is not presented as an issue. The Law School presented no evidence to show that adjustments in the process employed were used in order validly to compare applicants of different races; instead, it chose to avoid making such comparisons. Finally,

although the Committee did consider other information in the files of all applicants, the Law School has made no effort to show that it was because of these additional factors that it admitted minority applicants who would otherwise have been rejected. To the contrary, the school appears to have conceded that by its own assessment—taking all factors into account—it admitted minority applicants who would have been rejected had they been white. We have no choice but to evaluate the Law School's case as it has been made.

III

The Equal Protection Clause did not enact a requirement that law schools employ as the sole criterion for admissions a formula based upon the LSAT and undergraduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance, and ability that would lead a fairminded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would be offered admission not because he is black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him. Because of the weight of the prior handicaps, that black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria. There is currently no test available to the Admissions

Committee that can predict such possibilities with assurance, but the Committee may nevertheless seek to gauge it as best it can, and weigh this factor in its decisions. Such a policy would not be limited to blacks, or Chicanos or Filipinos, or American Indians, although undoubtedly groups such as these may in practice be the principal beneficiaries of it. But a poor Appalachian white, or a second generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the Committee.

The difference between such a policy and the one presented by this case is that the Committee would be making decisions on the basis of individual attributes, rather than according a preference solely on the basis of race. To be sure, the racial preference here was not absolute—the Committee did not admit all applicants from the four favored groups. But it did accord all such applicants a preference by applying, to an extent not precisely ascertainable from the record, different standards by which to judge their applications, with the result that the Committee admitted minority applicants who, in the school's own judgment, were less promising than other applicants who were rejected. Furthermore, it is apparent that because the Admissions Committee compared minority applicants only with one another, it was necessary to reserve some proportion of the class for them, even if at the outset a precise number of places were not set aside.[12] That proportion, apparently 15% to

[12] At the outset the Committee may have chosen only a range, with the precise number to be determined later in the process as the total number of minority applicants, and some tentative assessment of their quality, could be determined. This appears to be the current articulated policy, see App. to this opinion § 6, and we are advised by the respondents that § 6 "represents a more formal statement of the policy which was in effect in 1971 . . . but does not

20%, was chosen because the school determined it to be "reasonable," [13] although no explanation is provided as to how that number rather than some other was found appropriate. Without becoming embroiled in a semantic debate over whether this practice constitutes a "quota," it is clear that, given the limitation on the total number of applicants who could be accepted, this policy did reduce the total number of places for which DeFunis could compete—solely on account of his race. Thus, as the Washington Supreme Court concluded, whatever label one wishes to apply to it, "the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it." 82 Wash. 2d, at 32, 507 P. 2d, at 1182. A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause.

The consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination, *Anderson* v. *Martin,* 375 U. S. 399, 402; *Loving* v. *Virginia,* 388 U. S. 1, 10; *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 668. Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent

represent any change in policy." Letter to the Court dated March 19, 1974, p. 1. The fact that the Committee did not set a precise number in advance is obviously irrelevant to the legal analysis. Nor does it matter that there is some minimal level of achievement below which the Committee would not reach in order to achieve its stated goal as to the proportion of the class reserved for minority groups, so long as the Committee was willing, in order to achieve that goal, to admit minority applicants who, in the Committee's own judgment, were less qualified than other rejected applicants and who would not otherwise have been admitted.

[13] See n. 12, *supra,* and App. to this opinion § 6.

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with the Equal Protection Clause. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving, supra,* at 10. The Law School's admissions policy cannot be reconciled with that purpose, unless cultural standards of a diverse rather than a homogeneous society are taken into account. The reason is that professional persons, particularly lawyers, are not selected for life in a computerized society. The Indian who walks to the beat of Chief Seattle of the Muckleshoot Tribe in Washington [14] has a different culture from examiners at law schools.

The key to the problem is the consideration of each application *in a racially neutral way.* Since the LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Filipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities.

The melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot as I understand it is a figure of speech that depicts the wide diversities tolerated by the First Amendment under one flag. See 2 S. Morison & H. Commager, The Growth of the American Republic, c. VIII (4th ed. 1950). Minorities in our midst who are to serve actively in our public affairs should be chosen on talent and character alone, not on cultural orientation or leanings.

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[14] Uncommon Controversy, Report Prepared for American Friends Service Committee 29–30 (1970).

I do know, coming as I do from Indian country in Washington, that many of the young Indians know little about Adam Smith or Karl Marx but are deeply imbued with the spirit and philosophy of Chief Robert B. Jim of the Yakimas, Chief Seattle of the Muckleshoots, and Chief Joseph of the Nez Perce which offer competitive attitudes towards life, fellow man, and nature.[15]

I do not know the extent to which blacks in this country are imbued with ideas of African Socialism.[16] Leopold Senghor and Sékou Touré, the most articulate of African leaders, have held that modern African political philosophy is not oriented either to Marxism or to capitalism.[17] How far the reintroduction into educational curricula of ancient African art and history has reached the minds of young Afro-Americans I do not know. But at least as respects Indians, blacks, and Chicanos—as well as those from Asian cultures—I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences.

Insofar as LSAT's reflect the dimensions and orientation of the Organization Man they do a disservice to minorities. I personally know that admissions tests were once used to eliminate Jews. How many other minorities they aim at I do not know. My reaction is that the presence of an LSAT is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials.

The merits of the present controversy cannot in my view be resolved on this record. A trial would

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[15] See C. Fee, Chief Joseph, The Biography of a Great Indian (1936).

[16] See F. Brockway, African Socialism (1963); African Socialism (W. Friedland & C. Rosberg ed. 1964).

[17] See L. Senghor, On African Socialism (M. Cook ed. 1964).

involve the disclosure of hidden prejudices, if any, against certain minorities and the manner in which substitute measurements of one's talents and character were employed in the conventional tests. I could agree with the majority of the Washington Supreme Court only if, on the record, it could be said that the Law School's selection was racially neutral. The case, in my view, should be remanded for a new trial to consider, *inter alia,* whether the established LSAT's should be eliminated so far as racial minorities are concerned.

This does not mean that a separate LSAT must be designed for minority racial groups, although that might be a possibility. The reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant or on his behalf.*[18]

There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race.

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[18] We are not faced here with a situation where barriers are overtly or covertly put in the path of members of one racial group which are not required by others. There was also no showing that the purpose of the school's policy was to eliminate arbitrary and irrelevant barriers to entry by certain racial groups into the legal profession groups. *Griggs* v. *Duke Power Co.,* 401 U. S. 424. In *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16, we stated that as a matter of educational policy school authorities could, within their broad discretion, specify that each school within its district have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole, in order to disestablish a dual school system. But there is a crucial difference between the policy suggested in *Swann* and that under consideration here: the *Swann* policy would impinge on no person's constitutional rights, because no one would be excluded from a public school and no one has a right to attend a segregated public school.

There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

The slate is not entirely clean. First, we have held that pro rata representation of the races is not required either on juries, see *Cassell* v. *Texas,* 339 U. S. 282, 286–287, or in public schools, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 24. Moreover, in *Hughes* v. *Superior Court,* 339 U. S. 460, we reviewed the contempt convictions of pickets who sought by their demonstration to force an employer to prefer Negroes to whites in his hiring of clerks, in order to ensure that 50% of the employees were Negro. In finding that California could constitutionally enjoin the picketing there involved we quoted from the opinion of the California Supreme Court, which noted that the pickets would "'make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis.'" *Id.,* at 463–464. We then noted that

> "[t]o deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the

numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." *Id.*, at 464.

The reservation of a proportion of the law school class for members of selected minority groups is fraught with similar dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt* v. *Painter,* 339 U. S. 629, and allowed imposition of a "zero" allocation.[19] But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the

[19] *Sweatt* held that a State could not justify denying a black admission to its regular law school by creating a new law school for blacks. We held that the new law school did not meet the requirements of "equality" set forth in *Plessy* v. *Ferguson,* 163 U. S. 537. The student, we said, was entitled to "legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State." 339 U. S., at 635.

Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, *e. g., Yick Wo* v. *Hopkins,* 118 U. S. 356; *Terrace* v. *Thompson,* 263 U. S. 197; *Oyama* v. *California,* 332 U. S. 633. This Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States,* 323 U. S. 214, and *Hirabayashi* v. *United States,* 320 U. S. 81, involving curfews and relocations imposed upon Japanese-Americans.[20]

[20] Those cases involved an exercise of the war power, a great leveler of other rights. Our Navy was sunk at Pearl Harbor and no one knew where the Japanese fleet was. We were advised on oral argument that if the Japanese landed troops on our west coast nothing could stop them west of the Rockies. The military judgment was that, to aid in the prospective defense of the west coast, the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreak even more serious havoc on our western ports. The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. While our Joint Chiefs of Staff were worrying about Japanese soldiers landing on the west coast, they actually were landing in Burma and at Kota Bharu in Malaya. But those making plans for defense of the Nation had no such knowledge and were planning for the worst. Moreover, the day we decided *Korematsu* we also decided *Ex parte Endo,* 323 U. S. 283, holding that while evacuation of the Americans of Japanese ancestry was allowable under extreme war conditions, their detention after evacuation was not. We said:

"A citizen who is concededly loyal presents no problem of espio-

Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints.

The key to the problem is consideration of such applications *in a racially neutral way.* Abolition of the LSAT would be a start. The invention of substitute tests might be made to get a measure of an applicant's cultural background, perception, ability to analyze, and his or her relation to groups. They are highly subjective, but unlike the LSAT they are not concealed, but in the open. A law school is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment. It will be necessary under such an approach to put more effort into assessing each individual than is required when LSAT scores and undergraduate grades dominate the selection process. Interviews with the applicant and others who know him is a time-honored test. Some schools currently run summer programs in which potential students who likely would be bypassed under conventional admissions criteria are given the opportunity to try their hand at law courses,[21] and certainly their performance in such programs could be weighed heavily. There is, moreover, no bar to considering an individual's prior achievements in

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nage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.,* at 302.

[21] See n. 3, *supra.*

light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful legal career. Nor is there any bar to considering on an individual basis, rather than according to racial classifications, the likelihood that a particular candidate will more likely employ his legal skills to service communities that are not now adequately represented than will competing candidates. Not every student benefited by such an expanded admissions program would fall into one of the four racial groups involved here, but it is no drawback that other deserving applicants will also get an opportunity they would otherwise have been denied. Certainly such a program would substantially fulfill the Law School's interest in giving a more diverse group access to the legal profession. Such a program might be less convenient administratively than simply sorting students by race, but we have never held administrative convenience to justify racial discrimination.

The argument is that a "compelling" state interest can easily justify the racial discrimination that is practiced here. To many, "compelling" would give members of one race even more than *pro rata* representation. The public payrolls might then be deluged say with Chicanos because they are as a group the poorest of the poor and need work more than others, leaving desperately poor individual blacks and whites without employment. By the same token large quotas of blacks or browns could be added to the Bar, waiving examinations required of other groups, so that it would be better racially balanced.[22]

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[22] In *Johnson* v. *Committee on Examinations,* 407 U. S. 915, we denied certiorari in a case presenting a similar issue. There the petitioner claimed that the bar examiners reconsidered the papers submitted by failing minority applicants whose scores were close to the cutoff point, with the result that some minority appli-

The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone.[23] That is the point at the heart of all our

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cants were admitted to the Bar although they initially had examination scores lower than those of white applicants who failed.

As the Arizona Supreme Court denied Johnson admission summarily, in an original proceeding, there were no judicial findings either sustaining or rejecting his factual claims of racial bias, putting the case in an awkward posture for review here. Johnson subsequently brought a civil rights action in Federal District Court, seeking both damages and injunctive relief. The District Court dismissed the action and the Court of Appeals affirmed, holding that the lower federal courts did not have jurisdiction to review the decisions of the Arizona Supreme Court on admissions to the state Bar. Johnson then sought review here and we denied his motion for leave to file a petition for mandamus, prohibition and/or certiorari on February 19, 1974. *Johnson* v. *Wilmer,* 415 U. S. 911. Thus in the entire history of the case no court had ever actually sustained Johnson's factual contentions concerning racial bias in the bar examiners' procedures. *DeFunis* thus appears to be the first case here squarely presenting the problem.

[23] Underlying all cultural background tests are potential ideological issues that have plagued bar associations and the courts. *In re Summers,* 325 U. S. 561, involved the denial of the practice of law to a man who could not conscientiously bear arms. The vote against him was five to four. *Konigsberg* v. *State Bar,* 353 U. S. 252, followed, after remand, by *Konigsberg* v. *State Bar,* 366 U. S. 36, resulted in barring one from admission to a state bar because of his refusal to answer questions concerning Communist Party member-

school desegregation cases, from *Brown* v. *Board of Education,* 347 U. S. 483, through *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1. A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.

If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality. Speech is closely brigaded with action when it triggers a fight, *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, as shouting "fire" in a crowded theater triggers a riot. It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience, may in an extreme situation justify differences in racial treatment that no fairminded person would call "invidious" discrimination. Mental ability is not in that category. All races can compete fairly at all professional levels. So

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ship. He, too, was excluded five to four. The petitioner in *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, was, however, admitted to practice even though he had about 10 years earlier been a member of the Communist Party. But *In re Anastaplo,* 366 U. S. 82, a five-to-four decision, barred a man from admission to a state bar not because he invoked the Fifth Amendment when asked about membership in the Communist Party, but because he asserted that the First and Fourteenth Amendments protected him from that inquiry. *Baird* v. *State Bar of Arizona,* 401 U. S. 1, held by a divided vote that a person could not be kept out of the state bar for refusing to answer whether he had ever been a member of the Communist Party; and see *In re Stolar,* 401 U. S. 23.

far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.

The problem tendered by this case is important and crucial to the operation of our constitutional system; and educators must be given leeway. It may well be that a whole congeries of applicants in the marginal group defy known methods of selection. Conceivably, an admissions committee might conclude that a selection by lot of, say, the last 20 seats is the only fair solution. Courts are not educators; their expertise is limited; and our task ends with the inquiry whether, judged by the main purpose of the Equal Protection Clause—the protection against racial discrimination [24]—there has been an "invidious" discrimination.

We would have a different case if the suit were one to displace the applicant who was chosen in lieu of DeFunis. What the record would show concerning his potentials would have to be considered and weighed. The educational decision, provided proper guidelines were used, would reflect an expertise that courts should honor. The problem is not tendered here because the physical facilities were apparently adequate to take DeFunis in addition to the others. My view is only that I cannot say by the tests used and applied he was invidiously discriminated against because of his race.

I cannot conclude that the admissions procedure of the Law School of the University of Washington that excluded DeFunis is violative of the Equal Protection Clause of the Fourteenth Amendment. The judgment of the Washington Supreme Court should be vacated and the case remanded for a new trial.

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[24] See *Slaughter House Cases*, 16 Wall. 36, 81.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

The following are excerpts from the Law School's current admissions policy, as provided to the Court by counsel for the respondents.

ADMISSIONS

A. Policy Statement Regarding Admission to Entering Classes of Juris Doctor Program—Adopted by the Law Faculty December 4, 1973.

§ 1. The objectives of the admissions program are to select and admit those applicants who have the best prospect of high quality academic work at the law school and, in the minority admissions program described below, the further objective there stated.

§ 2. In measuring academic potential the law school relies primarily on the undergraduate grade-point average and the performance on the Law School Admission Test (LSAT). The weighting of these two indicators is determined statistically by reference to past experience at this school. For most applicants the resulting applicant ranking is the most nearly accurate of all available measures of relative academic potential. In truly exceptional cases, *i. e.,* those in which the numerical indicators clearly appear to be an inaccurate measure of academic potential, the admission decision indicated by them alone may be altered by a consideration of the factors listed below. The number of these truly exceptional cases in any particular year should fall somewhere from zero to approximately forty. These factors are used, however, only as an aid in assessing the applicant's academic potential in its totality, without undue emphasis or reliance upon one or a few and without an attempt to quantify in advance the strength of their

application, singly or as a whole, in a particular case. They are:

a) the difficulty or ease of the undergraduate curriculum track pursued;

b) the demanding or non-demanding quality of the undergraduate school or department;

c) the attainment of an advanced degree, the nature thereof, and difficulty or ease of its attainment;

d) the applicant's pursuits subsequent to attainment of the undergraduate degree and the degree of success therein, as bearing on the applicant's academic potential;

e) the possibility that an applicant many years away from academic work may do less well on the LSAT than his or her counterpart presently or recently in academic work;

f) substantial change in mental or physical health that indicates prospect for either higher or lower quality of academic work;

g) substantial change in economic pressures or other circumstances that indicates prospect for either higher or lower quality of academic work;

h) exceptionally good or bad performance upon the writing test ingredient of the LSAT, if the current year's weighting of the numerical indicators does not otherwise take the writing score into account;

i) the quality and strength of recommendations bearing upon the applicant's academic potential;

j) objective indicators of motivation to succeed at the academic study of law;

k) variations in the level of academic achievement over time; and

l) any other indicators that serve the objective stated above.

. . . . .

§ 6. Because certain ethnic groups in our society

have historically been limited in their access to the legal profession and because the resulting underrepresentation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognizes a special obligation in its admissions policy to contribute to the solution of the problem.

Qualified minority applicants are therefore admitted under the minority admissions program in such number that the entering class will have a reasonable proportion of minority persons, in view of the obligation stated above and of the overall objective of the law school to provide legal education for qualified persons generally. For the purpose of determining the number to be specially admitted under the program, and not as a ceiling on minority admissions generally, the faculty currently believes that approximately 15 to 20 percent is such a reasonable proportion if there are sufficient qualified applicants available. Under the minority admissions program, admission is offered to those applicants who have a reasonable prospect of academic success at the law school, determined in each case by considering the numerical indicators along with the listed factors in Section 2, above, but without regard to the restriction upon number contained in that section.

No particular internal percentage or proportion among various minority groups in the entering class is specified; rather, the law school strives for a reasonable internal balance given the particular makeup of each year's applicant population.

As to some or all ethnic groups within the scope of the minority admissions program, it may be appropriate to give a preference in some degree to residents of the state; that determination is made each year in view of

all the particulars of that year's situation, and the preference is given when necessary to meet some substantial local need for minority representation.

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

I respectfully dissent. Many weeks of the school term remain, and petitioner may not receive his degree despite respondents' assurances that petitioner will be allowed to complete this term's schooling regardless of our decision. Any number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term. Were that misfortune to befall, and were petitioner required to register for yet another term, the prospect that he would again face the hurdle of the admissions policy is real, not fanciful; for respondents warn that "Mr. DeFunis would have to take some appropriate action to request continued admission for the remainder of his law school education, and *some discretionary action by the University on such request would have to be taken.*" Respondents' Memorandum on the Question of Mootness 3–4 (emphasis supplied). Thus, respondents' assurances have not dissipated the possibility that petitioner might once again have to run the gantlet of the University's allegedly unlawful admissions policy. The Court therefore proceeds on an erroneous premise in resting its mootness holding on a supposed inability to render any judgment that may affect one way or the other petitioner's completion of his law studies. For surely if we were to reverse the Washington Supreme Court, we could insure that, if for some reason petitioner did not graduate this spring, he would be entitled to re-enrollment at a later time on the same basis as others who have not faced the hurdle of the University's allegedly unlawful admissions policy.

In these circumstances, and because the University's position implies no concession that its admissions policy is unlawful, this controversy falls squarely within the Court's long line of decisions holding that the "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); see *Gray* v. *Sanders*, 372 U. S. 368 (1963); *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). Since respondents' voluntary representation to this Court is only that they will permit petitioner to complete this term's studies, respondents have not borne the "heavy burden," *United States* v. *Phosphate Export Assn., supra,* at 203, of demonstrating that there was not even a "mere possibility" that petitioner would once again be subject to the challenged admissions policy. *United States* v. *W. T. Grant Co., supra,* at 633. On the contrary, respondents have positioned themselves so as to be "free to return to [their] old ways." *Id.,* at 632.

I can thus find no justification for the Court's straining to rid itself of this dispute. While we must be vigilant to require that litigants maintain a personal stake in the outcome of a controversy to assure that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution," *Flast* v. *Cohen,* 392 U. S. 83, 106 (1968), there is no want of an adversary contest in this case. Indeed, the Court concedes that, if petitioner has lost his stake in this controversy, he did so only when he

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registered for the spring term. But petitioner took that action only after the case had been fully litigated in the state courts, briefs had been filed in this Court, and oral argument had been heard. The case is thus ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues. Cf. *Sibron* v. *New York,* 392 U. S. 40, 57 (1968).

Moreover, in endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court. Cf. *Richardson* v. *Wright,* 405 U. S. 208, 212 (1972) (dissenting opinion). Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations, as here, not compelled by the record. Cf. *United States* v. *W. T. Grant Co., supra,* at 632; *Parker* v. *Ellis,* 362 U. S. 574, 594 (1960) (dissenting opinion). Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases. Cf. *Cohens* v. *Virginia,* 6 Wheat. 264, 404–405 (1821) (Marshall, C. J.).

On what appears in this case, I would find that there is an extant controversy and decide the merits of the very important constitutional questions presented.

KAHN *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 73–78. Argued February 25–26, 1974—Decided April 24, 1974

A Florida statute grants widows an annual $500 property tax exemption. Appellant, a widower, was denied an exemption because the statute offers no analogous benefit for widowers. He then sought a declaratory judgment in county Circuit Court, which held the statute violative of the Equal Protection Clause of the Fourteenth Amendment. The Florida Supreme Court reversed, finding the classification "widow" valid because it has a "fair and substantial relation to the object of the legislation" of reducing "the disparity between the economic capabilities of a man and a woman." *Held:*

1. The challenged tax law is reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden. *Frontiero* v. *Richardson,* 411 U. S. 677, distinguished. P. 355.

2. A state tax law is not arbitrary although it "discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy," and the statute here is well within those limits. Pp. 355–356.

273 So. 2d 72, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 357. WHITE, J., filed a dissenting opinion, *post,* p. 360.

Ruth Bader Ginsburg argued the cause for appellant. With her on the briefs was *Melvin L. Wulf.*

Sydney H. McKenzie III, Assistant Attorney General of Florida, argued the cause for appellees. With him on the brief was *Robert L. Shevin,* Attorney General, *pro se.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Since at least 1885, Florida has provided for some form of property tax exemption for widows.[1] The current law granting all widows an annual $500 exemption, Fla. Stat. § 196.202 (Supp. 1974–1975), has been essentially unchanged since 1941.[2] Appellant Kahn is a widower who lives in Florida and applied for the exemption to the Dade County Tax Assessor's Office. It was denied because the statute offers no analogous benefit for widowers. Kahn then sought a declaratory judgment in the Circuit Court for Dade County, Florida, and that court held the statute violative of the Equal Protection Clause of the Fourteenth Amendment because the classification "widow" was based upon gender. The Florida Supreme Court reversed, finding the classification valid because it has a " 'fair and substantial relation to the object of the legislation,' " [3] that object being the reduction of "the disparity between the economic capabilities of a man and a woman." Kahn appealed here, 28 U. S. C. § 1257 (2), and we noted probable jurisdiction, 414 U. S. 973. We affirm.

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[1] Article IX, § 9, of the 1885 Florida Constitution provided that: "There shall be exempt from taxation property to the value of two hundred dollars to every widow that has a family dependent on her for support, and to every person that has lost a limb or been disabled in war or by misfortune."

[2] In 1941 Fla. Stat. § 192.06 (7) exempted "[p]roperty to the value of five hundred dollars to every widow . . . ." That provision has survived a variety of minor changes and renumbering in substantially the same form, including Fla. Stat. § 196.191 (7) (1971) under which appellant was denied the exemption. Currently Fla. Stat. § 196.202 provides: "Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation."

[3] Quoting *Reed* v. *Reed,* 404 U. S. 71, 76.

There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.[4] There are, of course, efforts under way to remedy this situation. On the federal level, Title VII of the Civil Rights Act of 1964 prohibits covered employers and labor unions from discrimination on the basis of sex, 78 Stat. 253, 42 U. S. C. §§ 2000e–2 (a), (c), as does the Equal Pay Act of 1963, 77 Stat. 56, 29 U. S. C. § 206 (d). But firmly entrenched practices are resistant to such pressures, and, indeed, data compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males—a figure actually six points lower than had been achieved in 1955.[5] Other data point in the same direc-

[4] In 1970 while 40% of males in the work force earned over $10,000, and 70% over $7,000, 45% of women working full time earned less than $5,000, and 73.9% earned less than $7,000. U. S. Bureau of the Census: Current Population Reports, Series P–60, No. 80.

[5] The Women's Bureau provides the following data:

Year	Median earnings		Women's median earnings as percent of men's
	Women	Men	
1972	$5,903	$10,202	57.9
1971	5,593	9,399	59.5
1970	5,323	8,966	59.4
1969	4,977	8,227	60.5
1968	4,457	7,664	58.2
1967	4,150	7,182	57.8
1966	3,973	6,848	58.0
1965	3,823	6,375	60.0

[*Footnote 5 is continued on p. 354*]

tion.[6] The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.[7]

Year	Median earnings		Women's median earnings as percent of men's
	Women	Men	
1964	$3,690	$6,195	59.6
1963	3,561	5,978	59.6
1962	3,446	5,794	59.5
1961	3,351	5,644	59.4
1960	3,293	5,417	60.8
1959	3,193	5,209	61.3
1958	3,102	4,927	63.0
1957	3,008	4,713	63.8
1956	2,827	4,466	63.3
1955	2,719	4,252	63.9

Note.—Data for 1962–72 are not strictly comparable with those for prior years, which are for wage and salary income only and do not include earnings of self-employed persons.

Source: Table prepared by Women's Bureau, Employment Standards Administration, U. S. Department of Labor, from data published by Bureau of the Census, U. S. Department of Commerce.

[6] For example, in 1972 the median income of women with four years of college was $8,736—exactly $100 more than the median income of men who had never even completed one year of high school. Of those employed as managers or administrators, the women's median income was only 53.2% of the men's, and in the professional and technical occupations the figure was 67.5%. Thus the disparity extends even to women occupying jobs usually thought of as well paid. Tables prepared by the Women's Bureau, Employment Standards Administration, U. S. Department of Labor.

[7] It is still the case that in the majority of families where both spouses are present, the woman is not employed. A. Ferriss, Indicators of Trends in the Status of American Women 95 (1971).

There can be no doubt, therefore, that Florida's differing treatment of widows and widowers "'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.'" *Reed* v. *Reed,* 404 U. S. 71, 76, quoting *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415.

This is not a case like *Frontiero* v. *Richardson,* 411 U. S. 677, where the Government denied its female employees both substantive and procedural benefits granted males *"solely* . . . for administrative convenience." *Id.,* at 690 (emphasis in original).[8] We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. We have long held that "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U. S. 356, 359. A state tax law is not arbitrary although it "discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy," not in conflict with the Federal Constitution. *Allied Stores* v. *Bowers,* 358 U. S. 522, 528. This principle has weathered nearly a century of Supreme Court adjudica-

[8] And in *Frontiero* the plurality opinion also noted that the statutes there were "not in any sense designed to rectify the effects of past discrimination against women. On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages." 411 U. S., at 689 n. 22 (citations omitted).

tion,[9] and it applies here as well. The statute before us is well within those limits.[10]

Affirmed.

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[9] See *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Madden* v. *Kentucky,* 309 U. S. 83, 87–88; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412.

[10] The dissents argue that the Florida Legislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. But the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limitations. The dissents would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, [which] are elected to pass laws." *Ferguson* v. *Skrupa,* 372 U. S. 726, 730.

Gender has never been rejected as an impermissible classification in all instances. Congress has not so far drafted women into the Armed Services, 50 U. S. C. App. § 454. The famous Brandeis Brief in *Muller* v. *Oregon,* 208 U. S. 412, on which the Court specifically relied, *id.,* at 419–420, emphasized that the special physical structure of women has a bearing on the "conditions under which she should be permitted to toil." *Id.,* at 420. These instances are pertinent to the problem in the tax field which is presented by this present case. Mr. Chief Justice Hughes in speaking for the Court said:

"The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. . . . In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159.

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

The Court rejects widower Kahn's claim of denial of equal protection on the ground that the limitation in Fla. Stat. § 196.191 (7) (1971), which provides an annual $500 property tax exemption to widows, is a legislative classification that bears a fair and substantial relation to "the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Ante,* at 355. In my view, however, a legislative classification that distinguishes potential beneficiaries solely by reference to their gender-based status as widows or widowers, like classifications based upon race,[1] alienage,[2] and national origin,[3] must be subjected to close judicial scrutiny, because it focuses upon generally immutable characteristics over which individuals have little or no control, and also because gender-based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society. See *Frontiero* v. *Richardson,* 411 U. S. 677 (1973). The Court is not, therefore, free to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible,

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[1] See *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida,* 379 U. S. 184, 191–192 (1964); *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954).

[2] See *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971).

[3] See *Oyama* v. *California,* 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943).

less drastic means. While, in my view, the statute serves a compelling governmental interest by "cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," I think that the statute is invalid because the State's interest can be served equally well by a more narrowly drafted statute.

Gender-based classifications cannot be sustained merely because they promote legitimate governmental interests, such as efficacious administration of government. *Frontiero* v. *Richardson, supra; Reed* v. *Reed,* 404 U. S. 71 (1971). For "when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality. See *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Carrington* v. *Rash,* 380 U. S. 89 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' *Reed* v. *Reed,* 404 U. S., at 77, 76." *Frontiero* v. *Richardson, supra,* at 690. But Florida's justification of § 196.191 (7) is not that it serves administrative convenience or helps to preserve the public fisc. Rather, the asserted justification is that § 196.191 (7) is an affirmative step toward alleviating the effects of past economic discrimination against women.[4]

I agree that, in providing special benefits for a needy segment of society long the victim of purposeful dis-

[4] Brief for Appellees 24–25; Tr. of Oral Arg. 29–31. The State's argument is supported by the Florida Supreme Court which held that the object of § 196.191 (7) was to help " 'reduce the disparity between the economic . . . capabilities of a man and a woman . . . .' " 273 So. 2d 72, 73 (1973).

crimination and neglect, the statute serves the compelling state interest of achieving equality for such groups.[5] No one familiar with this country's history of pervasive sex discrimination against women [6] can doubt the need for remedial measures to correct the resulting economic imbalances. Indeed, the extent of the economic disparity between men and women is dramatized by the data cited by the Court, *ante,* at 353–354. By providing a property tax exemption for widows, § 196.191 (7) assists in reducing that economic disparity for a class of women particularly disadvantaged by the legacy of economic discrimination.[7] In that circumstance, the purpose and effect of the suspect classification are ameliorative; the statute neither stigmatizes nor denigrates widowers not also benefited by the legislation. Moreover, inclusion of needy widowers within the class of beneficiaries would

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[5] Significantly, the Florida statute does not compel the beneficiaries to accept the State's aid. The taxpayer must file for the tax exemption. This case, therefore, does not require resolution of the more difficult questions raised by remedial legislation which makes special treatment mandatory. See Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1113–1117 (1969).

[6] See *Frontiero* v. *Richardson,* 411 U. S. 677 (1973); *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal. 3d 1, 485 P. 2d 529 (1971). See generally The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969).

[7] As noted by the Court, *ante,* at 353–354:

"[D]ata compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males—a figure actually six points lower than had been achieved in 1955 . . . . The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." (Footnotes omitted.)

not further the State's overriding interest in remedying the economic effects of past sex discrimination for needy victims of that discrimination. While doubtless some widowers are in financial need, no one suggests that such need results from sex discrimination as in the case of widows.

The statute nevertheless fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means. Section 196.191 (7) is plainly overinclusive, for the $500 property tax exemption may be obtained by a financially independent heiress as well as by an unemployed widow with dependent children. The State has offered nothing to explain why inclusion of widows of substantial economic means was necessary to advance the State's interest in ameliorating the effects of past economic discrimination against women.

Moreover, alternative means of classification, narrowing the class of widow beneficiaries, appear readily available. The exemption is granted only to widows who complete and file with the tax assessor a form application establishing their status as widows. By merely redrafting that form to exclude widows who earn annual incomes, or possess assets, in excess of specified amounts, the State could readily narrow the class of beneficiaries to those widows for whom the effects of past economic discrimination against women have been a practical reality.

MR. JUSTICE WHITE, dissenting.

The Florida tax exemption at issue here is available to all widows but not to widowers. The presumption is that all widows are financially more needy and less trained

or less ready for the job market than men. It may be that most widows have been occupied as housewife, mother, and homemaker and are not immediately prepared for employment. But there are many rich widows who need no largess from the State; many others are highly trained and have held lucrative positions long before the death of their husbands. At the same time, there are many widowers who are needy and who are in more desperate financial straits and have less access to the job market than many widows. Yet none of them qualifies for the exemption.

I find the discrimination invidious and violative of the Equal Protection Clause. There is merit in giving poor widows a tax break, but gender-based classifications are suspect and require more justification than the State has offered.

I perceive no purpose served by the exemption other than to alleviate current economic necessity, but the State extends the exemption to widows who do not need the help and denies it to widowers who do. It may be administratively inconvenient to make individual determinations of entitlement and to extend the exemption to needy men as well as needy women, but administrative efficiency is not an adequate justification for discriminations based purely on sex. *Frontiero* v. *Richardson,* 411 U. S. 677 (1973); *Reed* v. *Reed,* 404 U. S. 71 (1971).

It may be suggested that the State is entitled to prefer widows over widowers because their assumed need is rooted in past and present economic discrimination against women. But this is not a credible explanation of Florida's tax exemption; for if the State's purpose was to compensate for past discrimination against females, surely it would not have limited the exemption to women who are widows. Moreover, even if past discrimination is considered to be the criterion for current tax exemption,

the State nevertheless ignores all those widowers who have felt the effects of economic discrimination, whether as a member of a racial group or as one of the many who cannot escape the cycle of poverty. It seems to me that the State in this case is merely conferring an economic benefit in the form of a tax exemption and has not adequately explained why women should be treated differently from men.

I dissent.

PERNELL *v.* SOUTHALL REALTY

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 72-6041. Argued February 19, 1974—Decided April 24, 1974

Since the right to recover possession of real property was a right ascertained and protected at common law, the Seventh Amendment of the Constitution entitles either party to demand a jury trial in an action to recover possession of real property in the Superior Court for the District of Columbia under § 16–1501 of the District of Columbia Code. Pp. 369–385.

294 A. 2d 490, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., and DOUGLAS, J., concurred in the result.

Norman C. Barnett argued the cause for petitioner. With him on the briefs was *Michael Boudin.*

Herman Miller argued the cause for respondent. With him on the brief was *Michael Ross.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether the Seventh Amendment guarantees the right to trial by jury in an action brought in the District of Columbia for the recovery of possession of real property. In May 1971, petitioner, Dave Pernell, entered into a lease agreement with respondent, Southall Realty, for the rental of a house in the District of Columbia. In July 1971, Southall filed a complaint in the Superior Court for the

**Allen G. Siegel* and *Daniel C. Kaufman* filed a brief for the Apartment House Council of Metropolitan Washington, Inc., as *amicus curiae* urging affirmance.

District of Columbia seeking to evict Pernell from the premises for alleged nonpayment of rent. Suit was brought under D. C. Code §§ 16–1501 through 16–1505, which establish a procedure for the recovery of possession of real property. In his answer, Pernell denied that rent was owing, asserted that Southall maintained the premises in an unsafe, unhealthy, and unsanitary condition in violation of the housing regulations of the District of Columbia,[1] and alleged that Southall breached an agreement to waive several months' rent in exchange for Pernell's making certain improvements on the property. Pernell also claimed a setoff of $389.60 for repairs made to bring the premises into partial compliance with the District's housing regulations and a counterclaim of $75 for back rent paid.

In his answer, Pernell also requested a trial by jury. The trial judge, however, struck the jury demand, tried the case himself, and entered judgment for Southall. Pernell appealed to the District of Columbia Court of Appeals, claiming that the Seventh Amendment guaranteed the right to trial by jury in all cases brought under § 16–1501 and, alternatively, that he was entitled to a jury trial in this case by virtue of the counterclaim and setoff specified in his answer. The Court of Appeals affirmed, 294 A. 2d 490 (1972), holding that jury trials are not guaranteed by the Seventh Amendment in landlord-tenant cases predicated on nonpayment of rent or some other breach of the lease where the only remedy sought is repossession of the rented premises. *Id.*, at 496. The court also held that if Pernell wished

[1] In the District of Columbia, a tenant may defend against eviction proceedings for nonpayment of rent on the ground that housing regulations have not been complied with and that the premises are not being maintained in a habitable condition by the landlord. See *Javins* v. *First Nat. Realty Corp.*, 138 U. S. App. D. C. 369, 428 F. 2d 1071, cert. denied, 400 U. S. 925 (1970).

to litigate his counterclaim for damages before a jury, he should have instituted a separate action rather than raise the counterclaim in the landlord's action for repossession. *Id.,* at 498.

Because of the novel nature of the Seventh Amendment question, we granted certiorari. 411 U. S. 915 (1973). We reverse.

I

Although the statutory cause of action now codified in § 16–1501 dates back to 1864,[2] it was unnecessary until recently for any court to pass upon the Seventh Amendment question now before us. Prior to 1970, D. C. Code § 13–702 preserved the right to jury trial "[w]hen the amount in controversy in a civil action . . . exceeds $20, and in all actions for the recovery of possession of real property . . . ." See, *e. g., Kass* v. *Baskin,* 82 U. S. App. D. C. 385, 164 F. 2d 513 (1947). The matter now appears in a different light, however, since § 13–702 was repealed by the District of Columbia Court Reform and Criminal Procedure Act of 1970. See Pub. L. 91–358, § 142 (5)(A), 84 Stat. 552.

We are met at the outset by the suggestion that, notwithstanding the repeal of § 13–702, it might still be possible to interpret the relevant statutes as providing for a right to jury trial. It is, of course, a " 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' " *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 369 (1971).

The Court of Appeals recognized that "Congress did not make clear what it intended by the repeal of this section." 294 A. 2d, at 491. Although the legislative

[2] See Act of July 4, 1864, c. 243, 13 Stat. 383. See also *infra,* at 377–378.

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history on this question is meager, an argument can be made that Congress in 1970 harbored no intent to do away with jury trials, but rather repealed § 13–702 as a housekeeping measure in the belief that jury trials would continue to be afforded in all cases previously covered by that section, including actions for the recovery of possession of real property.[3] The Court of Appeals, however, appears to have been of the view that, regardless of congressional intent, it was no longer possible to interpret the relevant statutes as providing a right to jury trial in light of the outright repeal of § 13–702. In its view, after 1970 the right to jury trial had to stand on constitutional ground if it were to stand at all. We find ourselves bound by that court's analysis of the effect of the 1970 Act in the circumstances of this case.

This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application. See, *e. g., Griffin* v. *United States,* 336 U. S. 704, 717–718 (1949); *Fisher* v. *United States,* 328 U. S. 463, 476 (1946). See also *Miller* v. *United States,* 357 U. S. 301, 306 (1958). In the past, this reluctance has typically

[3] The Senate version of the Court Reform Act retained a statutory guarantee of a right to jury trial almost identical to § 13–702. See S. 2601, 91st Cong., 1st Sess., § 202 (Sept. 16, 1969). While the House bill, which was adopted by the Conference Committee, did not contain a similar provision, the House Report seems to indicate that § 13–702 was not repealed in a conscious effort to change the practice of affording jury trial in actions to recover possession of real property, but was struck "as superfluous in light of constitutional jury trial requirements . . . ." H. R. Rep. No. 91–907, p. 164 (1970). See also H. R. 16196, 91st Cong., 2d Sess., § 142 (5)(A) (Mar. 13, 1970); H. R. Conf. Rep. No. 91–1303 (1970). It appears then that Congress itself believed that jury trials were constitutionally required in all actions previously covered by § 13–702 and would continue to be provided in such actions.

been expressed with regard to positions taken by the courts of the District on common-law questions of evidence and substantive criminal law. But in view of the restructuring of the District's court system accomplished by the Court Reform Act in 1970, we believe the same deference is owed the courts of the District with respect to their interpretation of Acts of Congress directed toward the local jurisdiction.

One of the primary purposes of the Court Reform Act was to restructure the District's court system so that "the District will have a court system comparable to those of the states and other large municipalities." H. R. Rep. No. 91–907, p. 23 (1970). Prior to 1970, the District's local courts and the United States District Court and Court of Appeals for the District of Columbia Circuit, unlike their counterparts in the several States, shared a complex and often confusing form of concurrent jurisdiction, with local-law matters often litigated in the United States District Court and decisions of the District of Columbia Court of Appeals reviewable in the United States Court of Appeals for the District of Columbia Circuit. See generally *ibid.*

The 1970 Act made fundamental changes in this structure. The District of Columbia Court of Appeals was made the highest court of the District, "similar to a state Supreme Court," and its judgments made reviewable by this Court in the same manner that we review judgments of the highest courts of the several States. See *ibid.* See also Pub. L. 91–358, § 111, 84 Stat. 475, codified at D. C. Code § 11–102; § 172 (a)(1), 84 Stat. 590, amending 28 U. S. C. § 1257. The respective jurisdictions of the newly created Superior Court of the District of Columbia and of the United States District Court for the District of Columbia were adjusted so as to "result in a Federal-State court system in the District of Columbia

analogous to court systems in the several States." H. R. Rep. No. 91–907, *supra,* at 35.

This new structure plainly contemplates that the decisions of the District of Columbia Court of Appeals on matters of local law—both common law and statutory law—will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law.[4] Congressional Acts directed toward the District, like other federal laws, admittedly come within this Court's Art. III jurisdiction, and we are therefore not barred from reviewing the interpretations of those Acts by the District of Columbia Court of Appeals in the same jurisdictional sense that we are barred from reconsidering a state court's interpretation of a state statute. See, *e. g., O'Brien* v. *Skinner,* 414 U. S. 524, 531 (1974); *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, 256 (1974). But

[4] We do not intend to imply that the District of Columbia Superior Court and Court of Appeals must be treated as state courts for all purposes. Cf. *District of Columbia* v. *Carter,* 409 U. S. 418 (1973). There are apparently several questions as yet unresolved concerning the relationship between the District of Columbia local courts and the United States District Court and the United States Court of Appeals for the District of Columbia Circuit. Among these are whether the United States District Court has jurisdiction under either 28 U. S. C. § 2254 or § 2255 to hear habeas corpus petitions or motions to vacate a sentence brought by persons in confinement by virtue of convictions had in the District of Columbia Superior Court and, if it does not, whether this Court has a special obligation to resolve conflicts between the District's "local" and "federal" courts on questions of constitutional law raised in such petitions. See D. C. Code §§ 16–1901 through 16–1909. Other unresolved questions involve the extent to which the principles of *Younger* v. *Harris,* 401 U. S. 37 (1971), and related cases apply to the relationship between the District's two court systems. See generally *Sullivan* v. *Murphy,* 156 U. S. App. D. C. 28, 50–54, 478 F. 2d 938, 960–964, cert. denied, 414 U. S. 880 (1973). We, of course, express no views on these issues.

the new court structure certainly lends additional support to our longstanding practice of not overruling the courts of the District on local law matters "save in exceptional situations where egregious error has been committed." *Fisher* v. *United States,* 328 U. S., at 476; *Griffin* v. *United States,* 336 U. S., at 718. This principle, long embedded in practice and now supported by the clear intent of Congress in enacting the 1970 Court Reform Act, must serve as our guide in the present case. As no such obvious error was committed here, we must accept the Court of Appeals' conclusion that the right to jury trial must stand or fall on constitutional ground after the repeal of § 13–702. Accordingly, it is to the Seventh Amendment issue that we now turn.

II

District of Columbia Code § 16–1501 provides a remedy "[w]hen a person detains possession of real property without right, or after his right to possession has ceased . . . ." The statute is not limited to situations where a landlord seeks to evict a tenant, but may be invoked by any "person aggrieved" by a wrongful detention of property. *Ibid.* See also *infra,* at 379. Under the statute, when a verified complaint is filed by the person aggrieved by the detention, the Superior Court of the District of Columbia may issue a summons to the defendant to appear and show cause why judgment should not be given against him for the restitution of possession. This summons must be served seven days before the day fixed for the trial of the action. § 16–1502. If, after the trial, it appears that the plaintiff is entitled to possession, judgment and execution for possession shall be awarded in his favor with costs. If, on the other hand, the plaintiff nonsuits or fails to prove his case, the defendant shall have judgment and execution for his costs. See § 16–1503.

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." Like other provisions of the Bill of Rights, it is fully applicable to courts established by Congress in the District of Columbia. See *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 5 (1899).

This Court has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury. In *Whitehead* v. *Shattuck,* 138 U. S. 146, 151 (1891), for example, we recognized that

> "[i]t would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law . . . ; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law."

See also *Scott* v. *Neely,* 140 U. S. 106, 110 (1891); *Ross* v. *Bernhard,* 396 U. S. 531, 533 (1970).

Respondent suggests, however, that these precedents should be limited to actions to recover property where title is in issue and that actions brought under § 16–1501 should be distinguished as actions for the recovery of possession where claims of title are irrelevant.[5] The

[5] Prior to the enactment of the Court Reform Act in 1970, D. C. Code § 16–1504 provided that if the defendant in an action brought under § 16–1501 pleads title in himself or in another under whom he claims, and provides a surety to pay damages, costs, and reasonable intervening rent for the premises, the court (then the District of Columbia Court of General Sessions) shall certify the proceedings to the United States District Court for the District of Columbia. Today, a rule of the Superior Court provides that

distinction between title to and possession of property, of course, was well recognized at common law. See *Grant Timber & Mfg. Co.* v. *Gray,* 236 U. S. 133, 134 (1915). But however relevant it was for certain purposes, it had no bearing on the right to a jury trial. The various forms of action which the common law developed for the recovery of possession of real property were also actions at law in which trial by jury was afforded.

Over the course of its history, the common law developed several possessory actions. Among the earliest of these was the assize of novel disseisin which developed in the latter half of the 12th century and permitted one who had been recently disseised of his tenement to be put back into seisin by judgment of the King's court.[6] Trial by assize represented one of the earliest forms of trial by jury. After the plaintiff lodged his complaint, a writ would issue bidding the sheriff to summon 12 good and lawful men of the neighborhood to "recognize" before the King's justices[7] whether the defendant had

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when an issue of title intrudes in an action brought under § 16–1501, the case is transferred from the Landlord and Tenant Branch which normally tries actions under § 16–1501 to the regular Civil Division. See 294 A. 2d 490, 492 and n. 8.

[6] See F. Maitland, The Forms of Action at Common Law 27–29 (1936); 1 F. Pollock & F. Maitland, The History of English Law 145–147 (2d ed. 1899); 3 W. Blackstone, Commentaries *187–188. Novel disseisin, like the action now embodied in § 16–1501, was designed primarily as a possessory action to permit one who had been ejected from his land to be restored to possession. If the ejector wished to raise questions of title, he could proceed later in a separate action. See T. Plucknett, A Concise History of the Common Law 341 (4th ed. 1948). See also *Grant Timber & Mfg. Co.* v. *Gray,* 236 U. S. 133, 134 (1915). Cf. n. 5, *supra.*

[7] See, *e. g.,* Maitland, *supra,* n. 6, at 83–84. Unlike the forcible entry and detainer remedy discussed *infra,* at 376–381, assizes of novel disseisin were presided over by a judge of the King's court rather than a justice of the peace. See *ibid.* The use of itinerant

unjustly disseised the plaintiff of his tenement.[8] Like the modern cause of action embodied in § 16–1501, novel disseisin was a summary procedure designed to mete out prompt justice in possessory disputes.[9]

Writs of entry, dating from about the same period, were developed to encompass situations not covered by the assize of novel disseisin. Novel disseisin, for example, was applicable only where the defendant gained possession wrongfully by putting the plaintiff out of seisin. Writs of entry, in contrast, permitted recovery where the defendant entered into possession lawfully but no longer had rightful possession.[10] Indeed, one of the writs of entry, the writ of entry *ad terminum qui praeterit,* could be used by a plaintiff to recover lands from a defendant who had originally held them for a term of years, which term had expired.[11] The writ, in other words, embodied a cause of action quite similar to that

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justices of the King's court to travel around the countryside on a regular basis to preside over the assizes was confirmed in Magna Carta, c. XII (1225). See also 1 Pollock & Maitland, *supra,* n. 6, at 155–156.

[8] In its origin trial by assize was slightly different from trial by jury as we know it today. In particular the jurors, or "recognitors" as they were then known, were summoned by the original writ and asked to answer a question posed by the writ itself as contrasted to the modern practice whereby jurors are not called into a case until it appears that questions of fact are raised by the pleadings. See generally 1 W. Holdsworth, A History of English Law 330–331 (1927). In course of time, however, the recognitors summoned by the writ of novel disseisin assumed the functions of a modern jury. See 1 Pollock & Maitland, *supra,* n. 6, at 149; Maitland, *supra,* n. 6, at 35.

[9] See Maitland, *supra,* n. 6, at 29; M. Hale, The History of the Common Law 175 (4th ed. 1779).

[10] See Maitland, *supra,* n. 6, at 44–46; Plucknett, *supra,* n. 6, at 342–343.

[11] *Id.,* at 343; Maitland, *supra,* n. 6, at 39; 3 Blackstone, *supra,* n. 6, at *183 n. z.

encompassed in § 16–1501. Significantly for present purposes, it is clear that either party could demand a jury trial.[12]

Both of these forms of action, though not legally abolished until well into the 19th century,[13] had fallen into disuse by the time our Constitution was drafted. By then, ejectment had become the most important possessory action. Ejectment originated as a very narrow remedy, designed to give the lessee of property a cause of action against anyone who ejected him, including his lessor.[14] But by a variety of intricate fictions, ejectment eventually developed into the primary means of trying either the title to or the right to possession of real property.[15]

In particular, ejectment became the principal means employed by landlords to evict tenants for overstaying the terms of their leases, nonpayment of rent, or other breach of lease covenants.[16] Had Southall Realty

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[12] Maitland, *supra,* n. 6, at 39.

[13] See 3 & 4 Will. 4, c. 27, § 36 (1833).

[14] Maitland, *supra,* n. 6, at 47; Plucknett, *supra,* n. 6, at 354; 3 Blackstone, *supra,* n. 6, at *199.

[15] The classic fiction was used where two persons wished to try the title to land. One of them leased it to an imaginary person and the other leased it to another imaginary person. One imaginary lessee "ejects" the other, and in order to try the right to possession of the rival imaginary lessees, the court must necessarily decide which of the real lessors had title to the land. See Maitland, *supra,* n. 6, at 57; 3 Blackstone, *supra,* n. 6, at *199–204. Cf. *M'Arthur* v. *Porter,* 6 Pet. 205, 211 (1832).

[16] See, *e. g., Little* v. *Heaton,* 1 Salk. 259, 91 Eng. Rep. 227 (Q. B. 1702); *Roe d. West* v. *Davis,* 7 East 363, 103 Eng. Rep. 140 (K. B. 1806); *Right d. Flower* v. *Darby,* 1 T. R. 159, 99 Eng. Rep. 1029 (K. B. 1786); *Doe d. Spencer* v. *Godwin,* 4 M. & S. 265, 105 Eng. Rep. 833 (K. B. 1815); *Doe d. Ash* v. *Calvert,* 2 Camp. 387, 170 Eng. Rep. 1193 (N. P. 1810). Indeed, the use of ejectment in landlord-tenant disputes became so widespread that a statute was

leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant. And, as all parties here concede, questions of fact arising in an ejectment action were resolved by a jury.[17]

Notwithstanding this history, the Court of Appeals reasoned that an action under § 16–1501 was not the "equivalent" of an action of ejectment. 294 A. 2d, at 492. It noted that another section of the D. C. Code sets forth a more specific action of ejectment.[18] Moreover, the expedited character of a § 16–1501 proceeding was seen as contrasting sharply with the archaic limitations and cumbersome procedures that marked the common-law action of ejectment. *Ibid.* Since, in its opinion, neither § 16–1501 nor its equivalent existed at common law, the Court of Appeals held that the Seventh Amendment did not guarantee the right to jury trial.

In our view, this analysis is fundamentally at odds with the test we have formulated for resolving Seventh Amendment questions. We recently had occasion to note that while "the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time." *Curtis* v. *Loether*, 415 U. S. 189, 193 (1974). The phrase "suits at common law" includes not only suits

"which the *common* law recognized among its old

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enacted to simplify its application to these cases. See 4 Geo. 2, c. 28 (1731).

[17] See *Whitehead* v. *Shattuck*, 138 U. S. 146 (1891). See also *Doe d. Cheny* v. *Batten*, 1 Cowp. 243, 98 Eng. Rep. 1066 (K. B. 1775); *Goodright d. Charter* v. *Cordwent*, 6 T. R. 219, 101 Eng. Rep. 520 (K. B. 1795).

[18] D. C. Code § 16–1124. This statute is apparently derived from 4 Geo. 2, c. 28, §§ 2–4 (1731). See n. 16, *supra*.

> and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830) (emphasis in original).

Whether or not a close equivalent to § 16–1501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty. See *Curtis* v. *Loether, supra,* at 195.

The proceeding established by § 16–1501, while a far cry in detail from the common-law action of ejectment, serves the same essential function—to permit the plaintiff to evict one who is wrongfully detaining possession and to regain possession himself. As one commentator has noted, while statutes such as § 16–1501 were "unknown to the common law . . . [t]hey are designed as statutes for relief, not to create new causes of action. The evident intention is to give this summary relief in those cases where . . . the action of ejectment would lie." [19] Indeed, the courts of the District themselves have frequently characterized the action created in § 16–1501 as a "substitute" for an ejectment action.[20] Moreover, it appears

[19] See 3A G. Thompson, Real Property § 1370, pp. 718–719 (1959).

[20] See, *e. g., Shapiro* v. *Christopher,* 90 U. S. App. D. C. 114, 123, 195 F. 2d 785, 794 (1952); *Service Parking Corp.* v. *Trans-Lux*

that every action recognized in 1791 for the recovery of possession of property carried with it the right to jury trial. Neither respondent nor the Court of Appeals was able to point to any equitable action even remotely resembling § 16–1501. Since the right to recover possession of real property governed by § 16–1501 was a right ascertained and protected by courts at common law, the Seventh Amendment preserves to either party the right to trial by jury.

III

Respondent argues, however, that the closest historical analogue to § 16–1501 was neither an action at law nor an action in equity, but rather a forcible entry and detainer statute enacted in the reign of Henry VI. See 8 Hen. 6, c. 9 (1429). That statute made it unlawful to "make any forcible Entry in Lands and Tenements, or other Possessions, or them hold forcibly." § II. Justices of the peace were directed to enforce its provisions. If complaint were made, they were to inquire into the matter and any persons found holding a place forcibly were to "be taken and put in the next Gaol, there to remain convict by the Record of the same Justices or Justice, until they have made Fine and Ransom to the King." § I. The justices of the peace were also empowered "to reseize the Lands and Tenements so entered or holden as afore, and shall put the Party so put out in full Possession of the same Lands and Tenements . . . ." § III.

While respondent's argument is lent some support by the fact that § 16–1501 is presently captioned "Forcible Entry and Detainer," closer examination of the per-

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Radio City Corp., 47 A. 2d 400, 403 (D. C. Mun. App. 1946); *Shipley* v. *Major*, 44 A. 2d 540, 541 (D. C. Mun. App. 1945).

tinent history reveals that respondent has misconstrued the actual relationship between the two statutes.

The first predecessor of § 16–1501 was the Act of July 4, 1864, c. 243, 13 Stat. 383.[21] That Act provided a remedy for three separate situations: "when forcible entry is made"; "when a peaceable entry is made and the possession unlawfully held by force"; and "when possession is held without right, after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise . . . ." See *id.*, § 2.

There is no question but that the first two of these remedies—for forcible entry or for peaceable entry followed by possession unlawfully held by force—can be traced directly to the statute of Henry VI.[22] The English statute, however, had no provision like that in the 1864 Act specifically designed for landlord-tenant disputes.

In 1953, Congress amended the 1864 Act and did away entirely with the provisions relating to forcible entry and peaceable entry with possession unlawfully held by force which can be traced to the English statute. See Act of June 18, 1953, c. 130, 67 Stat. 66. In its place, Congress enacted a general provision dealing with unlawful detention of property which could be invoked,

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[21] Prior to 1864, landlord-tenant disputes in the District of Columbia were governed by a Maryland statute, Act of Maryland of 1793, c. 43, 2 W. Kilty, Laws of Maryland (1800), which was incorporated into the laws of the District by the Act of Feb. 27, 1801, c. 15, 2 Stat. 103.

[22] The 1864 Act was essentially the same as an 1836 Massachusetts statute. See *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295 (1898). Those parts of the Massachusetts Act involving forcible entry and forcible detainer were derived from the English forcible entry and detainer statutes, including that of Henry VI. See *Page* v. *Dwight*, 170 Mass. 29 (1897); *Boyle* v. *Boyle*, 121 Mass. 85 (1876).

like § 16–1501 today, "[w]henever any person shall detain possession of real property without right, or after his right to possession shall have ceased . . . ." *Ibid.*

Not only is the historical nexus between the two statutes weak, it is also evident that the English forcible entry and detainer statute and § 16–1501 serve totally different functions. While the English statute provided for the restitution of possession in appropriate cases, it was essentially a criminal provision, prosecuted through the usual criminal process.[23] The gravamen of the offense was the use of violence in obtaining or detaining possession.[24] The question in an action brought under the English statute was not who had the better right to possession. If one with the better right used force to oust another, he could be made to relinquish possession to the party he ousted and would be remitted to seeking legal process to obtain his rightful possession. As Blackstone states, there was no "inquiring into the merits of the title: for the force is the only thing to be tried, punished, and remedied . . . ." [25]

[23] Suits were brought, for example, in the name of the State. See, *e. g., The King* v. *Wilson,* 8 T. R. 357, 101 Eng. Rep. 1432 (K. B. 1799); *The King* v. *Harris,* 1 Salk. 260, 91 Eng. Rep. 229 (K. B. 1699); *The King* v. *Dormy,* 1 Salk. 260, 91 Eng. Rep. 229 (K. B. 1700). The case was brought by way of indictment. See *Ford's Case,* Cro. Jac. 151, 79 Eng. Rep. 132 (K. B. 1607); W. Woodfall, Landlord and Tenant 814 (12th ed. 1881).

[24] See *The King* v. *Wilson, supra.* It appears that in order for the entry to be forcible, it had to be accompanied by actual violence or terror, such as assault, the breaking open of doors, or the carrying away of the other party's goods. See Woodfall, *supra,* n. 23. See also 4 Blackstone, *supra,* n. 6, at *148. The use of actual force was a prerequisite to recovery under the forcible entry and detainer provisions of the 1864 Act applicable to the District of Columbia prior to 1953. See *Thurston* v. *Anderson,* 40 A. 2d 342 (D. C. Mun. App. 1944).

[25] 4 Blackstone, *supra,* n. 6, at *148. See *Iron M. & H. R. Co.* v. *Johnson,* 119 U. S. 608 (1887).

In contrast, § 16–1501 is not a criminal action intended to redress the use of force, but rather was designed as a general civil remedy to determine which of two parties has the better legal right to possession of real estate. And, in this respect, § 16–1501 is not limited, as was the 1864 Act, to landlord-tenant disputes, but has been held to encompass, for example, suits by a purchaser at a foreclosure sale to evict the former owner,[26] by the heir of property to evict the current occupant,[27] and by a tenant in common seeking to share possession of the premises.[28]

Even were we to accept respondent's contention that the statute of Henry VI provides the closest common-law analogue for § 16–1501, that would lend no support to its argument that no right to jury trial should be recognized in actions under § 16–1501. The fact of the matter is that jury trials before justices of the peace were afforded in actions to recover possession of property brought under the statute of Henry VI.[29] Indeed, the statute itself provides for jury trials.[30]

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[26] See, *e. g., Glenn* v. *Mindell,* 74 A. 2d 835 (D. C. Mun. App. 1950); *Surratt* v. *Real Estate Exchange,* 76 A. 2d 587 (D. C. Mun. App. 1950); *Sayles* v. *Eden,* 144 A. 2d 895 (D. C. Mun. App. 1958).

[27] See, *e. g., Mahoney* v. *Campbell,* 209 A. 2d 791 (D. C. Ct. App. 1965).

[28] See, *e. g., Bagby* v. *Honesty,* 149 A. 2d 786 (D. C. Mun. App. 1959).

[29] See 4 Blackstone, *supra,* n. 6, at *148. See, *e. g., Ford's Case,* Cro. Jac. 151, 79 Eng. Rep. 132 (K. B. 1607). C. Beard, The Office of Justice of the Peace in England 68 (1904).

[30] "And also when the said Justices or Justice make such Inquiries as before, they shall make, or one of them shall make, their Warrants and Precepts to be directed to the Sheriff of the same County, commanding him of the King's Behalf to cause to come before them, and every of them, sufficient and indifferent Persons, dwelling next about the Lands so entered as before, to inquire of such Entries . . . ." 8 Hen. 6, c. 9, § IV (1429).

Respondent claims, however, that this trial by jury before a justice of the peace was not a trial by jury as that concept came to be established in the Seventh Amendment. Respondent relies primarily on our decision in *Capital Traction Co.* v. *Hof,* 174 U. S. 1 (1899), where the Court held that trial by a jury before a justice of the peace presiding over a small claims suit in the District of Columbia was not a trial by jury in the constitutional sense. This Court reasoned in *Hof* that the District's justice of the peace

> "was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law .... [The Act which permitted him to try cases with a jury] did not require him to superintend the course of the trial or to instruct the jury in matter of law; nor did it authorize him, upon the return of their verdict, to arrest judgment upon it, or to set it aside, for any cause whatever; but made it his duty to enter judgment upon it forthwith, as a thing of course. A body of men, so free from judicial control, was not a common law jury; nor was a trial by them a trial by jury, within the meaning of the Seventh Amendment to the Constitution." *Id.,* at 38–39.

We think respondent's reliance on *Hof* is misplaced. Although containing broad language to this effect, see *id.,* at 18, *Hof* does not stand for the proposition that a trial by jury before a justice of the peace was totally unknown at common law. Rather, *Hof* relied on the fact that at common law, justices of the peace had no jurisdiction whatever over civil suits similar to the small claims action involved in that case. *Id.,* at 16. A trial before a justice of the peace in this kind of case,

with or without a jury, was therefore unknown at common law, and could not have been within the contemplation of the Seventh Amendment. *Id.,* at 18.

The Court recognized in *Hof,* however, that English justices of the peace did have criminal jurisdiction. *Id.,* at 16. And, as we have seen, this criminal jurisdiction extended to trial of forcible entry and detainer and included trial by jury. History plainly reveals that a trial by jury before a justice of the peace in England, unlike trial before a justice of the peace in the District of Columbia, was a jury trial in the full constitutional sense. English justices of the peace were required to be learned in the law. They were judges of record and their courts, courts of record. The procedures they followed differed in no essential manner from that of the higher court of assize held by the King's judges. Trial by jury before the justices of the peace proceeded in the usual manner of a criminal trial by jury in the King's court.[31] Respondent's attempted analogy between § 16–1501 and the English forcible entry and detainer statute, rather than cutting against a right to jury trial in the present case, lends further support to our conclusion that § 16–1501 encompasses rights and remedies which were enforced, at common law, through trial by jury.[32]

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[31] See generally Beard, *supra,* n. 29, at 158–164; McVicker, The Seventeenth Century Justice of Peace in England, 24 Ky. L. J. 387, 392, 403–407 (1936).

[32] Respondent also relied on the fact that the procedure applicable to landlord-tenant disputes in the District of Columbia between 1801 and 1864, which had been incorporated from Maryland law, see n. 21, *supra,* also involved a jury of 12 before a justice of the peace. The Maryland Act embodied a summary means of recovering possession of lands held by tenants after the expiration of their terms, and provided that upon complaint, two justices of the peace shall, through a sheriff, summon 12 good and lawful men of the country to appear before the justices to determine whether resti-

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IV

The Court of Appeals also relied on our opinion in *Block* v. *Hirsh*, 256 U. S. 135 (1921), where we faced a challenge to the constitutionality of a statute transferring actions to recover possession of real property from the courts to a rent control commission. It was there argued that the statute deprived both landlords and tenants of their right to trial by jury. The Court, speaking through Mr. Justice Holmes, rejected this suggestion:

> "The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land.

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tution of the land should be made to the lessor. See Act of Maryland of 1793, c. 43, 2 W. Kilty, Laws of Maryland (1800).

The Court of Appeals found that this mode of trial, like the procedure involved in *Hof*, was something less than a trial by jury in the constitutional sense. It therefore reasoned that there was no unbroken history of trial by jury in landlord-tenant actions in the District of Columbia and believed this lent additional support to its conclusion that no jury trial was required by the Constitution. 294 A. 2d, at 495.

We disagree. To begin with, the Maryland statute involves a specialized cause of action, limited to landlord-tenant disputes, quite different from § 16–1501, which, as indicated earlier, is a general provision encompassing all disputes over the possession of land. See *supra*, at 379. Moreover, there is no indication, and the court below did not find, that § 16–1501 or any of its predecessor Acts were derived from this Maryland law. See *supra*, at 377–378. Whether or not jury trials were constitutionally required in the Maryland action after it was incorporated into the law of the District of Columbia, and whether or not the procedure actually afforded between 1801 and 1864 amounted to a full jury trial under our decision in *Hof*, are therefore irrelevant to the issue presented in this case. We have no occasion to decide, over 100 years after the fact, whether in suits brought between 1801 and 1864 under this now defunct landlord-tenant statute, parties were denied their Seventh Amendment rights.

> If the power of the Commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable." *Id.*, at 158.

The Court of Appeals reasoned that we "could scarcely have made this observation if the right to jury trial was conferred by the Constitution." 294 A. 2d, at 496. We think the Court of Appeals misunderstood the rationale of this case. *Block* v. *Hirsh* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. See *Curtis* v. *Loether,* 415 U. S., at 194. See also *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937). We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency. Congress has not seen fit to do so, however, but rather has provided that actions under § 16–1501 be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction. Where it has done so, and where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial. *Curtis* v. *Loether, supra,* at 195.

The Court of Appeals appeared troubled by the burden jury trials might place on the District's court system and by the possibility that a right to jury trial would conflict with efforts to expedite judicial disposition of landlord-tenant controversies. We think it doubtful, however, that the right to a jury trial would significantly impair these important interests. As indicated earlier,

the right to trial by jury was recognized by statute for over a century from 1864 to 1970,[33] and it does not appear to have posed any unmanageable problems during that period.

In the average landlord-tenant dispute, where the failure to pay rent is established and no substantial defenses exist, it is unlikely that a defendant would request a jury trial. And, of course, the trial court's power to grant summary judgment where no genuine issues of material fact are in dispute provides a substantial bulwark against any possibility that a defendant will demand a jury trial simply as a means of delaying an eviction. More importantly, however, we reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial. We note, for example, that the Oregon landlord-tenant procedure at issue in *Lindsey* v. *Normet,* 405 U. S. 56 (1972), although providing for a trial no later than six days after service of the complaint unless the defendant provided security for accruing rent, nevertheless guaranteed a right to jury trial. Many other States similarly provide for trial by jury in summary eviction proceedings.[34]

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[33] The Act of July 4, 1864, c. 243, 13 Stat. 383, contemplated determination of the suit by a justice of the peace with appeal to the Supreme Court of the District and trial *de novo* before a jury. See, *e. g., Luchs* v. *Jones,* 8 D. C. (1 MacArthur) 345 (D. C. Supreme Ct. 1874). Subsequent legislation, up to 1970, carefully preserved the right to jury trial. See, *e. g.,* Act of Mar. 3, 1901, c. 854, §§ 20–24 and 80, 31 Stat. 1193 and 1201; Act of Mar. 3, 1921, c. 125, § 3, 41 Stat. 1310.

[34] *E. g.,* Ariz. Rev. Stat. Ann. § 12–1176 (1956); Cal. Civ. Proc. Code § 1171 (1972); Colo. Rule Civ. Proc. 38 (a) (1970); Conn. Gen. Stat. Rev. § 52–463 (1973); Ga. Code Ann. §§ 105–1601, 105–1602 (1966); Ill. Rev. Stat., c. 57, § 11a (1973); Ind. Ann. Stat. § 3–1605 (1968); Kan. Stat. Ann. § 61–2309 (Supp. 1974); Ky. Rev.

Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

Reversed and remanded.

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur in the result.

Stat. Ann. § 383.210 (1972); Mich. Stat. Ann. § 27A.5738 (Supp. 1974); N. Y. Real Prop. Actions § 745 (1963); Ohio Rev. Code Ann. § 1923.10 (1968).

LEHMAN BROTHERS *v.* SCHEIN ET AL.

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

No. 73–439. Argued March 19, 1974—Decided April 29, 1974*

Shareholders' derivative diversity suits were brought in federal court in New York, alleging that the president of a Florida corporation as a fiduciary, with others, used inside information about projected corporate earnings for profit and hence was liable to the corporation for the unlawful profits. The District Court, looking to New York's choice-of-law rules, held that under Florida law, which it held governed, the defendants were not liable, and dismissed the complaints. The Court of Appeals reversed, finding that Florida law, though controlling, was not decisive, and that in this situation, Florida "would probably" apply a certain New York decision to impose liability. *Held:* While resort to an available certification procedure, such as is available in Florida, is not obligatory where there is doubt as to local law, and its use in a given case is discretionary, resort to such procedure seems particularly appropriate here in view of the novelty of the question, the unsettled state of Florida law, and the fact that when federal judges in New York attempt to predict uncertain Florida law, they act as "outsiders" not exposed to local law. Hence, the case is remanded to the Court of Appeals to reconsider whether the controlling issue of state law should be certified to the Florida Supreme Court. Pp. 389–392.

478 F. 2d 817, vacated and remanded.

DOUGLAS, J., delivered the opinion for a unanimous Court. REHNQUIST, J., filed a concurring opinion, *post,* p. 392.

James J. Hagan argued the cause for all petitioners. With him on the briefs for petitioner in No. 73–439 was *Stephen P. Duggan. David Hartfield, Jr.,* and *Laura*

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* Together with No. 73–440, *Simon* v. *Schein et al.,* and No. 73–495, *Investors Diversified Services, Inc., et al.* v. *Schein et al.,* also on certiorari to the same court.

Banfield were on the brief for petitioner in No. 73–440. *James V. Hayes, John E. Tobin, Richard Y. Holcomb,* and *Allan R. Freedman* were on the briefs for petitioners in No. 73–495.

Donald N. Ruby argued the cause for all respondents. With him on the brief were *Benedict Wolf, Edward A. Berman,* and *Victor P. Muskin.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases are here on petitions for certiorari and raise one identical question.

These are suits brought in the District Court for the Southern District of New York. Lum's, one of the respondents in the *Lehman Bros.* petition, is a Florida corporation with headquarters in Miami. Each of the three petitions, which we consolidated for oral argument, involves shareholders' derivative suits naming Lum's and others as defendants; and the basis of federal jurisdiction is diversity of citizenship, 28 U. S. C. § 1332 (a)(1), about which there is no dispute.

The complaints allege that Chasen, president of Lum's, called Simon, a representative of Lehman Bros., and told him about disappointing projections of Lum's earnings, estimates that were confidential, not public. Simon is said to have told an employee of IDS [1] about them. On the next day, it is alleged that the IDS defendants sold

[1] Investors Diversified Services, Inc., Investors Variable Payment Fund, Inc., and IDS New Dimensions Fund, Inc., were defendants in the *Schein* case. Of those, only Investors Diversified Services, Inc., is a defendant in the other derivative action brought by Gregorio. The dismissal of the third derivative action (*Gildenhorn*) was not pursued on appeal.

One Sit and one Jundt, defendants alleged to be employees of IDS, Inc., were dismissed from the case by the District Court for lack of personal jurisdiction. There was no appeal from that dismissal.

83,000 shares of Lum's on the New York Stock Exchange for about $17.50 per share. Later that day the exchanges halted trading in Lum's stock and on the next trading day it opened at $14 per share, the public being told that the projected earnings would be "substantially lower" than anticipated. The theory of the complaints was that Chasen was a fiduciary but used the inside information along with others for profit and that Chasen and his group are liable to Lum's for their unlawful profits.

Lehman and Simon defended on the ground that the IDS sale was not made through them and that neither one benefited from the sales. Nonetheless plaintiffs claimed that Chasen and the other defendants were liable under *Diamond* v. *Oreamuno,* 24 N. Y. 2d 494, 248 N. E. 2d 910 (1969). *Diamond* proceeds on the theory that "inside" information of an officer or director of a corporation is an asset of the corporation which had been acquired by the insiders as fiduciaries of the company and misappropriated in violation of trust.

The District Court looked to the choice-of-law rules of the State of New York, *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487 (1941), and held that the law of the State of incorporation governs the existence and extent of corporate fiduciary obligations, as well as the liability for violation of them. *Diamond* did, indeed, so indicate, 24 N. Y. 2d, at 503–504, 248 N. E. 2d, at 915.

The District Court in examining Florida law concluded that, although the highest court in Florida has not considered the question, several district courts of appeal indicate that a complaint which fails to allege both wrongful acts and damage to the corporation must be dismissed.[2] The District Court went on to consider whether if Florida followed the *Diamond* rationale, defendants would be liable. It concluded that the

[2] *E. g., Palma* v. *Zerbey,* 189 So. 2d 510, 511 (Fla. App. 1966).

present complaints go beyond *Diamond,* as Chasen, the only fiduciary of Lum's involved in the suits, never sold any of his holdings on the basis of inside information. The other defendants were not fiduciaries of Lum's.[3] The District Court accordingly dismissed the complaints, 335 F. Supp. 329 (1971).

The Court of Appeals by a divided vote reversed the District Court. 478 F. 2d 817 (CA2 1973). While the Court of Appeals held that Florida law was controlling, it found none that was decisive. So it then turned to the law of other jurisdictions, particularly that of New York, to see if Florida "would probably" interpret *Diamond* to make it applicable here. The Court of Appeals concluded that the defendants had engaged with Chasen "to misuse corporate property," *id.,* at 822, and that the theory of *Diamond* reaches that situation, "viewing the case as the Florida court would probably view it." *Ibid.* There were emanations from other Florida decisions[4] that made the majority on the Court of Appeals feel that Florida would follow that reading of *Diamond.* Such a construction of *Diamond,* the Court of Appeals said, would have "the prophylactic effect of providing a disincentive to insider trading." *Id.,* at 823. And so it would. Yet under the regime of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), a State can make just the opposite her law, providing there is no overriding federal rule which pre-empts state law by reason of federal curbs on trading in the stream of commerce.

The dissenter on the Court of Appeals urged that that court certify the state-law question to the Florida Supreme Court as is provided in Fla. Stat. Ann. § 25.031

[3] The District Court also held that whether Chasen would be liable not for profiting himself from the inside information but for revealing it to others could not be reached as Chasen, a nonresident of New York, had not been properly served.

[4] See, *e. g., Quinn* v. *Phipps,* 93 Fla. 805, 113 So. 419 (1927).

and its Appellate Rule 4.61. 478 F. 2d, at 828. That path is open to this Court and to any court of appeals of the United States. We have, indeed, used it before [5] as have courts of appeals.[6]

Moreover when state law does not make the certification procedure available,[7] a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn. *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U. S. 593 (1968). Numerous applications of that practice are reviewed in *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), which teaches that the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit. We do not suggest that where there is doubt as to local law and where the certification procedure is available,

[5] *Aldrich* v. *Aldrich*, 375 U. S. 249 (1963); *Dresner* v. *City of Tallahassee*, 375 U. S. 136 (1963).

[6] *Trail Builders Supply Co.* v. *Reagan*, 430 F. 2d 828 (CA5 1970); *Gaston* v. *Pittman*, 413 F. 2d 1031 (CA5 1969); *Martinez* v. *Rodriquez*, 410 F. 2d 729 (CA5 1969); *Moragne* v. *States Marine Lines, Inc.*, 409 F. 2d 32 (CA5 1969), rev'd on other grounds, 398 U. S. 375 (1970); *Hopkins* v. *Lockheed Aircraft Corp.*, 394 F. 2d 656 (CA5 1968); *Life Ins. Co. of Virginia* v. *Shifflet*, 380 F. 2d 375 (CA5 1967); *Green* v. *American Tobacco Co.*, 325 F. 2d 673 (CA5 1963); *Sun Insurance Office* v. *Clay*, 319 F. 2d 505 (CA5 1963). The Fifth Circuit's willingness to certify is in part a product of frequent state court repudiation of its interpretations of state law. See the cases summarized in *United Services Life Ins. Co.* v. *Delaney*, 328 F. 2d 483, 486–487 (CA5 1964) (Brown, C. J., concurring).

[7] Certification procedures are available in several States, including Colorado, Colo. Appellate Rule 21.1 (1970); Hawaii, Haw. Rev. Stat. § 602–36 (1969); Louisiana, La. Rev. Stat. Ann. § 13:72.1 (Supp. 1973); Maine, Me. Rev. Stat. Ann., Tit. 4, § 57 (1964); Maryland, Md. Ann. Code, Art. 26, § 161 (Supp. 1973); Massachusetts, Mass. Sup. Jud. Ct. Rule 3:21 (1973); Montana, Mont. Sup. Ct. Rule 1 (1973); New Hampshire, N. H. Rev. Stat. Ann. § 490 App. R. 20 (Supp. 1973); and Washington, Wash. Rev. Code Ann. §§ 2.60.010–2.60.030 (Supp. 1972).

resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.[8] Its use in a given case rests in the sound discretion of the federal court.

Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

> "Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law." *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 499 (1941).

See also *MacGregor* v. *State Mutual Life Assur. Co.*, 315 U. S. 280, 281 (1942); *Reitz* v. *Mealey*, 314 U. S. 33, 39 (1941).

The judgment of the Court of Appeals is vacated and the cases are remanded so that that court may reconsider

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[8] See Wright, The Federal Courts and the Nature and Quality of State Law, 13 Wayne L. Rev. 317 (1967); Kurland, Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F. R. D. 481 (1960); Note, Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U. Pa. L. Rev. 344 (1963); Note, Florida's Interjurisdictional Certification: A Reexamination To Promote Expanded National Use, 22 U. Fla. L. Rev. 21 (1969).

whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules.

So ordered.

MR. JUSTICE REHNQUIST, concurring.

The Court says that use of state court certification procedures by federal courts "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Ante,* at 391. It also observes that "[w]e do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory," *ante,* at 390–391, and further states that "[i]ts use in a given case rests in the sound discretion of the federal court." *Ante,* at 391. I agree with each of these propositions, but I think it appropriate to emphasize the scope of the discretion of federal judges in deciding whether to use such certification procedures.

Petitioners here were defendants in the District Court. That court, applying applicable New York choice-of-law rules, decided that Florida law governs the case and, finding that the respondents' complaint requested relief which would extend the substantive law even beyond New York's apparently novel decision in *Diamond* v. *Oreamuno,* 24 N. Y. 2d 494, 248 N. E. 2d 910 (1969), dismissed the complaint on the merits. The Court of Appeals agreed that Florida law applied, but held that Florida law would permit recovery on the claim stated by respondents. The opinion of the dissenting judge of the Court of Appeals, disagreeing with the majority's analysis of Florida law, added in a concluding paragraph that in light of the uncertainty of Florida law, the Florida certification procedure should have been utilized by the Court of Appeals. On rehear-

ing, petitioners requested the Court of Appeals to utilize this procedure, but they concede that this is the first such request that they made. Thus petitioners seek to upset the result of more than two years of trial and appellate litigation on the basis of a point which they first presented to the Court of Appeals upon petition for rehearing. Cf. *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 329 (1964).

The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them. *Western Pacific Railroad Case,* 345 U. S. 247 (1953). But a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly in telling the courts of appeals or the district courts how to go about deciding cases where federal jurisdiction is based on diversity of citizenship, cases which they see and decide far more often than we do.

This Court has held that a federal court may not remit a diversity plaintiff to state courts merely because of the difficulty in ascertaining local law, *Meredith* v. *Winter Haven,* 320 U. S. 228 (1943); it has also held that unusual circumstances may require a federal court having jurisdiction of an action to nonetheless abstain from deciding doubtful questions of state law, *e. g., Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25 (1959); *Kaiser Steel Corp.* v. *W. S. Ranch Co.,* 391 U. S. 593 (1968) (*per curiam*). In each of these situations, our decisions have dealt with the issue of how to reconcile the exercise of the jurisdiction which Congress has conferred upon the federal courts with the important considerations of comity and cooperative federalism which

are inherent in a federal system, both of which must be subject to a single national policy within the federal judiciary.

At the other end of the spectrum, however, I assume it would be unthinkable to any of the Members of this Court to prescribe the process by which a district court or a court of appeals should go about researching a point of state law which arises in a diversity case. Presumably the judges of the district courts and of the courts of appeals are at least as capable as we are in determining what the Florida courts have said about a particular question of Florida law.

State certification procedures are a very desirable means by which a federal court may ascertain an undecided point of state law, especially where, as is the case in Florida, the question can be certified directly to the court of last resort within the State. But in a purely diversity case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence.

While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court. See *Clay* v. *Sun Insurance Office,* 363 U. S. 207, 226–227 (1960) (dissenting opinion). The Supreme Court of Florida has promulgated an appellate rule, Fla. Appellate Rule 4.61 (1967), which provides that upon certification by a federal court to that court, the parties shall file briefs there according to a specified briefing schedule, that oral argument may be granted upon application, and that the parties shall pay the costs of the

certification.* Thus while the certification procedure is more likely to produce the correct determination of state law, additional time and money are required to achieve such a determination.

If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used. The question of whether certification on the facts of this case, particularly in view of the lateness of its suggestion by petitioners, would have advanced the goal of correctly disposing of this litigation on the state law issue is one which I would leave, and I understand that the Court would leave, to the sound judgment of the court making the initial choice. But since the Court has today for the first time expressed its view as to the use of certification procedures by the federal courts, I agree that it is appropriate to vacate the judgment of the Court of Appeals and remand the cases in order that the Court of Appeals may reconsider certification in light of the Court's opinion.

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*Fla. Appellate Rule 4.61 (1967) provides in part:

"f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

"g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 30 days after the filing of said certificate in the appellate court of this state having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 20 days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within 10 days thereafter.

"h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits."

PROCUNIER, CORRECTIONS DIRECTOR, ET AL. *v.* MARTINEZ ET AL.

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

No. 72–1465. Argued December 3, 1973—Decided April 29, 1974

Appellees, prison inmates, brought this class action challenging prisoner mail censorship regulations issued by the Director of the California Department of Corrections and the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates. The mail censorship regulations, *inter alia,* proscribed inmate correspondence that "unduly complain[ed]," "magnif[ied] grievances," "express[ed] inflammatory political, racial, religious or other views or beliefs," or contained matter deemed "defamatory" or "otherwise inappropriate." The District Court held these regulations unconstitutional under the First Amendment, void for vagueness, and violative of the Fourteenth Amendment's guarantee of procedural due process, and it enjoined their continued enforcement. The court required that an inmate be notified of the rejection of correspondence and that the author of the correspondence be allowed to protest the decision and secure review by a prison official other than the original censor. The District Court also held that the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates abridged the right of access to the courts and enjoined its continued enforcement. Appellants contend that the District Court should have abstained from deciding the constitutionality of the mail censorship regulations. *Held:*

1. The District Court did not err in refusing to abstain from deciding the constitutionality of the mail censorship regulations. Pp. 400–404.

2. The censorship of direct personal correspondence involves incidental restrictions on the right to free speech of both prisoners and their correspondents and is justified if the following criteria are met: (1) it must further one or more of the important and substantial governmental interests of security, order, and the rehabilitation of inmates, and (2) it must be no greater than is necessary to further the legitimate governmental interest involved. Pp. 404–414.

3. Under this standard the invalidation of the mail censorship regulations by the District Court was correct. Pp. 415–416.

4. The decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards against arbitrariness or error, and the requirements specified by the District Court were not unduly burdensome. Pp. 417–419.

5. The ban against attorney-client interviews conducted by law students or legal paraprofessionals, which was not limited to prospective interviewers who posed some colorable threat to security or to those inmates thought to be especially dangerous and which created an arbitrary distinction between law students employed by attorneys and those associated with law school programs (against whom the ban did not operate), constituted an unjustifiable restriction on the inmates' right of access to the courts. *Johnson* v. *Avery,* 393 U. S. 483. Pp. 419–422.

354 F. Supp. 1092, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined and in Part II of which DOUGLAS, J., joined, *post,* p. 422. DOUGLAS, J., filed an opinion concurring in the judgment, *post,* p. 428.

W. Eric Collins, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *Evelle J. Younger,* Attorney General, *Edward A. Hinz, Jr.,* Chief Assistant Attorney General, *Doris H. Maier,* Assistant Attorney General, and *Robert R. Granucci* and *Thomas A. Brady,* Deputy Attorneys General.

William Bennett Turner argued the cause for appellees. With him on the brief were *Mario Obledo, Sanford Jay Rosen, Anthony G. Amsterdam, Jack Greenberg, James M. Nabrit III, Stanley A. Bass, Lowell Johnston,* and *Alice Daniel.**

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*Briefs of *amici curiae* urging affirmance were filed by *William R. Fry* for the National Paralegal Institute, and by *Sheldon Krantz* and

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MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the constitutionality of certain regulations promulgated by appellant Procunier in his capacity as Director of the California Department of Corrections. Appellees brought a class action on behalf of themselves and all other inmates of penal institutions under the Department's jurisdiction to challenge the rules relating to censorship of prisoner mail and the ban against the use of law students and legal paraprofessionals to conduct attorney-client interviews with inmates. Pursuant to 28 U. S. C. § 2281 a three-judge United States District Court was convened to hear appellees' request for declaratory and injunctive relief. That court entered summary judgment enjoining continued enforcement of the rules in question and ordering appellants to submit new regulations for the court's approval. 354 F. Supp. 1092 (ND Cal. 1973). Appellants' first revisions resulted in counterproposals by appellees and a court order issued May 30, 1973, requiring further modification of the proposed rules. The second set of revised regulations was approved by the District Court on July 20, 1973, over appellees' objections. While the first proposed revisions of the Department's regulations were pending before the District Court, appellants brought this appeal to contest that court's decision holding the original regulations unconstitutional.

We noted probable jurisdiction. 412 U. S. 948 (1973). We affirm.

I

First we consider the constitutionality of the Director's rules restricting the personal correspondence of prison inmates. Under these regulations, correspondence be-

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Stephen Joel Trachtenberg for the Center for Criminal Justice, Boston University School of Law.

tween inmates of California penal institutions and persons other than licensed attorneys and holders of public office was censored for nonconformity to certain standards. Rule 2401 stated the Department's general premise that personal correspondence by prisoners is "a privilege, not a right . . . ." [1] More detailed regulations implemented the Department's policy. Rule 1201 directed inmates not to write letters in which they "unduly complain" or "magnify grievances." [2] Rule 1205 (d) defined as contraband writings "expressing inflammatory political, racial, religious or other views or beliefs . . . ." [3] Finally, Rule 2402 (8) provided that inmates "may not send or receive letters that pertain to criminal activity;

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[1] Director's Rule 2401 provided:

"The sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges."

[2] Director's Rule 1201 provided:

"INMATE BEHAVIOR: Always conduct yourself in an orderly manner. Do not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence."

It is undisputed that the phrases "unduly complain" and "magnify grievances" were applied to personal correspondence.

[3] Director's Rule 1205 provided:

"The following is contraband:

. . . . . .

"d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation."

Rule 1205 also provides that writings "not defined as contraband under this rule, but which, if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline, may be placed in the inmate's property, to which he shall have access under supervision."

are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate." [4]

Prison employees screened both incoming and outgoing personal mail for violations of these regulations. No further criteria were provided to help members of the mailroom staff decide whether a particular letter contravened any prison rule or policy. When a prison employee found a letter objectionable, he could take one or more of the following actions: (1) refuse to mail or deliver the letter and return it to the author; (2) submit a disciplinary report, which could lead to suspension of mail privileges or other sanctions; or (3) place a copy of the letter or a summary of its contents in the prisoner's file, where it might be a factor in determining the inmate's work and housing assignments and in setting a date for parole eligibility.

The District Court held that the regulations relating to prisoner mail authorized censorship of protected expression without adequate justification in violation of the First Amendment and that they were void for vagueness. The court also noted that the regulations failed to provide minimum procedural safeguards against error and arbitrariness in the censorship of inmate correspondence. Consequently, it enjoined their continued enforcement.

Appellants contended that the District Court should have abstained from deciding these questions. In that court appellants advanced no reason for abstention other than the assertion that the federal court should defer to the California courts on the basis of comity. The District Court properly rejected this suggestion, noting that the

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[4] At the time of appellees' amended complaint, Rule 2402 (8) included prohibitions against "prison gossip or discussion of other inmates." Before the first opinion of the District Court, these provisions were deleted, and the phrase "contain foreign matter" was substituted in their stead.

mere possibility that a state court might declare the prison regulations unconstitutional is no ground for abstention. *Wisconsin* v. *Constantineau,* 400 U. S. 433, 439 (1971).

Appellants now contend that we should vacate the judgment and remand the case to the District Court with instructions to abstain on the basis of two arguments not presented to it. First, they contend that any vagueness challenge to an uninterpreted state statute or regulation is a proper case for abstention. According to appellants, "[t]he very statement by the district court that the regulations are vague constitutes a compelling reason for abstention." Brief for Appellants 8–9. As this Court made plain in *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), however, not every vagueness challenge to an uninterpreted state statute or regulation constitutes a proper case for abstention.[5] But we need not decide whether appellants' contention is controlled by the analysis in *Baggett,* for the short

[5] In *Baggett* the Court considered the constitutionality of loyalty oaths required of certain state employees as a condition of employment. For the purpose of applying the doctrine of abstention the Court distinguished between two kinds of vagueness attacks. Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. 377 U. S., at 376–377. Abstention is therefore appropriate. Where, however, as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. *Id.,* at 378. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require "extensive adjudications, under the impact of a variety of factual situations," to bring the challenged statute or regulation "within the bounds of permissible constitutional certainty." *Ibid.*

answer to their argument is that these regulations were neither challenged nor invalidated solely on the ground of vagueness. Appellees also asserted, and the District Court found, that the rules relating to prisoner mail permitted censorship of constitutionally protected expression without adequate justification. In light of the successful First Amendment attack on these regulations, the District Court's conclusion that they were also unconstitutionally vague hardly "constitutes a compelling reason for abstention."

As a second ground for abstention appellants rely on Cal. Penal Code § 2600 (4), which assures prisoners the right to receive books, magazines, and periodicals.[6] Although they did not advance this argument to the District Court, appellants now contend that the interpretation of the statute by the state courts and its application to the regulations governing prisoner mail might avoid or modify the constitutional questions decided below. Thus appellants seek to establish the essential prerequisite for abstention—"an uncertain issue of state

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[6] Cal. Penal Code § 2600 provides that "[a] sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced . . . ," and it allows for partial restoration of those rights by the California Adult Authority. The statute then declares, in pertinent part:

"This section shall be construed so as not to deprive such person of the following civil rights, in accordance with the laws of this state:

. . . . . .

"(4) To purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office. Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery. . . ."

law," the resolution of which may eliminate or materially alter the federal constitutional question.[7] *Harman* v. *Forssenius,* 380 U. S. 528, 534 (1965). We are not persuaded.

A state court interpretation of § 2600 (4) would not avoid or substantially modify the constitutional question presented here. That statute does not contain any provision purporting to regulate censorship of personal correspondence. It only preserves the right of inmates to receive "newspapers, periodicals, and books" and authorizes prison officials to exclude "obscene publications or writings, and mail containing information concerning

[7] Appellants argue that the correctness of their abstention argument is demonstrated by the District Court's disposition of Count II of appellees' amended complaint. In Count II appellees challenged the mail regulations on the ground that their application to correspondence between inmates and attorneys contravened the Sixth and Fourteenth Amendments. Appellees later discovered that a case was then pending before the Supreme Court of California in which the application of the prison rules to attorney-client mail was being attacked under subsection (2) of § 2600, which provides:

"This section shall be construed so as not to deprive [an inmate] of the following civil rights, in accordance with the laws of this state:

. . . . .

"(2) To correspond, confidentially, with any member of the State Bar, or holder of public office, provided that the prison authorities may open and inspect such mail to search for contraband."

The District Court did stay its hand, and the subsequent decision in *In re Jordan,* 7 Cal. 3d 930, 500 P. 2d 873 (1972) (holding that § 2600 (2) barred censorship of attorney-client correspondence), rendered Count II moot. This disposition of the claim relating to attorney-client mail is, however, quite irrelevant to appellants' contention that the District Court should have abstained from deciding whether the mail regulations are constitutional as they apply to personal mail. Subsection (2) of § 2600 speaks directly to the issue of censorship of attorney-client mail but says nothing at all about personal correspondence, and appellants have not informed us of any challenge to the censorship of personal mail presently pending in the state courts.

where, how, or from whom *such matter* may be obtained . . ." (emphasis added). And the plain meaning of the language is reinforced by recent legislative history. In 1972, a bill was introduced in the California Legislature to restrict censorship of personal correspondence by adding an entirely new subsection to § 2600. The legislature passed the bill, but it was vetoed by Governor Reagan. In light of this history, we think it plain that no reasonable interpretation of § 2600 (4) would avoid or modify the federal constitutional question decided below. Moreover, we are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment. *Zwickler* v. *Koota,* 389 U. S. 241, 252 (1967); *Baggett* v. *Bullitt,* 377 U. S., at 379. We therefore proceed to the merits.

A

Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions.[8] More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons

[8] See Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841, 842–844 (1971).

in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.[9] Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect consti-

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[9] They are also ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints. Moreover, the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints. As one means of alleviating this problem, THE CHIEF JUSTICE has suggested that federal and state authorities explore the possibility of instituting internal administrative procedures for disposition of inmate grievances. 59 A. B. A. J. 1125, 1128 (1973). At the Third Circuit Judicial Conference meeting of October 15, 1973, at which the problem was addressed, suggestions also included (i) abstention where appropriate to avoid needless consideration of federal constitutional issues; and (ii) the use of federal magistrates who could be sent into penal institutions to conduct hearings and make findings of fact. We emphasize that we express no view as to the merit or validity of any particular proposal, but we do think it appropriate to indicate the necessity of prompt and thoughtful consideration by responsible federal and state authorities of this worsening situation.

tutional rights. *Johnson* v. *Avery,* 393 U. S. 483, 486 (1969). This is such a case. Although the District Court found the regulations relating to prisoner mail deficient in several respects, the first and principal basis for its decision was the constitutional command of the First Amendment, as applied to the States by the Fourteenth Amendment.[10]

The issue before us is the appropriate standard of review for prison regulations restricting freedom of speech. This Court has not previously addressed this question, and the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights has led the federal courts to adopt a variety of widely inconsistent approaches to the problem. Some have maintained a hands-off posture in the face of constitutional challenges to censorship of prisoner mail. *E. g., McCloskey* v. *Maryland,* 337 F. 2d 72 (CA4 1964); *Lee* v. *Tahash,* 352 F. 2d 970 (CA8 1965) (except insofar as mail censorship rules are applied to discriminate against a particular racial or religious group); *Krupnick* v. *Crouse,* 366 F. 2d 851 (CA10 1966); *Pope* v. *Daggett,* 350 F. 2d 296 (CA10 1965). Another has required only that censorship of personal correspondence not lack support "in any rational and constitutionally acceptable concept of a prison system." *Sostre* v. *McGinnis,* 442 F. 2d 178, 199 (CA2 1971), cert. denied *sub nom. Oswald* v. *Sostre,* 405 U. S. 978 (1972). At the other extreme some courts have been willing to require demonstration of a "compelling state interest" to justify censorship of prisoner mail. *E. g., Jackson* v. *Godwin,* 400 F. 2d 529

[10] Specifically, the District Court held that the regulations authorized restraint of lawful expression in violation of the First and Fourteenth Amendments, that they were fatally vague, and that they failed to provide minimum procedural safeguards against arbitrary or erroneous censorship of protected speech.

(CA5 1968) (decided on both equal protection and First Amendment grounds); *Morales* v. *Schmidt,* 340 F. Supp. 544 (WD Wis. 1972); *Fortune Society* v. *McGinnis,* 319 F. Supp. 901 (SDNY 1970). Other courts phrase the standard in similarly demanding terms of "clear and present danger." *E. g., Wilkinson* v. *Skinner,* 462 F. 2d 670, 672–673 (CA2 1972). And there are various intermediate positions, most notably the view that a "regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose." *E. g., Carothers* v. *Follette,* 314 F. Supp. 1014, 1024 (SDNY 1970) (citations omitted). See also *Gates* v. *Collier,* 349 F. Supp. 881, 896 (ND Miss. 1972); *LeMon* v. *Zelker,* 358 F. Supp. 554 (SDNY 1972).

This array of disparate approaches and the absence of any generally accepted standard for testing the constitutionality of prisoner mail censorship regulations disserve both the competing interests at stake. On the one hand, the First Amendment interests implicated by censorship of inmate correspondence are given only haphazard and inconsistent protection. On the other, the uncertainty of the constitutional standard makes it impossible for correctional officials to anticipate what is required of them and invites repetitive, piecemeal litigation on behalf of inmates. The result has been unnecessarily to perpetuate the involvement of the federal courts in affairs of prison administration. Our task is to formulate a standard of review for prisoner mail censorship that will be responsive to these concerns.

B

We begin our analysis of the proper standard of review for constitutional challenges to censorship of prisoner mail with a somewhat different premise from that taken

by the other federal courts that have considered the question. For the most part, these courts have dealt with challenges to censorship of prisoner mail as involving broad questions of "prisoners' rights." This case is no exception. The District Court stated the issue in general terms as "the applicability of First Amendment rights to prison inmates . . . ," 354 F. Supp., at 1096, and the arguments of the parties reflect the assumption that the resolution of this case requires an assessment of the extent to which prisoners may claim First Amendment freedoms. In our view this inquiry is unnecessary. In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them,[11] mail censorship implicates more than the right of prisoners.

Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal corre-

[11] Different considerations may come into play in the case of mass mailings. No such issue is raised on these facts, and we intimate no view as to its proper resolution.

spondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication. *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965); accord, *Kleindienst* v. *Mandel,* 408 U. S. 753, 762–765 (1972); *Martin* v. *City of Struthers,* 319 U. S. 141, 143 (1943). We do not deal here with difficult questions of the so-called "right to hear" and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him. In either event, censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.

Accordingly, we reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners. Into this category of argument falls appellants' contention that "an inmate's rights with reference to social correspondence are something fundamentally different than those enjoyed by his free brother." Brief for Appellants 19. This line of argument and the undemanding standard of review it is intended to support fail to recognize that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail. We therefore turn for guidance, not to cases involving questions of "prisoners' rights," but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities.

As the Court noted in *Tinker* v. *Des Moines School District,* 393 U. S. 503, 506 (1969), First Amendment

guarantees must be "applied in light of the special characteristics of the . . . environment." *Tinker* concerned the interplay between the right to freedom of speech of public high school students and "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.*, at 507. In overruling a school regulation prohibiting the wearing of antiwar armbands, the Court undertook a careful analysis of the legitimate requirements of orderly school administration in order to ensure that the students were afforded maximum freedom of speech consistent with those requirements. The same approach was followed in *Healy* v. *James,* 408 U. S. 169 (1972), where the Court considered the refusal of a state college to grant official recognition to a group of students who wished to organize a local chapter of the Students for a Democratic Society (SDS), a national student organization noted for political activism and campus disruption. The Court found that neither the identification of the local student group with the national SDS, nor the purportedly dangerous political philosophy of the local group, nor the college administration's fear of future, unspecified disruptive activities by the students could justify the incursion on the right of free association. The Court also found, however, that this right could be limited if necessary to prevent campus disruption, *id.*, at 189–190, n. 20, and remanded the case for determination of whether the students had in fact refused to accept reasonable regulations governing student conduct.

In *United States* v. *O'Brien,* 391 U. S. 367 (1968), the Court dealt with incidental restrictions on free speech occasioned by the exercise of the governmental power to conscript men for military service. O'Brien had burned his Selective Service registration certificate on the steps

of a courthouse in order to dramatize his opposition to the draft and to our country's involvement in Vietnam. He was convicted of violating a provision of the Selective Service law that had recently been amended to prohibit knowing destruction or mutilation of registration certificates. O'Brien argued that the purpose and effect of the amendment were to abridge free expression and that the statutory provision was therefore unconstitutional, both as enacted and as applied to him. Although O'Brien's activity involved "conduct" rather than pure "speech," the Court did not define away the First Amendment concern, and neither did it rule that the presence of a communicative intent necessarily rendered O'Brien's actions immune to governmental regulation. Instead, it enunciated the following four-part test:

> "[A] government regulation is sufficiently justified 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 377.

Of course, none of these precedents directly controls the instant case. In *O'Brien* the Court considered a federal statute which on its face prohibited certain conduct having no necessary connection with freedom of speech. This led the Court to differentiate between "speech" and "nonspeech" elements of a single course of conduct, a distinction that has little relevance here. Both *Tinker* and *Healy* concerned First and Fourteenth Amendment liberties in the context of state educational institutions, a circumstance involving rather different governmental interests than are at stake here. In broader terms, however, these precedents involved inci-

dental restrictions on First Amendment liberties by governmental action in furtherance of legitimate and substantial state interest other than suppression of expression. In this sense these cases are generally analogous to our present inquiry.

The case at hand arises in the context of prisons. One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task are the preservation of internal order and discipline,[12] the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners. While the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation,[13] the legitimate govern-

[12] We need not and do not address in this case the validity of a temporary prohibition of an inmate's personal correspondence as a disciplinary sanction (usually as part of the regimen of solitary confinement) for violation of prison rules.

[13] Policy Statement 7300.1A of the Federal Bureau of Prisons sets forth the Bureau's position regarding general correspondence by the prisoners entrusted to its custody. It authorizes all federal institutions to adopt open correspondence regulations and recognizes that any need for restrictions arises primarily from considerations of order and security rather than rehabilitation:

"Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process. At the same time, basic controls need to be exercised in order to protect the security of the institution, individuals and/or the community-at-large."

The recommended policy guideline adopted by the Association of State Correctional Administrators on August 23, 1972, echoes the view that personal correspondence by prison inmates is a generally wholesome activity:

"Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined

mental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence. Perhaps the most obvious example of justifiable censorship of prisoner mail would be refusal to send or deliver letters concerning escape plans or containing other information concerning proposed criminal activity, whether within or without the prison. Similarly, prison officials may properly refuse to transmit encoded messages. Other less obvious possibilities come to mind, but it is not our purpose to survey the range of circumstances in which particular restrictions on prisoner mail might be warranted by the legitimate demands of prison administration as they exist from time to time in the various kinds of penal institutions found in this country. Our task is to determine the proper standard for deciding whether a particular regulation or practice relating to inmate correspondence constitutes an impermissible restraint of First Amendment liberties.

Applying the teachings of our prior decisions to the instant context, we hold that censorship of prisoner mail is justified if the following criteria are met. First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate corre-

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persons and may form the basis for good adjustment in the institution and the community."

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spondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.[14]

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[14] While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction. For example, Policy Statement 7300.1A of the Federal Bureau of Prisons specifies that personal correspondence of inmates in federal prisons, whether incoming or outgoing, may be rejected for inclusion of the following kinds of material:

"(1) Any material which might violate postal regulations, *i. e.*, threats, blackmail, contraband or which indicate plots of escape.

"(2) Discussions of criminal activities.

"(3) No inmate may be permitted to direct his business while he is in confinement. This does not go to the point of prohibiting correspondence necessary to enable the inmate to protect the property and funds that were legitimately his at the time he was committed to the institution. Thus, an inmate could correspond about refinancing a mortgage on his home or sign insurance papers, but he could not operate a mortgage or insurance business while in the institution.

"(4) Letters containing codes or other obvious attempts to circumvent these regulations will be subject to rejection.

"(5) Insofar as possible, all letters should be written in English, but every effort should be made to accommodate those inmates who are unable to write in English or whose correspondents would be unable to understand a letter written in English. The criminal sophistication of the inmate, the relationship of the inmate and the

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On the basis of this standard, we affirm the judgment of the District Court. The regulations invalidated by that court authorized, *inter alia,* censorship of statements that "unduly complain" or "magnify grievances," expression of "inflammatory political, racial, religious or other views," and matter deemed "defamatory" or "otherwise inappropriate." These regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship. Not surprisingly, some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism. For example, at one institution under the Department's jurisdiction, the checklist used by the mailroom staff authorized rejection of letters "criticizing policy, rules or officials," and the mailroom sergeant stated in a deposition that he would reject as "defamatory" letters "belittling staff or our judicial system or anything connected with Department of Corrections." Correspondence was also censored for "disrespectful comments," "derogatory remarks," and the like.

Appellants have failed to show that these broad restrictions on prisoner mail were in any way necessary to the furtherance of a governmental interest unrelated to the suppression of expression. Indeed, the heart of appellants' position is not that the regulations are justified by a legitimate governmental interest but that they do not need to be. This misconception is not only stated affirmatively; it also underlies appellants' discussion of the particular regulations under attack. For example, appellants' sole defense of the prohibition against matter that is "defamatory" or "otherwise inappropriate" is that

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correspondent are factors to be considered in deciding whether correspondence in a foreign language should be permitted."

it is "within the discretion of the prison administrators." Brief for Appellants 21. Appellants contend that statements that "magnify grievances" or "unduly complain" are censored "as a precaution against flash riots and in the furtherance of inmate rehabilitation." *Id.*, at 22. But they do not suggest how the magnification of grievances or undue complaining, which presumably occurs in outgoing letters, could possibly lead to flash riots, nor do they specify what contribution the suppression of complaints makes to the rehabilitation of criminals. And appellants defend the ban against "inflammatory political, racial, religious or other views" on the ground that "[s]uch matter clearly presents a danger to prison security . . . ." *Id.*, at 21. The regulation, however, is not narrowly drawn to reach only material that might be thought to encourage violence nor is its application limited to incoming letters. In short, the Department's regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration demands and were properly found invalid by the District Court.[15]

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[15] After the District Court held the original regulations unconstitutional, revised regulations were developed by appellants and approved by the court. Supp. to App. 194–200, 211. Although these regulations are not before us for review, they are indicative of one solution to the problem. The following provisions govern censorship of prisoner correspondence:

"*CORRESPONDENCE*

"A. *Criteria for Disapproval of Inmate Mail*

"1. *Outgoing Letters*

"Outgoing letters from inmates of institutions not requiring approval of inmate correspondents may be disapproved for mailing only if the content falls as a whole or in significant part into any of the following categories:

"a. The letter contains threats of physical harm against any person or threats of criminal activity.

[*Footnote 15 is continued on p. 417*]

D

We also agree with the District Court that the decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards.

"b. The letter threatens blackmail . . . or extortion.

"c. The letter concerns sending contraband in or out of the institutions.

"d. The letter concerns plans to escape.

"e. The letter concerns plans for activities in violation of institutional rules.

"f. The letter concerns plans for criminal activity.

"g. The letter is in code and its contents are not understood by reader.

"h. The letter solicits gifts of goods or money from other than family.

"i. The letter is obscene.

"j. The letter contains information which if communicated would create a clear and present danger of violence and physical harm to a human being. Outgoing letters from inmates of institutions requiring approval of correspondents may be disapproved only for the foregoing reasons, or if the addressee is not an approved correspondent of the inmate and special permission for the letter has not been obtained.

"2. *Incoming Letters*

"Incoming letters to inmates may be disapproved for receipt only for the foregoing reasons, or if the letter contains material which would cause severe psychiatric or emotional disturbance to the inmate, or in an institution requiring approval of inmate correspondents, is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

"3. *Limitations*

"Disapproval of a letter on the basis that it would cause severe psychiatric or emotional disturbance to the inmate may be done only by a member of the institution's psychiatric staff after consultation with the inmate's caseworker. The staff member may disapprove the letter only upon a finding that receipt of the letter would be likely to affect prison discipline or security or the inmate's rehabilitation, and that there is no reasonable alternative means of ameliorating the disturbance of the inmate. Outgoing or incoming letters

The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a "liberty" interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment. As such, it is protected from arbitrary governmental invasion. See *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Perry* v. *Sindermann,* 408 U. S. 593 (1972). The District Court required that an inmate be notified of the rejection of a letter written by or addressed to him, that the author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than

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may not be rejected solely upon the ground that they contain criticism of the institution or its personnel.

"4. *Notice of Disapproval of Inmate Mail*

"a. When an inmate is *prohibited from sending* a letter, the letter and a written and signed notice stating one of the authorized reasons for disapproval and indicating the portion or portions of the letter causing disapproval will be given the inmate.

"b. When an inmate is *prohibited from receiving* a letter, the letter and a written and signed notice stating one of the authorized reasons for disapproval and indicating the portion or portions of the letter causing disapproval will be given the sender. The inmate will be given notice in writing that a letter has been rejected, indicating one of the authorized reasons and the sender's name.

"c. Material from correspondence which violates the provisions of paragraph one may be placed in an inmate's file. Other material from correspondence may not be placed in an inmate's file unless it has been lawfully observed by an employee of the department and is relevant to assessment of the inmate's rehabilitation. However, such material which is not in violation of the provisions of paragraph one may not be the subject of disciplinary proceedings against an inmate. An inmate shall be notified in writing of the placing of any material from correspondence in his file.

"d. Administrative review of inmate grievances regarding the application of this rule may be had in accordance with paragraph DP–1003 of these rules."

the person who originally disapproved the correspondence. These requirements do not appear to be unduly burdensome, nor do appellants so contend. Accordingly, we affirm the judgment of the District Court with respect to the Department's regulations relating to prisoner mail.

II

The District Court also enjoined continued enforcement of Administrative Rule MV–IV–02, which provides in pertinent part:

> "Investigators for an attorney-of-record will be confined to not more than two. Such investigators must be licensed by the State or must be members of the State Bar. Designation must be made in writing by the Attorney."

By restricting access to prisoners to members of the bar and licensed private investigators, this regulation imposed an absolute ban on the use by attorneys of law students and legal paraprofessionals to interview inmate clients. In fact, attorneys could not even delegate to such persons the task of obtaining prisoners' signatures on legal documents. The District Court reasoned that this rule constituted an unjustifiable restriction on the right of access to the courts. We agree.

The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. *Ex parte Hull,* 312 U. S. 546 (1941).

The District Court found that the rule restricting attorney-client interviews to members of the bar and licensed private investigators inhibited adequate professional representation of indigent inmates. The remoteness of many California penal institutions makes a personal visit to an inmate client a time-consuming undertaking. The court reasoned that the ban against the use of law students or other paraprofessionals for attorney-client interviews would deter some lawyers from representing prisoners who could not afford to pay for their traveling time or that of licensed private investigators. And those lawyers who agreed to do so would waste time that might be employed more efficaciously in working on the inmates' legal problems. Allowing law students and paraprofessionals to interview inmates might well reduce the cost of legal representation for prisoners. The District Court therefore concluded that the regulation imposed a substantial burden on the right of access to the courts.

As the District Court recognized, this conclusion does not end the inquiry, for prison administrators are not required to adopt every proposal that may be thought to facilitate prisoner access to the courts. The extent to which that right is burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials. In this case the ban against the use of law students and other paraprofessional personnel was absolute. Its prohibition was not limited to prospective interviewers who posed some colorable threat to security or to those inmates thought to be especially dangerous. Nor was it shown that a less restrictive regulation would unduly burden the administrative task of screening and monitoring visitors.

Appellants' enforcement of the regulation in question also created an arbitrary distinction between law students employed by practicing attorneys and those associated with law school programs providing legal assistance to prisoners.[16] While the Department flatly prohibited interviews of any sort by law students working for attorneys, it freely allowed participants of a number of law school programs to enter the prisons and meet with inmates. These largely unsupervised students were admitted without any security check other than verification of their enrollment in a school program. Of course, the fact that appellants have allowed some persons to conduct attorney-client interviews with prisoners does not mean that they are required to admit others, but the arbitrariness of the distinction between the two categories of law students does reveal the absence of any real justification for the sweeping prohibition of Administrative Rule MV–IV–02. We cannot say that the District Court erred in invalidating this regulation.

This result is mandated by our decision in *Johnson* v. *Avery*, 393 U. S. 483 (1969). There the Court struck down a prison regulation prohibiting any inmate from advising or assisting another in the preparation of legal documents. Given the inadequacy of alternative sources of legal assistance, the rule had the effect of denying to illiterate or poorly educated inmates any opportunity to vindicate possibly valid constitutional claims. The Court found that the regulation impermissibly burdened the right of access to the courts despite the not insignificant state interest in preventing the establishment of personal power structures by unscrupulous jailhouse lawyers and the attendant problems of prison discipline that

[16] Apparently, the Department's policy regarding law school programs providing legal assistance to inmates, though well established, is not embodied in any regulation.

follow. The countervailing state interest in *Johnson* is, if anything, more persuasive than any interest advanced by appellants in the instant case.

The judgment is

Affirmed.

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

I

I concur in the opinion and judgment of the Court. I write separately only to emphasize my view that prison authorities do not have a general right to open and read all incoming and outgoing prisoner mail. Although the issue of the First Amendment rights of inmates is explicitly reserved by the Court, I would reach that issue and hold that prison authorities may not read inmate mail as a matter of course.

II

As Mr. Justice Holmes observed over a half century ago, "the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ." *Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S. 407, 437 (1921) (dissenting opinion), quoted with approval in *Blount* v. *Rizzi,* 400 U. S. 410, 416 (1971). See also *Lamont* v. *Postmaster General,* 381 U. S. 301, 305 (1965). A prisoner does not shed such basic First Amendment rights at the prison gate.[1] Rather, he "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from

[1] See, *e. g., Cruz* v. *Beto,* 405 U. S. 319 (1972); *Cooper* v. *Pate,* 378 U. S. 546 (1964); *Brown* v. *Peyton,* 437 F. 2d 1228, 1230 (CA4 1971); *Rowland* v. *Sigler,* 327 F. Supp. 821, 827 (Neb.), aff'd, 452 F. 2d 1005 (CA8 1971); *Fortune Society* v. *McGinnis,* 319 F. Supp. 901, 903 (SDNY 1970).

him by law." *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (CA6 1944).[2] Accordingly, prisoners are, in my view, entitled to use the mails as a medium of free expression not as a privilege, but rather as a constitutionally guaranteed right.[3]

It seems clear that this freedom may be seriously infringed by permitting correctional authorities to read all prisoner correspondence. A prisoner's free and open expression will surely be restrained by the knowledge that his every word may be read by his jailors and that his message could well find its way into a disciplinary file, be the object of ridicule, or even lead to reprisals. A similar pall may be cast over the free expression of the inmates' correspondents. Cf. *Talley* v. *California*, 362 U. S. 60, 65 (1960); *NAACP* v. *Alabama*, 357 U. S. 449, 462 (1958). Such an intrusion on First Amendment freedoms can only be justified by a substantial government interest and a showing that the means chosen to effectuate the State's purpose are not unnecessarily restrictive of personal freedoms.

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more

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[2] Accord, *Moore* v. *Ciccone*, 459 F. 2d 574, 576 (CA8 1972); *Nolan* v. *Fitzpatrick*, 451 F. 2d 545, 547 (CA1 1971); *Brenneman* v. *Madigan*, 343 F. Supp. 128, 131 (ND Cal. 1972); *Burnham* v. *Oswald*, 342 F. Supp. 880, 884 (WDNY 1972); *Carothers* v. *Follette*, 314 F. Supp. 1014, 1023 (SDNY 1970).

[3] See, *e. g.*, *Sostre* v. *McGinnis*, 442 F. 2d 178, 199 (CA2 1971) (en banc); *Preston* v. *Thieszen*, 341 F. Supp. 785, 786–787 (WD Wis. 1972); cf. *Gray* v. *Creamer*, 465 F. 2d 179, 186 (CA3 1972); *Morales* v. *Schmidt*, 340 F. Supp. 544 (WD Wis. 1972); *Palmigiano* v. *Travisono*, 317 F. Supp. 776 (RI 1970); *Carothers* v. *Follette*, *supra*.

narrowly achieved." *Shelton* v. *Tucker,* 364 U. S. 479 488 (1960).[4]

The First Amendment must in each context "be applied 'in light of the special characteristics of the . . . environment,' " *Healy* v. *James,* 408 U. S. 169, 180 (1972), and the exigencies of governing persons in prisons are different from and greater than those in governing persons without. *Barnett* v. *Rodgers,* 133 U. S. App. D. C. 296, 301–302, 410 F. 2d 995, 1000–1001 (1969); *Rowland* v. *Sigler,* 327 F. Supp. 821, 827 (Neb.), aff'd, 452 F. 2d 1005 (CA8 1971). The State has legitimate and substantial concerns as to security, personal safety, institutional discipline, and prisoner rehabilitation not applicable to the community at large. But these considerations do not eliminate the need for reasons imperatively justifying the particular deprivation of fundamental constitutional rights at issue. Cf. *Healy* v. *James, supra,* at 180; *Tinker* v. *Des Moines School District,* 393 U. S. 503, 506 (1969).

The State asserts a number of justifications for a general right to read all prisoner correspondence. The State argues that contraband weapons or narcotics may be smuggled into the prison via the mail, and certainly this is a legitimate concern of prison authorities. But this argument provides no justification for reading outgoing mail. Even as to incoming mail, there is no showing that stemming the traffic in contraband could not be accomplished equally well by means of physical tests

[4] The test I would apply is thus essentially the same as the test applied by the Court:

"[T]he regulation . . . in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . [and] the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Ante,* at 413.

such as fluoroscoping letters.[5] If physical tests were inadequate, merely opening and inspecting—and not reading—incoming mail would clearly suffice.[6]

It is also suggested that prison authorities must read all prison mail in order to detect escape plans. The State surely could not justify reading everyone's mail and listening to all phone conversations on the off chance that criminal schemes were being concocted. Similarly, the reading of all prisoner mail is too great an intrusion on First Amendment rights to be justified by such a speculative concern. There has been no showing as to the seriousness of the problem of escapes planned or arranged via the mail. Indeed, the State's claim of concern over this problem is undermined by the general practice of permitting unmonitored personal interviews during which any number of surreptitious plans might be discussed undetected.[7] When prison authorities have reason to believe that an escape plot is being hatched by a particular inmate through his correspondence, they may well have an adequate basis to seize that inmate's letters; but there is no such justification for a blanket policy of reading all prison mail.

It is also occasionally asserted that reading prisoner mail is a useful tool in the rehabilitative process. The therapeutic model of corrections has come under increasing criticism and in most penal institutions rehabilitative programs are more ideal than reality.[8] Assuming the validity of the rehabilitative model, however, the State does not demonstrate that the reading of inmate

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[5] See *Marsh* v. *Moore,* 325 F. Supp. 392, 395 (Mass. 1971).

[6] See *Moore* v. *Ciccone, supra,* at 578 (Lay, J., concurring); cf. *Jones* v. *Wittenberg,* 330 F. Supp. 707, 719 (ND Ohio 1971), aff'd *sub nom. Jones* v. *Metzger,* 456 F. 2d 854 (CA6 1972).

[7] *Palmigiano* v. *Travisono, supra.*

[8] See generally J. Mitford, Kind and Usual Punishment: The Prison Business (1973).

mail, with its attendant chilling effect on free expression, serves any valid rehabilitative purpose. Prison walls serve not merely to restrain offenders but also to isolate them. The mails provide one of the few ties inmates retain to their communities or families—ties essential to the success of their later return to the outside world.[9] Judge Kaufman, writing for the Second Circuit, found two observations particularly apropos of similar claims of rehabilitative benefit in *Sostre* v. *McGinnis*, 442 F. 2d 178, 199 (1971) (en banc):

> " 'Letter writing keeps the inmate in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by prison life and isolation, stimulates his more natural and human impulses, and otherwise may make contributions to better mental attitudes and reformation.' " [10]

and:

> " 'The harm censorship does to rehabilitation . . . cannot be gainsaid. Inmates lose contact with the outside world and become wary of placing intimate thoughts or criticisms of the prison in letters. This artificial increase of alienation from society is ill advised.' " [11]

The Court today agrees that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation." *Ante*, at 412.[12]

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[9] See, *e. g.*, National Advisory Commission on Criminal Justice Standards and Goals, Corrections 67–68 (1973).

[10] See *Palmigiano* v. *Travisono*, *supra*, at 791.

[11] Singer, Censorship of Prisoners' Mail and the Constitution, 56 A. B. A. J. 1051, 1054 (1970).

[12] Various studies have strongly recommended that correctional authorities have the right to inspect mail for contraband but not to read it. National Advisory Commission on Criminal Justice Stand-

Balanced against the State's asserted interests are the values that are generally associated with freedom of speech in a free society—values which "do not turn to dross in an unfree one." *Sostre* v. *McGinnis, supra,* at 199. First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives. Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration. The threat of identification and reprisal inherent in allowing correctional authorities to read prisoner mail is not lost on inmates who might otherwise criticize their jailors. The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.[13]

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.[14] Cf. *Stanley* v. *Georgia,* 394 U. S.

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ards and Goals, Corrections, Standard 2.17, pp. 66–69 (1973); see California Board of Corrections, California Correctional System Study: Institutions 40 (1971); Center for Criminal Justice, Boston University Law School, Model Rules and Regulations on Prisoners' Rights and Responsibilities, Standards IC–1 and IC–2, pp. 46–47 (1973).

[13] See, *e. g., Nolan* v. *Fitzpatrick,* 451 F. 2d, at 547–548.

[14] Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 879–880 (1963).

557 (1969). Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, Aeropagitica 21 (Everyman's ed. 1927). When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.

MR. JUSTICE DOUGLAS joins in Part II of this opinion.

MR. JUSTICE DOUGLAS, concurring in the judgment.

I have joined Part II of MR. JUSTICE MARSHALL'S opinion because I think it makes abundantly clear that foremost among the Bill of Rights of prisoners in this country, whether under state or federal detention, is the First Amendment. Prisoners are still "persons" entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all of the requirements of due process.

While Mr. Chief Justice Hughes in *Stromberg* v. *California,* 283 U. S. 359, stated that the First Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth, it has become customary to

rest on the broader foundation of the entire Fourteenth Amendment. Free speech and press within the meaning of the First Amendment are, in my judgment, among the pre-eminent privileges and immunities of all citizens.

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GOODING *v.* UNITED STATES

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

No. 72-6902. Argued February 25, 1974—Decided April 29, 1974

Petitioner, charged with illegal possession of drugs, made a motion to suppress the physical evidence seized in petitioner's apartment on February 12, 1971, at 9:30 p. m. by District of Columbia police officers pursuant to a magistrate's search warrant. Although no provisions of the D. C. Code were explicitly referred to, petitioner apparently contended, *inter alia,* that the warrant was executed in the nighttime in violation of D. C. Code § 23-521 (f)(5), which specifically requires that search warrants be served in the daytime unless certain statutory conditions are met, none of which was satisfied here. The District Court granted petitioner's motion, rejecting the Government's contention that the warrant was issued under 21 U. S. C. § 879 (a), which relates only to searches for "controlled substances" and provides that a warrant may be served "at any time of the day or night" as long as the issuing authority is satisfied that probable cause exists to believe that there are grounds for the warrant "and for its service at such time." The Court of Appeals reversed on the ground that 21 U. S. C. § 879 (a) was the applicable statute and that its terms had been satisfied. *Held:*

1. Title 21 U. S. C. § 879 (a), which is part of a comprehensive federal scheme for the control of drug abuse, applies to this case. Pp. 446–454.

(a) The standards for issuance of the warrant should be governed by nationwide federal legislation rather than by local D. C. laws. An Assistant United States Attorney filed the application for the warrant with a Federal Magistrate, alleging violations of the United States Code for which petitioner was indicted. P. 447.

(b) Though the affiant officer and the officers executing the warrant were D. C. police, rather than federal officers, and the legislative history of § 879 (a) stressed federal enforcement, Congress manifested no purpose to dispense with the aid of other enforcement personnel in dealing with the narcotics problem. Pp. 447–450.

(c) If petitioner's contention were to prevail, the general search warrant statute applicable to the District of Columbia would govern D. C. police officers when investigating federal drug violations but not other federal crimes, despite the fact that D. C. police officers historically played a prominent role in federal drug enforcement under 18 U. S. C. § 1405 (1964 ed.), the predecessor statute of 21 U. S. C. § 879 (a). Pp. 450–454.

2. Title 21 U. S. C. § 879 (a), as was true of its predecessor statute, requires no special showing for a nighttime search, other than a showing, such as was made here, that the contraband is likely to be on the property or person to be searched at that time. Pp. 454–458.

155 U. S. App. D. C. 259, 477 F. 2d 428, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 459. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post,* p. 461.

Herbert A. Rosenthal, by appointment of the Court, 414 U. S. 998, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Edward R. Korman,* and *Jerome M. Feit.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner in this case presents a claim that evidence offered against him at his trial should have been suppressed because it was seized at nighttime in violation of governing statutory provisions. The search which led to the seizure was conducted by officers of the District of Columbia Metropolitan Police Department at approximately 9:30 p. m. within the District of Columbia.

Armed with a search warrant, the officers entered petitioner's apartment for the purpose of discovering violations of a federal narcotics statute, and seized a substantial amount of contraband narcotics. The parties urge upon us differing theories concerning which federal or District of Columbia statute bears on the legality of this search, and we must therefore interpret and reconcile several recent congressional enactments dealing with nighttime searches which seem to embody somewhat inconsistent views.[1]

The Court of Appeals agreed with the District Court's description of this congeries of statutes as a " 'bramble-bush of uncertainties and contradictions,' " [2] and a mere summary of the statutes attests to the accuracy of that observation:

District of Columbia Statutes: The older of the two conceivably relevant District of Columbia statutes, D. C. Code § 33–414 (1973),[3] was enacted in 1956 and authorizes

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[1] The Government contends that even though we were to determine that the applicable statutory provision was violated in this case, the evidence should nonetheless not be suppressed. Since we conclude that the seizure was consistent with the governing statute, we have no occasion to reach this alternative argument.

[2] See 155 U. S. App. D. C. 259, 261, 477 F. 2d 428, 430 (1973), quoting from 328 F. Supp. 1005, 1008 (DC 1971).

[3] "§ 33–414. Search warrants—Requirements—Form—Contents—Return—Penalty for interfering with service.

"(a) A search warrant may be issued by any judge of the Superior Court of the District of Columbia or by a United States commissioner for the District of Columbia when any narcotic drugs are manufactured, possessed, controlled, sold, prescribed, administered, dispensed, or compounded, in violation of the provisions of this chapter, and any such narcotic drugs and any other property designed for use in connection with such unlawful manufacturing, possession, controlling, selling, prescribing, administering, dispensing, or compounding, may be seized thereunder, and shall be subject to such disposition as the court may make thereof and such narcotic

search warrants for violations of the District of Columbia narcotics laws. This section does not limit the time during which searches may be made, stating plainly that "[t]he judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night." This liberal time provision is in direct contrast to the more restrictive provisions of the second

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drugs may be taken on the warrant from any house or other place in which they are concealed.

"(b) A search warrant cannot be issued but upon probable cause supported by affidavit particularly describing the property and the place to be searched.

"(c) The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"(d) The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"(e) If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him, to the major and superintendent of police of the District of Columbia or any member of the Metropolitan police department, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the place named for the property specified and to bring it before the judge or commissioner.

"(f) A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

"(g) The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

"(h) The judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night."

District of Columbia statute to be considered, D. C. Code § 23–521 (f)(5),[4] which specifically requires that search warrants be served in the daytime unless certain con-

[4] "§ 23–521. Nature and issuance of search warrants

"(a) Under circumstances described in this subchapter, a judicial officer may issue a search warrant upon application of a law enforcement officer or prosecutor. A warrant may authorize a search to be conducted anywhere in the District of Columbia and may be executed pursuant to its terms.

"(b) A search warrant may direct a search of any or all of the following:

"(1) one or more designated or described places or premises;

"(2) one or more designated or described vehicles;

"(3) one or more designated or described physical objects; or

"(4) designated persons.

"(c) A search warrant may direct the seizure of designated property or kinds of property, and the seizure may include, to such extent as is reasonable under all the circumstances, taking physical or other impressions, or performing chemical, scientific, or other tests or experiments of, from, or upon designated premises, vehicles, or objects.

"(d) Property is subject to seizure pursuant to a search warrant if there is probable cause to believe that it—

"(1) is stolen or embezzled;

"(2) is contraband or otherwise illegally possessed;

"(3) has been used or is possessed for the purpose of being used, or is designed or intended to be used, to commit or conceal the commission of a criminal offense; or

"(4) constitutes evidence of or tends to demonstrate the commission of an offense or the identity of a person participating in the commission of an offense.

"(e) A search warrant may be addressed to a specific law enforcement officer or to any classification of officers of the Metropolitan Police Department of the District of Columbia or other agency authorized to make arrests or execute process in the District of Columbia.

"(f) A search warrant shall contain—

"(1) the name of the issuing court, the name and signature of the issuing judicial officer, and the date of issuance;

"(2) if the warrant is addressed to a specific officer, the name of

ditions set forth in § 23–522 (c)(1) are met. These conditions essentially require a showing of special need to search at night, and concededly have not been satisfied in this case.

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that officer, otherwise, the classifications of officers to whom the warrant is addressed;

"(3) a designation of the premises, vehicles, objects, or persons to be searched, sufficient for certainty of identification;

"(4) a description of the property whose seizure is the object of the warrant;

"(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;

"(6) where the judicial officer has found cause therefor, including one of the grounds set forth in subparagraph (A), (B), or (D) of section 23–591 (c)(2), an authorization that the executing officer may break and enter the dwelling house or other building or vehicles to be searched without giving notice of his identity and purpose; and

"(7) a direction that the warrant and an inventory of any property seized pursuant thereto be returned to the court on the next court day after its execution.

"§ 23–522. Applications for search warrants

"(a) Each application for a search warrant shall be made in writing upon oath or affirmation to a judicial officer.

"(b) Each application shall include—

"(1) the name and title of the applicant;

"(2) a statement that there is probable cause to believe that property of a kind or character described in section 23–521 (d) is likely to be found in a designated premise, in a designated vehicle or subject, or upon designated persons;

"(3) allegations of fact supporting such statement; and

"(4) a request that the judicial officer issue a search warrant directing a search for and seizure of the property in question.

"The applicant may also submit depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application.

"(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

Federal Statutes and Rules: The general provision governing federal search warrants is found in Fed. Rule Crim. Proc. 41.[5] At the time the search in this case

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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; and

"(2) a request that the search warrant authorize the executing officer to break and enter dwelling houses or other buildings or vehicles to be searched without giving notice of his identity and purpose, upon probable cause to believe that one of the conditions set forth in subparagraph (A), (B), or (D) of section 23–591 (c)(2) is likely to exist at the time and place at which such warrant is to be executed.

"Any request made pursuant to this subsection must be accompanied and supported by allegations of fact supporting such request."

[5] At the time of the search in this case Rule 41 read, in part, as follows:

"Search and Seizure

"(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

"(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., § 957.

"(c) Issuance and contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer

took place, Rule 41 (c) provided that warrants must be served in the daytime except where "the affidavits are positive that the property is on the person or in the place to be searched." [6] In such event the war-

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of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

. . . . . .

"(g) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule to include documents, books, papers and any other tangible objects."

[6] Rule 41 has since been amended to read, in part:

"(a) Authority to issue warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

"(b) Property which may be seized with a warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

"(c) Issuance and contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and

rant could direct "that it be served at any time." This provision was incorporated in the Rules in 1948 as a replacement for language previously contained in the Espionage Act of 1917.[7] A second federal statute relating only to searches for "controlled substances" is found in 21 U. S. C. § 879 (a),[8] which was enacted in

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naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

. . . . .

"(h) Scope and definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule to include documents, books, papers and any other tangible objects. The term 'daytime' is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m. according to local time. The phrase 'federal law enforcement officer' is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54 (c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant."

[7] § 10, 40 Stat. 229.

[8] "21 U. S. C. § 879. Search warrants.

"(a) A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the

1970. That section provides that a warrant may be served "at any time of the day or night" so long as the issuing authority "is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time." This provision in turn is the successor to a provision in 18 U. S. C. § 1405 (1964 ed.),[9] enacted in 1956 to relax the "positivity" test of Rule 41 in cases involving certain narcotic drugs.[10] Congress had passed this statute in response to the complaints of law enforcement officers that the positivity requirement gave commercial narcotics dealers a definite advantage over federal agents. Rule 41 is therefore not applicable to searches governed by the more specific narcotic search statutes.[11]

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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."

[9] "§ 1405. Issuance of search warrants—procedure.

"In any case involving a violation of any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code, a violation of subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or a violation of the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a)—

"(1) a search warrant may be 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) 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."

[10] See, *e. g.*, H. R. Rep. No. 2546, 84th Cong., 2d Sess., 16 (1956).

[11] See, *e. g.*, *United States* v. *Stallings*, 413 F. 2d 200 (CA7), cert. denied, 396 U. S. 972 (1969); *United States* v. *Castle*, 213 F. Supp. 52 (DC 1962).

Our Brother MARSHALL in his dissenting opinion stresses Congress' continuing concern for individual privacy, as demonstrated by the

The facts of this case must be understood in the context of these statutes. On February 11, 1971, an Assistant United States Attorney applied to a United States Magistrate sitting in the District of Columbia for a warrant authorizing a search of petitioner's apartment for evidence of illegal narcotics. The application included the brief notation: "Violation: U. S. C.; Title 26. Sections: 4704a." In connection with the application, an officer of the Metropolitan Police Department vice squad appeared before the Magistrate and swore that he had reason to believe petitioner was concealing property held in violation of that same code provision.[12]

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limitations on nighttime searches contained in the Espionage Act, *supra,* and later, Fed. Rule Crim. Proc 41. The implication seems to be that this concern must be read into the provisions of 21 U. S. C. § 879 (a) to reach the interpretation for which he argues. But this argument totally ignores the fact that Congress, in 1956, enacted a statute governing searches for dangerous drugs which deliberately removed the stricter limitations on night searches found in Rule 41. Our construction of the principal statute considered in this case, 21 U. S. C. § 879 (a), therefore, represents no novel departure from previous congressional policy in this area, but is, on the contrary, consistent with the conceded meaning of the statute which governed federal drug searches for almost 15 years.

[12] The affidavit read in full:

"BEFORE Lawrence S. Margolis, Wash., D. C. The undersigned being duly sworn deposes and says:

"That he (has reason to believe) that (on the premises known as) 1419 Chapin Street, N. W., as you enter the building last apartment on the right next to the elevator on the first floor Washington in the District of Columbia there is now being concealed certain property, namely heroin, syringes, tourniquets, cookers and paraphernalia used in the preparation of heroin for retail and any other paraphernalia used in the preparation and dispensation of heroin and any other narcotic drugs illegally held, which are in violation of Title 26 U. S. Code Section 4704 (a).

"And that the facts tending to establish the foregoing grounds

The officer supplemented his personal testimony with a written affidavit, outlining the basis for the application in more detail and alleging specifically that "illegal drugs are sold and possessed in violation of the United States Code, Title 26, Section 4704a." [13] The affidavit concluded with the language: "I am positive that Lonnie Gooding is secreting narcotics inside his apartment at 1419 Chapin Street NW in violation of the US Code."

The Magistrate then issued a warrant directing the Chief of Police or "any member of MPDC" to search petitioner's apartment.[14] The warrant specifically noted

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for issuance of a Search Warrant are as follows: See the facts set forth in the affidavit attached hereto and made a part hereof.

/s/ Marion L. Green
MARION L. GREEN
MPD"

[13] The affidavit states specifically:

"I, the undersigned officer who is assigned to the Third District Vice Squad, Metropolitan Police Department, and working in the City of Washington, D. C. in an undercover capacity where illegal drugs are sold and possessed in violation of the United States Code, Title 26, Section 4704a. Had the occasion to investigate the following offense."

[14] The warrant read in its entirety:

"To Chief of Police or any Member of MPDC

"Affidavit having been made before me by Plc. Marrion [*sic*] L. Green, Jr. Third District Vice Squad that he (has reason to believe) that (on the premises known as) 1419 Chapin Street, N. W., as you enter the building last apartment on the right next to the elevator on the first floor, Washington in the District of Columbia, there is now being concealed certain property, namely heroin, capsules, envelopes, syringes, tourniquets, cookers and paraphernalia used in the preparation of heroin for distribution or use and any other instrumentalities or evidence of illegal possession or dispensation of heroin or of any other narcotic drugs illegally held. See the facts set forth in the affidavit attached hereto and made a part hereof which are in violation of Title 26 Section 4704 (a) of the U. S. Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above

that facts had been set forth in an affidavit alleging a violation of 26 U. S. C. § 4704 (a) (1964 ed.) and that those facts established probable cause to make the search. The warrant also stated that the search could be made "at any time in the day or night." This phrase was accompanied by a footnote reference to Fed. Rule Crim. Proc. 41 (c), presumably because the police officer had asserted he was "positive" the drugs were in petitioner's apartment. One of the briefs filed in this case suggests that the warrant form was preprinted and contemplated application of Rule 41 standards.[15]

The search warrant was executed on February 12, 1971, at 9:30 p. m.[16] The officers engaged in the search were

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described and that the foregoing grounds for application for issuance of the search warrant exist.

"*You are hereby commanded* to search forthwith the (place) named for the property specified, serving this warrant and making the search (at any time in the day or night[*]) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

"Dated this day of Feb. 11, 1971

/s/ Lawrence S. Margolis
U. S. Commissioner"

"[*]The Federal Rules of Criminal Procedure provide: 'The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time.' (Rule 41C)."

[15] Reply Brief for Petitioner 8.

[16] The Government contends in its brief, apparently for the first time in the course of this litigation, that the search was not in fact a nighttime search. The primary basis for this argument is revised Fed. Rule Crim. Proc. 41 which states that "[t]he term 'daytime' is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m. according to local time." See n. 6, *supra*. In view of our conclusion

all members of the District of Columbia Metropolitan Police Department, and the search uncovered a substantial quantity of contraband narcotic materials. They were seized and formed the basis for charging petitioner with violations of 26 U. S. C. § 4704 (a) (1964 ed.) [17] and 21 U. S. C. § 174 (1964 ed.).[18] Following his indictment in the United States District Court for the District of Columbia on April 6, 1971, petitioner filed a motion to suppress the evidence discovered in the February 12 search.

Several grounds were asserted in support of the motion, particularly that "[t]he search warrant was executed at night but the application for the warrant did not comply with the D. C. Code provisions for nighttime search

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that the standards for a nighttime as well as a daytime search under 21 U. S. C. § 879 (a) were met in this case, we do not need to resolve this issue.

[17] "§ 4704. Packages.

"(a) General requirement.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

[18] "§ 174. Same; penalty; evidence.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000."

warrants . . . ." [19] Although no provisions of the D. C. Code were explicitly referred to, petitioner's argument apparently was that Title 23 of the D. C. Code, requiring that a special showing of need be made to justify a search at night, governed this search, and that its requirements had not been met. The District Court found this reasoning persuasive and granted the motion to suppress. Rejecting the Government's argument that the warrant was not issued under Title 23 but rather under 21 U. S. C. § 879 (a), the court stated:

> "Whatever be the standards generally for issuance of a nighttime search warrant in federal narcotics cases in other parts of the country, however, the Court finds that the existence of 21 U. S. C. § 879 (a) does not remove such cases from the explicit requirements for search warrants in the District of Columbia under the newly enacted Title 23, D. C. Code." [20]

Having decided that District of Columbia law applied, the District Court admitted to some uncertainty about the status of D. C. Code § 33–414, the provision dealing specifically with violations of local drug laws. The court noted with some puzzlement that no mention of this provision was found in the legislative history of Title 23, and that some language in the legislative history suggested that the provision had simply been overlooked.[21] Nevertheless, the court determined that

"[p]ending prompt review of this determination

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[19] Petitioner also contended that the officers entered the apartment without knocking and without having a "no-knock" warrant and that the police had no probable cause to search him. Neither court below passed upon the sufficiency of these contentions, and they are not before us here.

[20] 328 F. Supp., at 1007.

[21] *Id.*, at 1008 n. 1.

> or congressional action, and pending interpretation of 33 D. C. Code § 414 (h) in light of the new Title 23 provisions, search warrants which are to be executed in the nighttime should comply in all respects with 23 D. C. Code § 523 (b)." [22]

Concededly the warrant issued in this case did not comply with the requirements of Title 23.

The Court of Appeals for the District of Columbia Circuit reversed the District Court,[23] although none of the three judges who composed the panel completely agreed with any other on the proper rationale. All three agreed, however, that 21 U. S. C. § 879 (a), rather than any provision of the District of Columbia Code, was the provision which determined the legality of this search. All three likewise agreed that the affidavit submitted by the District of Columbia police officer satisfied the requirements of that section. Judge Wilkey and Judge Fahy found that no greater showing for a nighttime search was required by § 879 (a) than was required by its predecessor statute governing federal narcotics searches, 18 U. S. C. § 1405 (1964 ed.), and that the affidavit need establish only probable cause to believe that the property would be on the premises at the time of the search.[24] Judge Robinson believed that § 879 (a)

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[22] *Id.*, at 1008.

[23] 155 U. S. App. D. C. 259, 477 F. 2d 428 (1973).

[24] Judge Wilkey stated in his opinion: "We hold that the applicable statute, 21 U. S. C. § 879 (a), requires only a showing of probable cause to believe that the narcotics will be found on the premises at any time of the day or night." *Id.*, at 266, 477 F. 2d, at 435. Judge Fahy in his opinion stated: "Thus, in the case of narcotics, previously under Section 1405 (1) and later under Section 879 (a), if the judge was satisfied 'that there is probable cause to believe' rather than 'if the affidavits are positive' that the 'property is on the person or in the place to be searched,' the warrant could permit execution at any time." *Id.*, at 268, 477 F. 2d, at 437.

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did require an additional showing for a nighttime search, but concluded that such a showing had been made in this case.[25]

Petitioner urges that we reverse the Court of Appeals on either or both of two alternative grounds. First, petitioner repeats his assertion, sustained by the District Court, that Title 23 of the D. C. Code is the statute applicable to the search in this case and that, as the Government has conceded, the requirements of that title have not been satisfied. Second, petitioner argues that, if 21 U. S. C. § 879 (a) is considered to be the applicable provision, a special showing for nighttime searches must be made. We agree with the Court of Appeals that 21 U. S. C. § 879 (a) is the statute applicable to this case, and that its provisions have been satisfied here.[26]

I

The unique situation of the District of Columbia, for which Congress legislates both specially and as a part

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[25] Judge Robinson concluded: "The test of reasonable cause for nighttime execution does not demand a demonstration that drugs are positively on the premises at night, or that they could be found on the premises only at night, or that for some reason a search would be impossible in the daytime. It does summon some factual basis for a prudent conclusion that the greater intrusiveness of nighttime execution of the warrant is justified by the exigencies of the situation." *Id.*, at 274, 477 F. 2d, at 443. Judge Robinson then went on to find that a proper showing had been made in this case. He stated: "Where, as here, it appears that a search is calculated not only to garner evidence of past crime but also to terminate a serious species of ongoing criminality, reasonable cause for a nocturnal intrusion is demonstrated." *Id.*, at 275, 477 F. 2d, at 444.

[26] We are therefore not required to reach the Government's argument that, despite the fact that the application for the search warrant alleged a violation of the United States Code, the search could be justified under D. C. Code § 33–414 as a search for violations of local drug laws.

of the Nation, gives rise to the principal difficulties in this case. For we deal here not with statutory schemes enacted by independent legislative bodies, but with possibly overlapping schemes enacted by a single body. Despite the potential overlap, however, we think that the operative facts surrounding this search strongly indicate that the standards for issuance of a warrant should be governed by the nationwide federal legislation enacted by Congress—that is, 21 U. S. C. § 879 (a) [27]—rather than by the local D. C. laws. To begin with, an Assistant United States Attorney, who had discretion to proceed either under federal or under local law, filed the application for the search warrant alleging a violation of the United States Code. Application was made to a United States Magistrate, located in the United States District Court building, and neither the application nor the supporting affidavits contained any mention of the local narcotics laws. After the materials were seized, petitioner was indicted for violations of federal law.

Petitioner contends, however, that Title 23 of the D. C. Code should apply to this case because the executing officers, as well as the officer swearing to the affidavit presented to the Magistrate, were not federal officers but officers of the District of Columbia Metropolitan Police Department. He argues that the provisions of 21 U. S. C. § 879 (a) were intended to apply solely to agents of the Bureau of Narcotics and Dangerous Drugs, none of whom were involved here, whereas Title 23 of the D. C. Code was intended to provide comprehensive regulation of District of Columbia police officers investigating both local and federal offenses. Petitioner reinforces his argument by noting that the former federal statute

[27] The provisions of 21 U. S. C. § 879 (a) prevail over the provisions of Fed. Rule Crim. Proc. 41 when controlled substances are involved. See nn. 10 and 11, *supra*.

regulating drug searches specifically provided 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," [28] while no such section appears in 21 U. S. C. § 879. Therefore, says petitioner, the District of Columbia police were no longer to be considered federal agents for the purpose of enforcing federal drug laws.

Although petitioner's arguments cannot be dismissed lightly, we find them ultimately unpersuasive. Concededly there are hints in the statutory framework and legislative history of the Controlled Substances Act, 84 Stat. 1242, that indicate the policing function under those provisions would be the primary responsibility of the Bureau of Narcotics and Dangerous Drugs.[29] But this focus on the Bureau's role seems entirely natural in view of one of the Act's stated purposes to "collect the diverse drug

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[28] See n. 9, *supra*.

[29] For example, John Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, stated at the Hearings on Drug Abuse Control Amendments—1970 before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., ser. 91–45, pt. 1, p. 86 (1970), that the no-knock provision, incorporated in § 702 (b) of the proposed bill, see n. 32, *infra*, would grant authority "restricted to special agents of the Bureau of Narcotics and Dangerous Drugs." In addition, the preceding provision of the bill set forth expanded powers for the agents of the BNDD. However, although these excerpts would argue for petitioner's position here, we believe that the Government's position ultimately proves to be stronger. We believe for the reasons stated in the text that the emphasis on the powers of the BNDD agents was not intended to remove powers from other federal agents who had previously assisted in the enforcement of federal drug laws. See also 18 U. S. C. §§ 3052, 3053, and 3056, setting forth arrest powers for agents of the Federal Bureau of Investigation, United States marshals, and Secret Service agents.

control and enforcement laws under one piece of legislation to facilitate law enforcement, drug research, educational and related control facilities." [30] In providing a comprehensive federal scheme for the control of drug abuse, Congress could be expected to pay special attention to the federal agency set up to enforce the laws. But this attention does not mean that Congress at the same time wished to dispense with the aid of other enforcement personnel who had previously given assistance.

The failure of Congress to include a special provision authorizing District of Columbia police officers to obtain search warrants for investigating federal offenses cannot be taken as a deliberate exclusion in view of the overall statutory framework. The provision included in the previous federal statute may well have seemed unnecessary, both in light of the history of cooperation between the District of Columbia police and federal officers and in view of the provisions of D. C. Code § 4–138 providing that "[a]ny warrant for search or arrest, issued by any magistrate of the District, may be executed in any part of the District by any member of the police force . . . ." [31] Thus, both custom and statute already assured the availability of District of Columbia police. Furthermore, the legislative history relating to § 879 (a) stresses the need for stronger enforcement of the federal narcotics laws, a goal hardly advanced by reducing the forces available to execute those laws. In fact, the provision

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[30] S. Rep. No. 91–613, p. 3 (1969).

[31] D. C. Code § 4–138 provides:

"Any warrant for search or arrest, issued by any magistrate of the District, may be executed in any part of the District by any member of the police force, without any backing or indorsement of the warrant, and according to the terms thereof; and all provisions of law in relation to bail in the District shall apply to this chapter."

See *Thomas* v. *United States*, 409 U. S. 992, 993 (1973) (DOUGLAS, J., dissenting).

which is now § 879 (b), permitting "no-knock" searches under certain conditions, was one of the most controversial sections of the entire bill, and was defended primarily by the pressing need for added enforcement weapons to combat the increased drug traffic.[32]

Finally, the interpretation urged by petitioner would leave District of Columbia officers able to execute general federal search warrants under amended Fed. Rule Crim. Proc. 41, but would deny them that authority under the federal drug search statute. Rule 41 now provides that "a federal law enforcement officer"—defined in the Rule to include "any category of officers authorized by the Attorney General to request the issuance of a search warrant"—may make applications under the Rule. The Attorney General has since listed the Metropolitan Police Department among those agencies

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[32] "§ 879. Search warrants.

. . . . . .

"(b) Any officer authorized to execute a search warrant relating to offenses involving controlled substances the penalty for which is imprisonment for more than one year may, without notice of his authority and purpose, break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or United States magistrate issuing the warrant (1) is satisfied that there is probable cause to believe that (A) the property sought may and, if such notice is given, will be easily and quickly destroyed or disposed of, or (B) the giving of such notice will immediately endanger the life or safety of the executing officer or another person, and (2) has included in the warrant a direction that the officer executing it shall not be required to give such notice. Any officer acting under such warrant, shall, as soon as practicable after entering the premises, identify himself and give the reasons and authority for his entrance upon the premises."

See H. R. Rep. No. 91–1444, p. 25 (1970), which stated:

"The purpose of this provision [the no-knock provision], as explained in the hearings, is to provide law enforcement officials with a tool to aid in combatting the illicit traffic in drugs which has proved helpful in all of the 29 States where this authority exists either by statute or common law."

which are so authorized.[33] If petitioner's contention were accepted, it would seemingly mean that the general search warrant statute applicable to the District of Columbia would govern District of Columbia police officers investigating federal drug cases, but would not govern them when investigating other federal crimes. This result would obtain despite the fact that District of Columbia police officers historically played a prominent role in the enforcement of federal drug laws under 18 U. S. C. § 1405 (1964 ed.).

There is little indication that Title 23 of the D. C. Code was intended to serve the sweeping purpose which petitioner attributes to it.[34] The search warrant provisions upon which petitioner relies were part of the Court Reform and Criminal Procedure Act, which substantially reorganized the District of Columbia court system, providing for a new local court of general jurisdiction and relieving the United States District Court for the District of Columbia of much of its local burden.[35] Prior to that time all local felonies had been tried in the United States District Court, and the Federal Rules of Criminal Procedure by their terms had applied. The creation of the new Superior Court created the need for a new set of pro-

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[33] See Atty. Gen. Order 510–73, 38 Fed. Reg. 7244–7245.

[34] The effect of Title 23 on other statutes was debated in some detail below. Judge Wilkey in his opinion noted that the provisions of 21 U. S. C. § 879 (a) were not only enacted after the provisions of Title 23 (although they took effect sooner), but also are more specific in terms of subject matter, *i. e.*, drug control. 155 U. S. App. D. C., at 262, 477 F. 2d, at 431. Thus, as a matter of statutory construction, it is somewhat difficult to see how Title 23 was intended to modify any later, more specific statute. Petitioner no longer suggests that Title 23 must be read into the provisions of 21 U. S. C. § 879 (a). He contends either that Title 23 is applicable in its entirety or that § 879 (a) by its own terms requires a special showing for searches at night.

[35] D. C. Code § 11–901.

cedural rules, and, though some important changes were made, the new rules quite closely tracked the Federal Rules. It does not seem unreasonable, therefore, to suggest that the general provision relating to search warrants, found in D. C. Code § 23–521 *et seq.* and then incorporated in similar form into the rules [36] promulgated

[36] "Rule 41. Search and Seizure.

"(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the Superior Court.

"(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize property. Property is subject to seizure pursuant to a search warrant if there is probable cause to believe that it (1) is stolen or embezzled; or (2) is contraband or otherwise illegally possessed; or (3) has been used or is possessed for the purpose of being used, or is designed or intended to be used, to commit or conceal the commission of an offense; or (4) constitutes evidence of or tends to demonstrate the commission of an offense or the identity of a person participating in the commission of an offense.

"(c) Application for Search Warrants. Each application for a search warrant shall be made in writing upon oath to a judge of the Superior Court. Each application shall include the name and title of the applicant; a statement that there is probable cause to believe that property described in paragraph (b) as subject to seizure is likely to be found in a designated premise, in a designated vehicle or object, or upon designated persons; allegations of fact supporting such statement; and a request that the judge issue a search warrant directing a search for and seizure of the property in question. The applicant may also submit depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application.

"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 (i) there is probable cause to believe that it cannot be executed during the hours of daylight, or (ii) the property sought is likely to be removed or destroyed if not seized forthwith, or (iii) the property sought is not likely to be found except at certain times or in certain circumstances; and (2) a request approved by an appropriate prosecutor that the search warrant authorize the executing officer to break and enter dwelling houses or other buildings

Feb. 1, 1971, for the new Superior Court, was intended to be a counterpart to Fed. Rule Crim. Proc. 41. The Federal Rule, as discussed *infra,* did not apply to narcotics cases in the federal courts since more specific provisions, first those of 18 U. S. C. § 1405 (1964 ed.) and then those of 21 U. S. C. § 879 (a), controlled.[37]

This conclusion is reinforced by the fact that Federal Rule 41 has been subsequently modified to more closely resemble the District of Columbia statute and rule. The new Federal Rule, though less specific than the local rule, provides that a search warrant must be served in the daytime, "unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime," and abandons the old, cumbersome positivity standard. The concern for individual privacy revealed in the provisions of the District of Columbia search statute may thus be found in the new Federal Rule as well, but Congress, as it had in the earlier version of the Rule,

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or vehicles to be searched without giving notice of his identity and purpose, upon probable cause to believe that one of the conditions listed in subparagraphs (a), (b), or (d) of D. C. Code § 23–591 (c) (2) is likely to exist at the time and place at which such warrant is to be executed whereby the applicant may dispense with such requirement. Any request that a search warrant be executable at any time of the day or night or that a search warrant authorize the executing officer to break and enter without a prior announcement of his identity and purpose must be accompanied and supported by allegations of fact supporting such request." Effective Oct. 25, 1973, paragraph (b) of this rule was amended. Paragraphs (a) and (c) were unchanged.

[37] We note that the District of Columbia Court of Appeals has indicated that the specific provisions of Title 33 are not qualified by the more general provisions of Title 23 in searches for violations of the local drug laws in the District of Columbia. See *United States* v. *Thomas,* 294 A. 2d 164, 167–168, cert. denied, 409 U. S. 992 (1973).

nevertheless showed its clear intention to leave intact other special search warrant provisions, including, of course, the provisions relating to searches for controlled substances.[38] In those limited cases Congress has considered the need for privacy to be counterbalanced by the public need for more effective law enforcement. We do not believe that Congress, by enacting a general search warrant provision for the District of Columbia, has struck a different balance in federal drug cases simply because District of Columbia police officers are involved.

We therefore conclude, as did all the judges of the Court of Appeals, that the statute applicable to this case is 21 U. S. C. § 879 (a). Our remaining task is to determine whether the requirements of that section have been met.

II

> "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." 21 U. S. C. § 879 (a).

Only the last seven words of the statute are really in controversy here. Petitioner contends that this language, not found in the predecessor statute, 18 U. S. C. § 1405 (1964 ed.), was intended to require some special showing of need for searches conducted at night rather than during the day. His contention was adopted, at least in part, by Judge Robinson in the Court of Appeals. The Government, on the other hand, contends that it must show only probable cause to believe that the

[38] See Fed. Rule Crim. Proc. 41 (h), *supra*, n. 6. See also subsection (g) of prior Rule 41, n. 5, *supra*.

sought-after property will be on the premises at the time of the search, and that if there is probable cause to believe the property will be on the premises at night, such a showing sufficiently meets the requirement imposed by the last seven words of § 879 (a).

The language of the statute by itself is not crystal clear on this issue. Petitioner insists that the last phrase requires with unmistakable clarity a separate finding of probable cause to justify a nighttime search. Thus, according to petitioner, the issuing magistrate would have to satisfy himself that there was not only probable cause for the search, but also probable cause for believing that the search should be conducted at nighttime rather than during the daytime. While this is *a* possible meaning, it is by no means the only possible meaning attributable to the words.

Petitioner's interpretation really assumes that the statute reads: "There is probable cause to believe that grounds exist for the warrant and, *if served at night,* for its service at such time." But the statute does not include the italicized four words; it makes no distinction whatever between day and night, and literally read would apparently require that a special showing be made for a daytime search as well. The idea that a particularized showing must be made for searches in the daytime is completely novel and lacks even a single counterpart in other search statutes enacted by Congress.

Petitioner suggests that since Congress was concerned about the greater intrusion resulting from nighttime searches, it would be logical to apply the language, "probable cause . . . for its service at such time," only to nighttime searches. But even this interpretation, which is by no means a literal reading of the language, is not wholly convincing. The traditional limitation placed on nighttime searches, as evident from the earlier

language of Rule 41, is to require, not that there be probable cause for searching at night, but that the affiant be *positive* that the property is in fact located on the property to be searched. Thus Congress' very choice of the words "probable cause" would indicate that the earlier limitation of "positivity" was not to apply, while offering no other immediately ascertainable standard for what should constitute "probable cause" for executing a search warrant during the night.

This roundabout way of limiting nighttime searches, if that were in fact the statute's intent, would sharply contrast with the manner in which Congress has required special showings for nighttime searches in other statutes. For example, Title 23 of the D. C. Code, discussed *supra,* specifies that the warrant "be executed *during the hours of daylight*" (emphasis added) unless certain itemized conditions are met. Federal Rule Crim. Proc. 41, as amended in 1972, states: "The warrant *shall be served in the daytime* unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Emphasis added.) The fact that Congress, when it has intended to require such special showings for nighttime searches, has done so in language largely free from ambiguity militates against petitioner's assertion that the language of § 879 (a) on its face supports his position.

The legislative history lends no support to petitioner's interpretation, but in fact cuts the other way. Both the House and the Senate Committee Reports on the bill incorporated a summary prepared by the Department of Justice, where much of the bill's drafting had taken place, which stated:

> "Section 702 (a) [now § 879 (a)] incorporates 18 U. S. C. [§] 1405 and authorizes service of a search

> warrant at any time of the day or night if probable cause has been established to the satisfaction of the judge or U. S. magistrate issuing the warrant." [39]

As previously noted, § 1405 provided that a search warrant could be served at any time of the day or night so long as the issuing officer was "satisfied that there is probable cause to believe that the grounds for the application exist . . . ." Case law had uniformly interpreted the language to mean that probable cause for the warrant itself was all that was necessary for a nighttime search.[40] The officers or agents simply had to establish probable cause for believing that the sought-after property would be found in the place to be searched.

There is no suggestion in any of the hearings or debates before Congress that a change from the prior law in this area was intended. The provision itself went unmentioned in the debates and hearings on the bill, a surprising omission if the bill effected the cutback petitioner says it did. Of like import is the fact that in the long and heated discussions over § 702 (b), the so-called "no-knock" provision of the bill, no defender of the bill saw fit to argue that any greater intrusion caused by the no-knock provision would be partially offset by the greater difficulty in obtaining warrants executable at night.[41] While congressional silence as to a particular provision of a bill during debates which give extensive consideration to neighboring provisions is not easy to interpret, it would be unusual for such a significant

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[39] S. Rep. No. 91–613, pp. 30–31 (1969). See also H. R. Rep. No. 91–1444, pt. 1, p. 54 (1970).

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

[41] The debates on this controversial proposal may be found generally in volume 116 of the Congressional Record. See, *e. g.*, 116 Cong. Rec. 1159–1162, 1164–1177, 33639–33645.

change as that proposed by petitioner to have entirely escaped notice.

Finally, it is important to note that the Department of Justice itself submitted this bill to Congress for enactment, including § 879 (a) in its present form. Since the hearings and debates stress that a major purpose of the bill was to supply more effective enforcement tools to combat the increasing use of narcotic drugs, it seems totally illogical to suggest that the Department of Justice would submit a bill making it substantially more difficult to control the traffic in hard drugs. Petitioner suggests that this surrender was necessary to convince Congress to bring additional drugs within the Controlled Substances Act, but that theory rests entirely on speculation. There is absolutely no indication in the legislative history that any price had to be paid for what was thought to be a much-desired reorganization and expansion of the drug laws, much less the substantial price that petitioner argues had to be paid here.

We therefore conclude that 21 U. S. C. § 879 (a) requires no special showing for a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched at that time.[42] We believe that the showing was met in this case. The affidavit submitted by the District of Columbia police officer suggested that there was a continuing traffic of drugs from petitioner's apartment, and a prior purchase through an informer had confirmed that drugs were available. This was sufficient to satisfy 21 U. S. C. § 879 (a). The judgment of the Court of Appeals for the District of Columbia Circuit is

Affirmed.

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[42] We note that the Court of Appeals for the Fifth Circuit has recently reached the same conclusion. See *United States* v. *Thomas*, 489 F. 2d 664 (1973).

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

The petitioner is charged with possession of heroin and narcotics paraphernalia in violation of 21 U. S. C. § 174 (1964 ed.) and 26 U. S. C. § 4704 (a) (1964 ed.). He moved the District Court to suppress certain evidence seized from his home pursuant to a search warrant secured by and directed to the Metropolitan Police Department of the District of Columbia. The District Court granted the suppression motion on the ground that the search was conducted at night in violation of D. C. Code §§ 23–521–523 (1973) which limit search warrant execution to daylight hours absent specific contrary authorization founded upon the judicial officer's determination

> "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 . . . ." D. C. Code § 23–522 (c)(1).[1]

Though the warrant here directed a search "at any time in the day or night," none of the grounds set forth in § 23–522 (c)(1) were contained in either the application or the warrant itself. The police obtained the warrant on February 11, 1971, but they failed to execute it during the day of February 12, waiting instead until 9:30 p. m. on that date. Since they delayed execution until well after the daylight hours had ended,

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[1] D. C. Code § 23–523 (b) directs that all search warrants are to be executed only during daylight hours, absent express authorization pursuant to D. C. Code § 23–521 (f). Section 23–521 (f)(5) allows authorization for nighttime execution where the "judicial officer has found cause therefor, including one of the grounds set forth in section 23–522 (c)(1) . . . ."

the seizure was invalid if governed by D. C. Code §§ 23–521 to 23–523.

The Court holds, however, that the D. C. Code provisions are inapplicable and that the search is governed by 21 U. S. C. § 879 (a). That section became effective October 27, 1970, as part of the Controlled Substances Act, 84 Stat. 1242, 21 U. S. C. § 801 *et seq.;* it relates to search warrants issued in connection with offenses involving controlled substances. The D. C. Code provisions, however, became effective February 11, 1971, as part of the District of Columbia Court Reform and Criminal Procedure Act. The latter Act did not distinguish between local and federal prosecutions in its procedural innovations.[2] The purpose of the restriction upon nighttime searches was to limit such intrusions to those instances where there is "some justification for it," [3] thus implementing the "policy generally disfavoring nighttime executions, nighttime intrusions, more characteristic of a 'police state' lacking in the respect for due process and the right of privacy dictated by the U. S. Constitution and history . . . ." [4]

Approximately 60% of the search warrants issued in the District of Columbia relate to narcotics violations. Congress was aware of this, and, if it had intended to except federal narcotics search warrants from the protections against unnecessary nighttime "police state" searches, one would expect an expression of such intent. I agree with Judge Gesell that no such intent is indicated.

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[2] Thus various rules are applicable in the United States District Court for the District of Columbia which are not applicable in district courts elsewhere in the country. See, *e. g.*, D. C. Code § 23–1322, dealing with detention prior to trial.

[3] Hearings on Crime in the National Capital before the Senate Committee on the District of Columbia, 91st Cong., 1st Sess., pt. 4, p. 1404 (1969).

[4] S. Rep. No. 91–538, p. 12 (1969).

Thus, "[w]hatever be the standards generally for issuance of a nighttime search warrant in federal narcotics cases in other parts of the country . . . the existence of 21 U. S. C. § 879 (a) does not remove such cases from the explicit requirements for search warrants in the District of Columbia under the newly enacted Title 23, D. C. Code." 328 F. Supp. 1005, 1007. I would reverse the Court of Appeals and sustain the District Court's suppression order.

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

I agree with my Brother DOUGLAS that the provisions of the District of Columbia Code requiring a showing of need for execution of a search warrant at night govern the search involved in this case, and, accordingly, I join in his dissenting opinion. A majority of the Court, however, rejects this argument and goes on to discuss the standards imposed by 21 U. S. C. § 879 (a) upon issuance of search warrants for nighttime execution in federal narcotics cases. Obviously, the Court's interpretation of § 879 (a) is of far greater significance, of national rather than purely local concern. I cannot let the Court's construction of § 879 (a) pass without registering my dissent on this issue as well.

The opinion of the Court, it seems to me, analyzes the § 879 (a) issue in a vacuum, without any discussion of some of the important policy considerations which underlie this question of statutory interpretation. Perhaps a partial vacuum would be a more appropriate description, since the Court is obviously fully cognizant of the substantial governmental interest in enforcement of the narcotics laws, an interest which its interpretation of § 879 (a) so well serves. But plainly there are other concerns implicated in our interpretation of this con-

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gressional enactment restricting the issuance of search warrants—the protection of individual privacy which is the very purpose of the statute's search warrant requirement and which of course is given constitutional recognition in the Fourth Amendment. The Court seems totally oblivious to these constitutional considerations. Taking them into account, I find that the only acceptable interpretation of the statute is one which requires some additional justification for authorizing a nighttime search over and above the ordinary showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found upon the search.

Fundamentally at issue in this case is the extent of the protection which we will all enjoy from police intrusion into the privacy of our homes during the middle of the night. The Fourth Amendment was intended to protect our reasonable expectations of privacy from unjustified governmental intrusion. *Katz* v. *United States,* 389 U. S. 347, 360–362 (1967) (Harlan, J., concurring). In my view, there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night. The idea of the police unnecessarily forcing their way into the home in the middle of the night—frequently, in narcotics cases, without knocking and announcing their purpose—rousing the residents out of their beds, and forcing them to stand by in indignity in their night clothes while the police rummage through their belongings does indeed smack of a " 'police state' lacking in the respect for . . . the right of privacy dictated by the U. S. Constitution." S. Rep. No. 91–538, p. 12 (1969). The public outrage at the series of mistaken nighttime raids by narcotics agents in Collinsville, Illinois, last

April, see N. Y. Times, Apr. 29, 1973, p. 1, col. 5; N. Y. Times, Apr. 30, 1973, p. 30, col. 1, serves to emphasize just how inconsistent with our constitutional guarantees such nighttime searches are.

This Court has consistently recognized that the intrusion upon privacy engendered by a search of a residence at night is of an order of magnitude greater than that produced by an ordinary search. Mr. Justice Harlan observed in holding a nighttime search unconstitutional in *Jones* v. *United States,* 357 U. S. 493, 498 (1958): "[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home." In *Coolidge* v. *New Hampshire,* 403 U. S. 443, 477 (1971), the Court again recognized that a midnight entry into a home was an "extremely serious intrusion." And our decision in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), was in large part based upon our revulsion at the thought of nighttime searches of the marital bedroom to discover evidence of illegal contraceptive use. See *id.,* at 485–486.

It is small wonder, then, that Congress has consistently required more stringent justification for nighttime searches than that needed to authorize a search during the day. The first congressional enactment setting out comprehensive search warrant procedures, § 10 of Tit. XI of the Espionage Act of 1917, 40 Stat. 217, 229, 18 U. S. C. § 620 (1940 ed.), required that the affiant must be "positive" that the property to be seized was on the premises to justify a nighttime search. When the provisions of the Espionage Act were replaced by the Federal Rules of Criminal Procedure in 1946, this requirement of positivity was carried forward in Rule 41. Despite the stringency of this requirement, it remained with us until very recently, until the 1972 amendments to Rule 41. And although the Rule was then modified to require

"reasonable cause" for nighttime execution of a warrant, significantly the amended Rule retained the principle that nighttime searches require an additional showing of justification over and above probable cause. Congress has also manifested its concern for protection of individual privacy against nighttime searches in its legislation for the District of Columbia, as MR. JUSTICE DOUGLAS' opinion amply demonstrates with respect to enactment of the D. C. Court Reform and Criminal Procedure Act in 1970. *Ante,* at 460.[1]

The strong policy underlying these congressional enactments is clear. As even the Government in this case concedes, "searches conducted in the middle of the night . . . involve a greater intrusion than ordinary searches and therefore require a greater justification." Brief for United States 14. In my view, this principle may well be a constitutional imperative. It is by now established Fourth Amendment doctrine that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches. In *Camara* v. *Municipal Court,* 387 U. S. 523 (1967), after holding that search warrants were required to authorize administrative inspections, we held that the quantum of probable cause required for issuance of an inspection warrant must be determined in part by the reasonableness of the proposed search. As MR. JUSTICE WHITE stated, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.,* at 536–537. The Court in *Camara* thus approved the issu-

[1] Similarly, most of the States' laws provide that search warrants may only be served during the day unless express authorization for a nighttime search is obtained, and such authorization can generally be obtained only by meeting special requirements for a nighttime search. See L. Hall, Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 259 (3d ed. 1969).

ance of area inspection warrants in part because such searches "involve a relatively limited invasion of the urban citizen's privacy." *Id.*, at 537. See also *Terry* v. *Ohio,* 392 U. S. 1, 20–21 (1968); *Couch* v. *United States,* 409 U. S. 322, 349 n. 6 (1973) (MARSHALL, J., dissenting). I do not regard this principle as a one-way street, to be used only to water down the requirement of probable cause when necessary to authorize governmental intrusions. In some situations—and the search of a private home during nighttime would seem to be a paradigm—this principle requires a showing of additional justification for a search over and above the ordinary showing of probable cause. Cf. *Stanford* v. *Texas,* 379 U. S. 476, 485–486 (1965).

Of course, this constitutional question is not presented in this case and need not be resolved here. But the long history of congressional authorization of nighttime searches only upon a showing of additional justification, the strong constitutionally based policy which these statutes implement, and the substantial constitutional question posed by the majority's interpretation of § 879 (a) are surely relevant to the question of statutory interpretation with which we are faced. Viewed against this background, I think it is plain that the majority's interpretation of the statute should be rejected.

Section 879 (a) provides that search warrants may be executed at night only if "there is probable cause to believe that grounds exist for the warrant and for its service at such time." It seems to me quite clear that the statute, on its face, imposes two distinct requirements: that there be probable cause for the issuance of the warrant, and that there be cause "for its service at such time." While the Court relies on legislative history which suggests that § 879 (a) merely "incorporates" the provisions of its predecessor, 18 U. S. C. § 1405 (1964 ed.), the plain

fact is that § 879 (a) does far more than this: it also adds to the language of § 1405 the final clause—"and for its service at such time"—which is at the heart of the dispute in this case. I can see no plausible interpretation of this final clause other than that it imposes an additional requirement of justification for a search at night over and above a showing of probable cause.

The Court, while conceding this to be a "possible" meaning of the statute's final clause, argues that "it is by no means the only possible meaning attributable to the words." *Ante,* at 455. Unfortunately, the Court then fails to come forward with any alternative interpretation of these final words of § 879 (a). Instead, the Court simply reads the disputed language out of the statute entirely, and decrees that the statute shall be interpreted as if it were not there. The Court holds that the statute requires only "a showing that the contraband is likely to be on the property or person to be searched at that time" to justify nighttime execution of a search warrant. *Ante,* at 458. But the showing of probable cause required for issuance of any warrant necessarily includes a showing that the objects to be seized will probably be found on the premises at the time of the search. See *Sgro* v. *United States,* 287 U. S. 206, 210–211 (1932); *Schoeneman* v. *United States,* 115 U. S. App. D. C. 110, 113, 317 F. 2d 173, 176–177 (1963); *Rosencranz* v. *United States,* 356 F. 2d 310, 315–318 (CA1 1966). This requirement is clearly imposed by the Fourth Amendment itself. It is also clearly mandated by the first part of the statutory language, which merely incorporates the constitutional requirement of probable cause for issuance of the warrant. The majority's interpretation of the statute thus leaves the final clause of § 879 (a)—the language in controversy here—totally without meaning. See *United States* v. *Thomas,* 294 A. 2d 164, 170 (DC Ct. App.)

(Kelly, J., dissenting), cert. denied, 409 U. S. 992 (1972); *United States* v. *Gooding,* 155 U. S. App. D. C. 259, 273, 477 F. 2d 428, 442 (1973) (Robinson, J., concurring in result). I cannot subscribe to such an evisceration of the statute.[2]

[2] In an effort to conjure up ambiguity in the statutory language, the Court argues that the statute could have been drawn with more precision, and specifically points out that read literally, the statutory requirement of cause "for its service at such time" would seem to apply to daytime searches as well as those conducted at night. *Ante,* at 455–456. I readily agree that the statute could have been more artfully drafted, but the fact that it could have been stated in different words hardly justifies disregarding the plain meaning of the statutory language with which we must deal. It ill suits the Court to suggest that this language is ambiguous when the Court is unable to come forward with any plausible alternative construction.

The Court's suggestion that the statute is ambiguous because it could be literally applied to daytime searches as well as those during the night is wholly insubstantial. As the Court well knows, no one has ever proposed that an additional burden of justification for daytime searches is necessary or appropriate; in sharp contrast, the Congress has consistently acted to protect nighttime privacy through such an additional burden on nighttime searches. The Court's confusion arises only because the words "at such time" in the statute logically refer back to its authorization of service "at any time of the day or night." But this latter phrase has consistently been used in congressional enactments as a shorthand expression for a warrant whose service at night is authorized, see, *e. g.,* D. C. Code § 33–414 (h), *ante,* at 433 n. 3; §§ 23–521 (f)(5), 23–522 (c)(1), *ante,* at 435–436, n. 4; cf. former Fed. Rule Crim. Proc. 41 (c), *ante,* at 436–437, n. 5, to distinguish such a warrant from any other warrant, which may be served only in the day. Plainly the statute's requirement of cause "for its service at such time" was intended to apply only to nighttime execution of search warrants.

As for the Court's complaint that a requirement of cause for nighttime service of a warrant is not the "traditional limitation" imposed upon nighttime searches, it should suffice to point out that Congress became aware in its consideration of the D. C. Court Reform and Criminal Procedure Act in 1969 that a requirement of cause would provide *greater* protection for nighttime privacy than the old posi-

The Court bases its holding upon the meager recorded legislative history of § 879 (a). But when the language of a statute is as clear and unambiguous as it is here, it is neither helpful nor appropriate to look to its legislative history. *Ex parte Collett,* 337 U. S. 55, 61 (1949); *United States* v. *Oregon,* 366 U. S. 643, 648 (1961). While committee reports in particular are often a helpful guide to the meaning of ambiguous statutory language, even they must be disregarded if inconsistent with the plain language of the statute. *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, 89 (1935); *George Van Camp & Sons Co.* v. *American Can Co.,* 278 U. S. 245, 253–254 (1929). It is the language of the statute, as enacted by the Congress, that is the law of the land, not the language of a committee report which may or may not represent accurately the views of the hundreds of other legislators who voted for the bill.

In any event, even if resort to examination of the legislative history were appropriate here, I do not find it nearly so conclusive as does the majority of the Court. The Court relies on a single brief statement on § 879 (a) in the committee report stating that the statute merely incorporated the provisions of § 1405, which had been construed not to impose any requirement for a nighttime search warrant over and above probable cause. Yet this statement fails to provide any explanation for the language which Congress added to § 1405, the language

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tivity test, by eliminating unnecessary nighttime searches regardless of how sure police were of their basis for the search. See Hearings on Crime in the National Capital before the Senate Committee on the District of Columbia, 91st Cong., 1st Sess., pt. 4, p. 1404 (1969); Brief for United States 49–50. This change was therefore incorporated into the D. C. Code, see D. C. Code §§ 23–521 to 23–523. It was also adopted in the 1972 amendment to Rule 41. It would hardly be surprising for the Congress to introduce a modification along the same lines into § 879 (a).

in controversy here. As to the meaning—or, as the Court would have it, the lack of meaning—of this language, the Court relies basically upon the law enforcement goals of the Department of Justice and the silence of Congress. But, as we have frequently warned, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States,* 328 U. S. 61, 69 (1946); see H. M. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1395–1398 (tent. ed. 1958), and cases there cited. The Court in effect presumes from Congress' failure to explain the meaning of the final clause of § 879 (a) its acquiescence in the Justice Department's apparent view that this language in fact serves no purpose.

I would presume the contrary. Congress' consistent protection of nighttime privacy by imposing restrictions upon the availability of warrants for nighttime searches reinforces the unambiguous statutory language. Both lead me to the conclusion that the final clause of § 879 (a) must be viewed as another congressional manifestation of its strong policy against nighttime intrusions into the home. I do not think that this interpretation is at all inconsistent with the narcotics law-enforcement objectives which were the principal focus of this legislation. The requirement that cause be shown for the necessity of a nighttime search is still a substantial easing of the requirement of positivity which was then embodied in Rule 41, and which would otherwise have applied to many of the searches now covered by § 879 (a). I respectfully dissent.

KEWANEE OIL CO. *v.* BICRON CORP. ET AL.

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

No. 73–187. Argued January 9, 1974—Decided May 13, 1974

Harshaw Chemical Co., an unincorporated division of petitioner, over a period of years developed certain processes in the growth and encapsulation of synthetic crystals and purification of raw materials, some of which processes were considered to be trade secrets; it eventually succeeded for the first time in growing a 17-inch crystal of a type useful in the detection of ionizing radiation. The individual respondents, former employees of Harshaw who while working there had signed agreements not to disclose trade secrets obtained as employees, formed or later joined respondent Bicron Corp., which competed with Harshaw in producing crystals; Bicron, soon after its formation, also grew a 17-inch crystal. Petitioner brought this diversity action seeking injunctive relief and damages for misappropriation of trade secrets. The District Court, applying Ohio trade secret law, granted a permanent injunction. The Court of Appeals reversed on the ground that Ohio's trade secret law conflicted with the federal patent laws. *Held:* Ohio's trade secret law is not pre-empted by the federal patent laws. Pp. 474–493.

(a) The States are not forbidden to protect the kinds of intellectual property that may make up the subject matter of trade secrets; just as the States may exercise regulatory power over writings, *Goldstein* v. *California*, 412 U. S. 546, so may they regulate with respect to discoveries, the only limitation being that regulation in the area of patents and copyrights must not conflict with the operation of federal laws in this area. Pp. 478–479.

(b) Abolition of trade secret protection would not result in increased disclosure to the public of discoveries in the area of nonpatentable subject matter, and the public would not be benefited by disclosure of such discoveries. Pp. 482–483.

(c) The federal patent policy of encouraging invention is not disturbed by the existence of another form of incentive to invention such as trade secret protection, and in this respect the two systems are not in conflict. P. 484.

(d) Nor is the patent policy that matter once in the public domain must remain there incompatible with the existence of trade secret protection. P. 484.

(e) Nor is there any conflict between trade secret law and the patent policy of disclosure whether a trade secret concerning patentable subject matter is in the category of discovery which is (1) clearly unpatentable, (2) doubtfully patentable, or (3) clearly patentable. As to the first category, the patent alternative is not available and trade secret law will encourage invention and prompt the innovator to proceed with the discovery and exploitation of his invention, and to license others to exploit secret processes. As to the second category, the risk and cost of eventual patent invalidity may impel the inventor not to seek patent protection regardless of the existence of trade secret law, and the encouragement by the elimination of trade secret protection of patent applications by some with doubtfully patentable inventions is likely to have a deleterious effect on society and patent policy. As to the third category, trade secret law, which affords weaker protection than the patent laws, presents no reasonable risk of deterrence from patent application. Pp. 484–491.

(f) There being no real possibility that trade secret law will conflict with federal patent policy, partial pre-emption as to clearly patentable inventions would not be appropriate and could well unnecessarily burden administration of trade secret law by States. Pp. 491–492.

478 F. 2d 1074, reversed and remanded for reinstatement of District Court Judgment.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the result, *post*, p. 493. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 495. POWELL, J., took no part in the decision of the case.

Erwin N. Griswold argued the cause for petitioner. With him on the brief were *Robert J. Hoerner, Barry L. Springel, Edward P. Troxell, Robert P. Mooney,* and *James A. Lucas.*

William C. McCoy, Jr., argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Bork* and *Edmund W. Kitch* for the United States; by *Donald W. Banner, Thomas F. McWilliams, John C. Dorfman,* and

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

We granted certiorari to resolve a question on which there is a conflict in the courts of appeals: whether state trade secret protection is pre-empted by operation of the federal patent law.[1] In the instant case the Court of Appeals for the Sixth Circuit held that there was pre-emption.[2] The Courts of Appeals for the Second, Fourth, Fifth, and Ninth Circuits have reached the opposite conclusion.[3]

Chesterfield Smith for the American Bar Assn.; by *Austin F. Canfield, Jr.*, *Maurice H. Klitzman*, *Francis C. Browne*, *Donald R. Dunner*, and *John T. Roberts* for the Bar Association of the District of Columbia; by *Walter A. Porter* and *Bruce Tittel* for the Ohio State Bar Assn.; by *Milton A. Smith*, *Marcus B. Finnegan*, *Douglas B. Henderson*, and *Kenneth E. Payne* for the Chamber of Commerce of the United States; by *John T. Kelton* and *George E. Frost* for the American Patent Law Assn.; by *Charles W. Bradley*, *Thomas P. Dowling*, *Edward Halle*, and *Willard R. Sprowls* for the New York Patent Law Assn.; by *Karl W. Flocks* and *Paul L. Gomory* for the Association for the Advancement of Invention & Innovation; by *Tom Arnold* and *Bill Durkee* for the Licensing Executives Society; by *Jeremiah D. Lambert* and *Robert J. DeGiacomo* for the Electronic Industries Assn.; by *Marx Leva*, *Lloyd Symington*, and *John S. Hoff* for the Manufacturing Chemists Assn.; by *Herman Foster* and *Edward M. Farrell* for Budd Co.; by *James M. Clabault*, *Edward G. Fiorito*, and *Edward F. Langs* for Burroughs Corp.; by *Harold C. Hohbach* and *David J. Brezner* for Optical Coating Laboratory, Inc.; by *Irving M. Tullar* and *Grover M. Myers* for R. J. Reynolds Industries, Inc.; by *Patrick J. Schlesinger* for Rohr Industries, Inc.; and by *Van C. Wilks* for Southwire Co.

Briefs of *amici curiae* urging affirmance were filed by *Eric P. Schellin* for National Patent Council, Inc., et al., and by *Mary Helen Sears* and *Edward S. Irons* for SCM Corp.

[1] 414 U. S. 818 (1973).

[2] 478 F. 2d 1074 (1973).

[3] *Painton & Co.* v. *Bourns, Inc.*, 442 F. 2d 216 (CA2 1971); *Servo Corp. of America* v. *General Electric Co.*, 337 F. 2d 716 (CA4 1964), cert. denied, 383 U. S. 934 (1966); *Water Services, Inc.* v. *Tesco*

I

Harshaw Chemical Co., an unincorporated division of petitioner, is a leading manufacturer of a type of synthetic crystal which is useful in the detection of ionizing radiation. In 1949 Harshaw commenced research into the growth of this type crystal and was able to produce one less than two inches in diameter. By 1966, as the result of expenditures in excess of $1 million, Harshaw was able to grow a 17-inch crystal, something no one else had done previously. Harshaw had developed many processes, procedures, and manufacturing techniques in the purification of raw materials and the growth and encapsulation of the crystals which enabled it to accomplish this feat. Some of these processes Harshaw considers to be trade secrets.

The individual respondents are former employees of Harshaw who formed or later joined respondent Bicron. While at Harshaw the individual respondents executed, as a condition of employment, at least one agreement each, requiring them not to disclose confidential information or trade secrets obtained as employees of Harshaw. Bicron was formed in August 1969 to compete with Harshaw in the production of the crystals, and by April 1970, had grown a 17-inch crystal.

Petitioner brought this diversity action in United States District Court for the Northern District of Ohio seeking injunctive relief and damages for the misappropriation of trade secrets. The District Court, applying Ohio trade secret law, granted a permanent injunction against the disclosure or use by respondents of 20 of the 40 claimed trade secrets until such time as the trade secrets had

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Chemicals, Inc., 410 F. 2d 163 (CA5 1969); *Winston Research Corp.* v. *Minnesota Mining & Mfg. Co.*, 350 F. 2d 134 (CA9 1965); *Dekar Industries, Inc.* v. *Bissett-Berman Corp.*, 434 F. 2d 1304 (CA9 1970), cert. denied, 402 U. S. 945 (1971).

been released to the public, had otherwise generally become available to the public, or had been obtained by respondents from sources having the legal right to convey the information.

The Court of Appeals for the Sixth Circuit held that the findings of fact by the District Court were not clearly erroneous, and that it was evident from the record that the individual respondents appropriated to the benefit of Bicron secret information on processes obtained while they were employees at Harshaw. Further, the Court of Appeals held that the District Court properly applied Ohio law relating to trade secrets. Nevertheless, the Court of Appeals reversed the District Court, finding Ohio's trade secret law to be in conflict with the patent laws of the United States. The Court of Appeals reasoned that Ohio could not grant monopoly protection to processes and manufacturing techniques that were appropriate subjects for consideration under 35 U. S. C. § 101 for a federal patent but which had been in commercial use for over one year and so were no longer eligible for patent protection under 35 U. S. C. § 102 (b).

We hold that Ohio's law of trade secrets is not preempted by the patent laws of the United States, and, accordingly, we reverse.

II

Ohio has adopted the widely relied-upon definition of a trade secret found at Restatement of Torts § 757, comment *b* (1939). *B. F. Goodrich Co.* v. *Wohlgemuth,* 117 Ohio App. 493, 498, 192 N. E. 2d 99, 104 (1963); *W. R. Grace & Co.* v. *Hargadine,* 392 F. 2d 9, 14 (CA6 1968). According to the Restatement,

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not

> know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers."

The subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business. *B. F. Goodrich Co.* v. *Wohlgemuth, supra,* at 499, 192 N. E. 2d, at 104; *National Tube Co.* v. *Eastern Tube Co.,* 3 Ohio C. C. R. (n. s.) 459, 462 (1902), aff'd, 69 Ohio St. 560, 70 N. E. 1127 (1903). This necessary element of secrecy is not lost, however, if the holder of the trade secret reveals the trade secret to another "in confidence, and under an implied obligation not to use or disclose it." *Cincinnati Bell Foundry Co.* v. *Dodds,* 10 Ohio Dec. Reprint 154, 156, 19 Weekly L. Bull. 84 (Super. Ct. 1887). These others may include those of the holder's "employees to whom it is necessary to confide it, in order to apply it to the uses for which it is intended." *National Tube Co.* v. *Eastern Tube Co., supra,* at 462. Often the recipient of confidential knowledge of the subject of a trade secret is a licensee of its holder. See *Lear, Inc.* v. *Adkins,* 395 U. S. 653 (1969).

The protection accorded the trade secret holder is against the disclosure or unauthorized use of the trade secret by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse.[4] The law also protects the holder of a trade

[4] Ohio Rev. Code Ann. § 1333.51 (C) (Supp. 1973) provides:

"No person, having obtained possession of an article representing a trade secret or access thereto with the owner's consent, shall convert such article to his own use or that of another person, or thereafter without the owner's consent make or cause to be made a copy of such article, or exhibit such article to another."

Ohio Rev. Code Ann. § 1333.99 (E) (Supp. 1973) provides:

"Whoever violates section 1333.51 of the Revised Code shall be

secret against disclosure or use when the knowledge is gained, not by the owner's volition, but by some "improper means," Restatement of Torts § 757 (a), which may include theft, wiretapping, or even aerial reconnaissance.[5] A trade secret law, however, does not offer protection against discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering, that is by starting with the known product and working backward to divine the process which aided in its development or manufacture.[6]

Novelty, in the patent law sense, is not required for a trade secret, *W. R. Grace & Co.* v. *Hargadine,* 392 F. 2d, at 14. "Quite clearly discovery is something less than invention." *A. O. Smith Corp.* v. *Petroleum Iron Works Co.,* 73 F. 2d 531, 538 (CA6 1934), modified to increase scope of injunction, 74 F. 2d 934 (1935). However, some novelty will be required if merely because that which does not possess novelty is usually known; secrecy, in the context of trade secrets, thus implies at least minimal novelty.[7]

The subject matter of a patent is limited to a "process, machine, manufacture, or composition of matter, or . . . improvement thereof," 35 U. S. C. § 101, which fulfills the three conditions of novelty and utility as articulated and defined in 35 U. S. C. §§ 101 and 102, and nonobvi-

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fined not more than five thousand dollars, imprisoned not less than one nor more than ten years, or both."

[5] *E. I. duPont deNemours & Co.* v. *Christopher,* 431 F. 2d 1012 (CA5 1970), cert. denied, 400 U. S. 1024 (1971). See generally Comment, Theft of Trade Secrets: The Need for a Statutory Solution, 120 U. Pa. L. Rev. 378 (1971).

[6] *National Tube Co.* v. *Eastern Tube Co.,* 3 Ohio C. C. R. (n. s.) 459, 462 (1902), aff'd, 69 Ohio St. 560, 70 N. E. 1127 (1903).

[7] See Comment, The *Stiffel* Doctrine and the Law of Trade Secrets, 62 Nw. U. L. Rev. 956, 969 (1968).

ousness, as set out in 35 U. S. C. § 103.[8] If an invention meets the rigorous statutory tests for the issuance of a patent, the patent is granted, for a period of 17

[8] "§ 101. *Inventions patentable*

"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.

"§ 102. *Conditions for patentability; novelty and loss of right to patent*

"A person shall be entitled to a patent unless—

"(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

"(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

"(c) he has abandoned the invention, or

"(d) the invention was first patented or caused to be patented, or was the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States, or

"(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

"(f) he did not himself invent the subject matter sought to be patented, or

"(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

"§ 103. *Conditions for patentability; non-obvious subject matter*

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this

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years, giving what has been described as the "right of exclusion," R. Ellis, Patent Assignments and Licenses § 4, p. 7 (2d ed. 1943).[9] This protection goes not only to copying the subject matter, which is forbidden under the Copyright Act, 17 U. S. C. § 1 *et seq.*, but also to independent creation.

III

The first issue we deal with is whether the States are forbidden to act at all in the area of protection of the kinds of intellectual property which may make up the subject matter of trade secrets.

Article I, § 8, cl. 8, of the Constitution grants to the Congress the power

> "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

In the 1972 Term, in *Goldstein* v. *California,* 412 U. S. 546 (1973), we held that the cl. 8 grant of power to Congress was not exclusive and that, at least in the case of writings, the States were not prohibited from encouraging and protecting the efforts of those within their borders by

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title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

[9] Title 35 U. S. C. § 154 provides:

"Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, subject to the payment of issue fees as provided for in this title, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof."

appropriate legislation. The States could, therefore, protect against the unauthorized rerecording for sale of performances fixed on records or tapes, even though those performances qualified as "writings" in the constitutional sense and Congress was empowered to legislate regarding such performances and could pre-empt the area if it chose to do so. This determination was premised on the great diversity of interests in our Nation—the essentially nonuniform character of the appreciation of intellectual achievements in the various States. Evidence for this came from patents granted by the States in the 18th century. 412 U. S., at 557.

Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress, and it is to that more difficult question we now turn.

IV

The question of whether the trade secret law of Ohio is void under the Supremacy Clause involves a consideration of whether that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). See *Florida Avocado Growers* v. *Paul,* 373 U. S. 132, 141 (1963). We stated in *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U. S. 225, 229 (1964), that when state law touches upon the area of federal statutes enacted pursuant to constitutional authority, "it is 'familiar doctrine' that the federal policy

'may not be set at naught, or its benefits denied' by the state law. *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173, 176 (1942). This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power."

The laws which the Court of Appeals in this case held to be in conflict with the Ohio law of trade secrets were the patent laws passed by the Congress in the unchallenged exercise of its clear power under Art. I, § 8, cl. 8, of the Constitution. The patent law does not explicitly endorse or forbid the operation of trade secret law. However, as we have noted, if the scheme of protection developed by Ohio respecting trade secrets "clashes with the objectives of the federal patent laws," *Sears, Roebuck & Co.* v. *Stiffel Co., supra,* at 231, then the state law must fall. To determine whether the Ohio law "clashes" with the federal law it is helpful to examine the objectives of both the patent and trade secret laws.

The stated objective of the Constitution in granting the power to Congress to legislate in the area of intellectual property is to "promote the Progress of Science and useful Arts." The patent laws promote this progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens. In return for the right of exclusion—this "reward for inventions," *Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471, 484 (1944)—the patent laws impose upon the inventor a requirement of disclosure. To insure adequate and full disclosure so that upon the

expiration of the 17-year period "the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use," *United States* v. *Dubilier Condenser Corp.,* 289 U. S. 178, 187 (1933), the patent laws require [10] that the patent application shall include a full and clear description of the invention and "of the manner and process of making and using it" so that any person skilled in the art may make and use the invention. 35 U. S. C. § 112. When a patent is granted and the information contained in it is circulated to the general public and those especially skilled in the trade, such additions to the general store of knowledge are of such importance to the public weal that the Federal Government is willing to pay the high price of 17 years of exclusive use for its disclosure, which disclosure, it is assumed, will stimulate ideas and the eventual development of further significant advances in the art. The Court has also articulated another policy of the patent law: that which is in the public domain cannot be removed therefrom by action of the States.

> "[F]ederal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent." *Lear, Inc.* v. *Adkins,* 395 U. S., at 668.

See also *Goldstein* v. *California,* 412 U. S., at 570–571; *Sears, Roebuck & Co.* v. *Stiffel Co., supra; Compco Corp.* v. *Day-Brite Lighting, Inc.,* 376 U. S. 234, 237–238 (1964); *International News Service* v. *Associated Press,* 248 U. S. 215, 250 (1918) (Brandeis, J., dissenting).

The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law. "The necessity of good faith and honest, fair dealing, is the very life

[10] 35 U. S. C. § 111.

and spirit of the commercial world." *National Tube Co.* v. *Eastern Tube Co.*, 3 Ohio C. C. R. (n. s.), at 462.[11] In *A. O. Smith Corp.* v. *Petroleum Iron Works Co.*, 73 F. 2d, at 539, the Court emphasized that even though a discovery may not be patentable, that does not

> "destroy the value of the discovery to one who makes it, or advantage the competitor who by unfair means, or as the beneficiary of a broken faith, obtains the desired knowledge without himself paying the price in labor, money, or machines expended by the discoverer."

In *Wexler* v. *Greenberg*, 399 Pa. 569, 578–579, 160 A. 2d 430, 434–435 (1960), the Pennsylvania Supreme Court noted the importance of trade secret protection to the subsidization of research and development and to increased economic efficiency within large companies through the dispersion of responsibilities for creative developments.[12]

Having now in mind the objectives of both the patent and trade secret law, we turn to an examination of the interaction of these systems of protection of intellectual property—one established by the Congress and the other by a State—to determine whether and under what circumstances the latter might constitute "too great an encroachment on the federal patent system to be tolerated." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S., at 232.

As we noted earlier, trade secret law protects items which would not be proper subjects for consideration for patent protection under 35 U. S. C. § 101. As in the

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[11] See also *Winston Research Corp.* v. *Minnesota Mining & Mfg. Co.*, 350 F. 2d, at 138.

[12] See also *Water Services, Inc.* v. *Tesco Chemicals, Inc.*, 410 F. 2d, at 171.

case of the recordings in *Goldstein* v. *California,* Congress, with respect to nonpatentable subject matter, "has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act." *Goldstein* v. *California, supra,* at 570 (footnote omitted).

Since no patent is available for a discovery, however useful, novel, and nonobvious, unless it falls within one of the express categories of patentable subject matter of 35 U. S. C. § 101, the holder of such a discovery would have no reason to apply for a patent whether trade secret protection existed or not. Abolition of trade secret protection would, therefore, not result in increased disclosure to the public of discoveries in the area of nonpatentable subject matter. Also, it is hard to see how the public would be benefited by disclosure of customer lists or advertising campaigns; in fact, keeping such items secret encourages businesses to initiate new and individualized plans of operation, and constructive competition results. This, in turn, leads to a greater variety of business methods than would otherwise be the case if privately developed marketing and other data were passed illicitly among firms involved in the same enterprise.

Congress has spoken in the area of those discoveries which fall within one of the categories of patentable subject matter of 35 U. S. C. § 101 and which are, therefore, of a nature that would be subject to consideration for a patent. Processes, machines, manufactures, compositions of matter, and improvements thereof, which meet the tests of utility, novelty, and nonobviousness are entitled to be patented, but those which do not, are not. The question remains whether those items which are proper subjects for consideration for a patent may also have available the alternative protection accorded by trade secret law.

Certainly the patent policy of encouraging invention is not disturbed by the existence of another form of incentive to invention. In this respect the two systems are not and never would be in conflict. Similarly, the policy that matter once in the public domain must remain in the public domain is not incompatible with the existence of trade secret protection. By definition a trade secret has not been placed in the public domain.[13]

The more difficult objective of the patent law to reconcile with trade secret law is that of disclosure, the *quid pro quo* of the right to exclude. *Universal Oil Co.* v. *Globe Co.*, 322 U. S., at 484. We are helped in this stage of the analysis by Judge Henry Friendly's opinion in *Painton & Co.* v. *Bourns, Inc.*, 442 F. 2d 216 (CA2 1971). There the Court of Appeals thought it useful, in determining whether inventors will refrain because of the existence of trade secret law from applying for patents, thereby depriving the public from learning of the invention, to distinguish between three categories of trade secrets:

> "(1) the trade secret believed by its owner to constitute a validly patentable invention; (2) the trade secret known to its owner not to be so patentable; and (3) the trade secret whose valid patentability is considered dubious." *Id.*, at 224.

Trade secret protection in each of these categories would run against breaches of confidence—the employee and licensee situations—and theft and other forms of industrial espionage.

As to the trade secret known not to meet the standards

[13] An invention may be placed "in public use or on sale" within the meaning of 35 U. S. C. § 102 (b) without losing its secret character. *Painton & Co.* v. *Bourns, Inc.*, 442 F. 2d, at 224 n. 6; *Metallizing Engineering Co.* v. *Kenyon Bearing & Auto Parts Co.*, 153 F. 2d 516, 520 (CA2), cert. denied, 328 U. S. 840 (1946).

of patentability, very little in the way of disclosure would be accomplished by abolishing trade secret protection. With trade secrets of nonpatentable subject matter, the patent alternative would not reasonably be available to the inventor. "There can be no public interest in stimulating developers of such [unpatentable] know-how to flood an overburdened Patent Office with applications [for] what they do not consider patentable." *Ibid.* The mere filing of applications doomed to be turned down by the Patent Office will bring forth no new public knowledge or enlightenment, since under federal statute and regulation patent applications and abandoned patent applications are held by the Patent Office in confidence and are not open to public inspection. 35 U. S. C. § 122; 37 CFR § 1.14 (b).

Even as the extension of trade secret protection to patentable subject matter that the owner knows will not meet the standards of patentability will not conflict with the patent policy of disclosure, it will have a decidedly beneficial effect on society. Trade secret law will encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered and the public is not deprived of the use of valuable, if not quite patentable, invention.[14]

Even if trade secret protection against the faithless employee were abolished, inventive and exploitive effort in the area of patentable subject matter that did not meet the standards of patentability would continue, although at a reduced level. Alternatively with the effort that remained, however, would come an increase in the amount of self-help that innovative companies

[14] Doerfer, The Limits on Trade Secret Law Imposed by Federal Patent and Antitrust Supremacy, 80 Harv. L. Rev. 1432, 1454 (1967).

would employ. Knowledge would be widely dispersed among the employees of those still active in research. Security precautions necessarily would be increased, and salaries and fringe benefits of those few officers or employees who had to know the whole of the secret invention would be fixed in an amount thought sufficient to assure their loyalty.[15] Smaller companies would be placed at a distinct economic disadvantage, since the costs of this kind of self-help could be great, and the cost to the public of the use of this invention would be increased. The innovative entrepreneur with limited resources would tend to confine his research efforts to himself and those few he felt he could trust without the ultimate assurance of legal protection against breaches of confidence. As a result, organized scientific and technological research could become fragmented, and society, as a whole, would suffer.

Another problem that would arise if state trade secret protection were precluded is in the area of licensing others to exploit secret processes. The holder of a trade secret would not likely share his secret with a manufacturer who cannot be placed under binding legal obligation to pay a license fee or to protect the secret. The result would be to hoard rather than disseminate knowledge. *Painton & Co.* v. *Bourns, Inc.*, 442 F. 2d, at 223. Instead, then, of licensing others to use his invention and making the most efficient use of existing manufacturing and marketing structures within the industry, the trade secret holder would tend either to limit his utilization of the invention, thereby depriving the public of the maximum benefit of its use, or engage in the time-consuming and economically wasteful enterprise of

[15] See generally Wydick, Trade Secrets: Federal Preemption in Light of Goldstein and Kewanee (Part II—Conclusion), 56 J. Pat. Off. Soc. 4, 23–24 (1974).

constructing duplicative manufacturing and marketing mechanisms for the exploitation of the invention. The detrimental misallocation of resources and economic waste that would thus take place if trade secret protection were abolished with respect to employees or licensees cannot be justified by reference to any policy that the federal patent law seeks to advance.

Nothing in the patent law requires that States refrain from action to prevent industrial espionage. In addition to the increased costs for protection from burglary, wiretapping, bribery, and the other means used to misappropriate trade secrets, there is the inevitable cost to the basic decency of society when one firm steals from another. A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable; [16] the state interest in denying profit to such illegal ventures is unchallengeable.

The next category of patentable subject matter to deal with is the invention whose holder has a legitimate doubt as to its patentability. The risk of eventual patent invalidity by the courts and the costs associated with that risk may well impel some with a good-faith doubt as to patentability not to take the trouble to seek to obtain and defend patent protection for their discoveries, regardless of the existence of trade secret protection. Trade secret protection would assist those inventors in the more efficient exploitation of their discoveries and not conflict with the patent law. In most cases of genuine doubt as to patent validity the potential rewards of patent protection are so far superior to those accruing to holders of trade secrets, that the holders of

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[16] Note, Patent Preemption of Trade Secret Protection of Inventions Meeting Judicial Standards of Patentability, 87 Harv. L. Rev. 807, 828 (1974).

such inventions will seek patent protection, ignoring the trade secret route. For those inventors "on the line" as to whether to seek patent protection, the abolition of trade secret protection might encourage some to apply for a patent who otherwise would not have done so. For some of those so encouraged, no patent will be granted and the result

> "will have been an unnecessary postponement in the divulging of the trade secret to persons willing to pay for it. If [the patent does issue], it may well be invalid, yet many will prefer to pay a modest royalty than to contest it, even though *Lear* allows them to accept a license and pursue the contest without paying royalties while the fight goes on. The result in such a case would be unjustified royalty payments from many who would prefer not to pay them rather than agreed fees from one or a few who are entirely willing to do so." *Painton & Co.* v. *Bourns, Inc.*, 442 F. 2d, at 225.

The point is that those who might be encouraged to file for patents by the absence of trade secret law will include inventors possessing the chaff as well as the wheat. Some of the chaff—the nonpatentable discoveries—will be thrown out by the Patent Office, but in the meantime society will have been deprived of use of those discoveries through trade secret-protected licensing. Some of the chaff may not be thrown out. This Court has noted the difference between the standards used by the Patent Office and the courts to determine patentability. *Graham* v. *John Deere Co.*, 383 U. S. 1, 18 (1966).[17] In *Lear, Inc.* v. *Adkins*, 395 U. S. 653 (1969), the Court thought that an invalid patent was so serious a threat to the free use of

[17] For a possible explanation see P. Areeda, Antitrust Analysis ¶ 406 (d), pp. 327–328 (1967).

ideas already in the public domain that the Court permitted licensees of the patent holder to challenge the validity of the patent. Better had the invalid patent never been issued. More of those patents would likely issue if trade secret law were abolished. Eliminating trade secret law for the doubtfully patentable invention is thus likely to have deleterious effects on society and patent policy which we cannot say are balanced out by the speculative gain which might result from the encouragement of some inventors with doubtfully patentable inventions which deserve patent protection to come forward and apply for patents. There is no conflict, then, between trade secret law and the patent law policy of disclosure, at least insofar as the first two categories of patentable subject matter are concerned.

The final category of patentable subject matter to deal with is the clearly patentable invention, *i. e.,* that invention which the owner believes to meet the standards of patentability. It is here that the federal interest in disclosure is at its peak; these inventions, novel, useful and nonobvious, are " 'the things which are worth to the public the embarrassment of an exclusive patent.' " *Graham* v. *John Deere Co., supra,* at 9 (quoting Thomas Jefferson). The interest of the public is that the bargain of 17 years of exclusive use in return for disclosure be accepted. If a State, through a system of protection, were to cause a substantial risk that holders of patentable inventions would not seek patents, but rather would rely on the state protection, we would be compelled to hold that such a system could not constitutionally continue to exist. In the case of trade secret law no reasonable risk of deterrence from patent application by those who can reasonably expect to be granted patents exists.

Trade secret law provides far weaker protection in

many respects than the patent law.[18] While trade secret law does not forbid the discovery of the trade secret by fair and honest means, *e. g.*, independent creation or reverse engineering, patent law operates "against the world," forbidding any use of the invention for whatever purpose for a significant length of time. The holder of a trade secret also takes a substantial risk that the secret will be passed on to his competitors, by theft or by breach of a confidential relationship, in a manner not easily susceptible of discovery or proof. *Painton & Co.* v. *Bourns, Inc.*, 442 F. 2d, at 224. Where patent law acts as a barrier, trade secret law functions relatively as a sieve. The possibility that an inventor who believes his invention meets the standards of patentability will sit back, rely on trade secret law, and after one year of use forfeit any right to patent protection, 35 U. S. C. § 102 (b), is remote indeed.

Nor does society face much risk that scientific or technological progress will be impeded by the rare inventor with a patentable invention who chooses trade secret protection over patent protection. The ripeness-of-time concept of invention, developed from the study of the many independent multiple discoveries in history, predicts that if a particular individual had not made a particular discovery others would have, and in probably a relatively short period of time. If something is to be discovered at all very likely it will be discovered by more than one person. Singletons and Multiples in Science (1961), in R. Merton, The Sociology of Science 343 (1973); J. Cole & S. Cole, Social Stratification in Science 12–13, 229–230 (1973); Ogburn & Thomas, Are Inventions Inevitable?, 37 Pol. Sci. Q. 83 (1922).[19] Even

[18] *Water Services, Inc.* v. *Tesco Chemicals, Inc.*, 410 F. 2d, at 172.

[19] See J. Watson, The Double Helix (1968). If Watson and Crick had not discovered the structure of DNA it is likely that Linus

were an inventor to keep his discovery completely to himself, something that neither the patent nor trade secret laws forbid, there is a high probability that it will be soon independently developed. If the invention, though still a trade secret, is put into public use, the competition is alerted to the existence of the inventor's solution to the problem and may be encouraged to make an extra effort to independently find the solution thus known to be possible. The inventor faces pressures not only from private industry, but from the skilled scientists who work in our universities and our other great publicly supported centers of learning and research.

We conclude that the extension of trade secret protection to clearly patentable inventions does not conflict with the patent policy of disclosure. Perhaps because trade secret law does not produce any positive effects in the area of clearly patentable inventions, as opposed to the beneficial effects resulting from trade secret protection in the areas of the doubtfully patentable and the clearly unpatentable inventions, it has been suggested that partial pre-emption may be appropriate, and that courts should refuse to apply trade secret protection to inventions which the holder should have patented, and which would have been, thereby, disclosed.[20] However, since there is no real possibility that trade secret law will conflict with the federal policy favoring disclosure of clearly patentable inventions partial pre-emption is inappropri-

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Pauling would have made the discovery soon. Other examples of multiple discovery are listed at length in the Ogburn and Thomas article.

[20] See Note, Patent Preemption of Trade Secret Protection of Inventions Meeting Judicial Standards of Patentability, 87 Harv. L. Rev. 807 (1974); Brief for the United States as *Amicus Curiae*, presenting the view within the Government favoring limited pre-emption (which view is not that of the United States, which believes that patent law does not pre-empt state trade secret law).

ate. Partial pre-emption, furthermore, could well create serious problems for state courts in the administration of trade secret law. As a preliminary matter in trade secret actions, state courts would be obliged to distinguish between what a reasonable inventor would and would not correctly consider to be clearly patentable, with the holder of the trade secret arguing that the invention was not patentable and the misappropriator of the trade secret arguing its undoubted novelty, utility, and non-obviousness. Federal courts have a difficult enough time trying to determine whether an invention, narrowed by the patent application procedure [21] and fixed in the specifications which describe the invention for which the patent has been granted, is patentable.[22] Although state courts in some circumstances must join federal courts in judging whether an issued patent is valid, *Lear, Inc.* v. *Adkins, supra,* it would be undesirable to impose the almost impossible burden on state courts to determine the patentability—in fact and in the mind of a reasonable inventor—of a discovery which has not been patented and remains entirely uncircumscribed by expert analysis in the administrative process. Neither complete nor partial pre-emption of state trade secret law is justified.

Our conclusion that patent law does not pre-empt trade secret law is in accord with prior cases of this Court. *Universal Oil Co.* v. *Globe Co.,* 322 U. S., at 484; *United States* v. *Dubilier Condenser Corp.,* 289 U. S., at 186–187; *Becher* v. *Contoure Laboratories,* 279 U. S. 388, 391 (1929); *Du Pont Powder Co.* v. *Masland,* 244 U. S. 100, 102 (1917); *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 402–403 (1911); *Board of Trade* v. *Christie*

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[21] See P. Areeda, Antitrust Analysis ¶ 407, p. 329 (1967).

[22] See Judge L. Hand's lament in *Harries* v. *Air King Products Co.,* 183 F. 2d 158, 162 (CA2 1950).

Grain & Stock Co., 198 U. S. 236, 250–251 (1905).[23] Trade secret law and patent law have co-existed in this country for over one hundred years. Each has its particular role to play, and the operation of one does not take away from the need for the other. Trade secret law encourages the development and exploitation of those items of lesser or different invention than might be accorded protection under the patent laws, but which items still have an important part to play in the technological and scientific advancement of the Nation. Trade secret law promotes the sharing of knowledge, and the efficient operation of industry; it permits the individual inventor to reap the rewards of his labor by contracting with a company large enough to develop and exploit it. Congress, by its silence over these many years, has seen the wisdom of allowing the States to enforce trade secret protection. Until Congress takes affirmative action to the contrary, States should be free to grant protection to trade secrets.

Since we hold that Ohio trade secret law is not preempted by the federal patent law, the judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded to the Court of Appeals with directions to reinstate the judgment of the District Court.

It is so ordered.

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

MR. JUSTICE MARSHALL, concurring in the result.

Unlike the Court, I do not believe that the possibility that an inventor with a patentable invention will rely

[23] The Court of Appeals below relied, in part, on *Kendall* v. *Winsor*, 21 How. 322 (1859), a case decided nine years before trade secret law was imported into this country from England by means of the landmark case of *Peabody* v. *Norfolk*, 98 Mass. 452 (1868).

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on state trade secret law rather than apply for a patent is "remote indeed." *Ante,* at 490. State trade secret law provides substantial protection to the inventor who intends to use or sell the invention himself rather than license it to others, protection which in its unlimited duration is clearly superior to the 17-year monopoly afforded by the patent laws. I have no doubt that the existence of trade secret protection provides in some instances a substantial disincentive to entrance into the patent system, and thus deprives society of the benefits of public disclosure of the invention which it is the policy of the patent laws to encourage. This case may well be such an instance.

But my view of sound policy in this area does not dispose of this case. Rather, the question presented in this case is whether Congress, in enacting the patent laws, intended merely to offer inventors a limited monopoly in exchange for disclosure of their invention, or instead to exert pressure on inventors to enter into this exchange by withdrawing any alternative possibility of legal protection for their inventions. I am persuaded that the former is the case. State trade secret laws and the federal patent laws have co-existed for many, many years. During this time, Congress has repeatedly demonstrated its full awareness of the existence of the trade secret system, without any indication of disapproval. Indeed, Congress has in a number of instances given explicit federal protection to trade secret information provided to federal agencies. See, *e. g.,* 5 U. S. C. § 552 (b)(4); 18 U. S. C. § 1905; see generally Appendix to Brief for Petitioner. Because of this, I conclude that there is "neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." *Florida Avocado Growers* v. *Paul,*

373 U. S. 132, 141 (1963). I therefore concur in the result reached by the majority of the Court.

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

Today's decision is at war with the philosophy of *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234. Those cases involved patents—one of a pole lamp and one of fluorescent lighting fixtures each of which was declared invalid. The lower courts held, however, that though the patents were invalid the sale of identical or confusingly similar products to the products of the patentees violated state unfair competition laws. We held that when an article is unprotected by a patent, state law may not forbid others to copy it, because every article not covered by a valid patent is in the public domain. Congress in the patent laws decided that where no patent existed, free competition should prevail; that where a patent is rightfully issued, the right to exclude others should obtain for no longer than 17 years, and that the States may not "under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws,"[1] 376 U. S., at 231.

The product involved in this suit, sodium iodide synthetic crystals, was a product that could be patented but was not. Harshaw the inventor apparently contributed greatly to the technology in that field by developing processes, procedures, and techniques that produced

[1] Here as in *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 674, which held that a licensee of a patent is not precluded by a contract from challenging the patent, for if he were, that would defeat the policy of the patent laws: "enforcing this contractual provision would undermine the strong federal policy favoring the full and free use of ideas in the public domain."

much larger crystals than any competitor. These processes, procedures, and techniques were also patentable; but no patent was sought. Rather Harshaw sought to protect its trade secrets by contracts with its employees. And the District Court found that, as a result of those secrecy precautions, "not sufficient disclosure occurred so as to place the claimed trade secrets in the public domain"; and those findings were sustained by the Court of Appeals.

The District Court issued a permanent injunction against respondents, ex-employees, restraining them from using the processes used by Harshaw. By a patent which would require full disclosure Harshaw could have obtained a 17-year monopoly against the world. By the District Court's injunction, which the Court approves and reinstates, Harshaw gets a permanent injunction running into perpetuity against respondents. In *Sears,* as in the present case, an injunction against the unfair competitor issued. We said: "To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that while federal law grants only 14 or 17 years' protection to genuine inventions, see 35 U. S. C. §§ 154, 173, States could allow perpetual protection to articles too lacking in novelty to merit any patent at all under federal constitutional standards. This would be too great an encroachment on the federal patent system to be tolerated." 376 U. S., at 231–232.

The conflict with the patent laws is obvious. The decision of Congress to adopt a patent system was based on the idea that there will be much more innovation if discoveries are disclosed and patented than there will be when everyone works in secret. Society thus fosters a

free exchange of technological information at the cost of a limited 17-year monopoly.[2]

A trade secret,[3] unlike a patent, has no property dimension. That was the view of the Court of Appeals, 478 F. 2d 1074, 1081; and its decision is supported by what Mr. Justice Holmes said in *Du Pont Powder Co.* v. *Masland,* 244 U. S. 100, 102:

> "The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain

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[2] "The holding [of the Court of Appeals] in *Kewanee* seems correct. If it is permissible for an inventor to use the law of unfair competition as a substitute for patenting, certain categories of inventions would receive privileged protection under that law. Thus a new laser, television set, or airplane could not be protected because inventions which by their nature cannot be put into commercial use without disclosure, are not eligible for trade secret protection after they are put on the market. Those that can be maintained are eligible. But as the basic economic function of the patent system is to encourage the making and commercialization of inventions, there seems to be no justification for providing incentives beyond those provided by the patent law to discriminate between different categories of inventions, i. e., those that may inherently be kept secret and those that may not. Moreover, state rules which would grant such incentives seem to conflict with the economic *quid pro quo* underlying patent protection; i. e., a monopoly limited in time, in return for full disclosure of the invention. Thus federal law has struck a balance between incentives for inventors and the public's right to a competitive economy. In this sense, the patent law is an integral part of federal competitive policy." Adelman, Secrecy and Patenting: Some Proposals for Resolving the Conflict, 1 APLA Quarterly Journal 296, 298–299 (1973).

[3] Trade secrets often are unpatentable. In that event there is no federal policy which is contravened when an injunction to bar disclosure of a trade secret is issued. Moreover, insofar as foreign patents are involved our federal patent policy is obviously irrelevant. S. Oppenheim, Unfair Trade Practices 264–265 (2d ed. 1965). As respects further contrasts between patents and trade secrets see Milgrim, Trade Secret Protection and Licensing, 4 Pat. L. Rev. 375 (1972).

> secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets he must take the burden with the good." [4]

A suit to redress theft of a trade secret is grounded in tort damages for breach of a contract—a historic remedy, *Cataphote Corp.* v. *Hudson,* 422 F. 2d 1290. Damages for breach of a confidential relation are not pre-empted by this patent law, but an injunction

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[4] As to *Goldstein* v. *California,* 412 U. S. 546, the ruling of Mr. Justice Bradley concerning the distinction between patents and copyright is relevant:

"The difference between the two things, letters-patent and copyright, may be illustrated by reference to the subjects just enumerated. Take the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book, if he pleases; but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries." *Baker* v. *Selden,* 101 U. S. 99, 102–103.

against use is pre-empted because the patent law states the only monopoly over trade secrets that is enforceable by specific performance; and that monopoly exacts as a price full disclosure. A trade secret can be protected only by being kept secret. Damages for breach of a contract are one thing; an injunction barring disclosure does service for the protection accorded valid patents and is therefore pre-empted.

From the findings of fact of the lower courts, the process involved in this litigation was unique, such a great discovery as to make its patentability a virtual certainty. Yet the Court's opinion reflects a vigorous activist anti-patent philosophy. My objection is not because it is activist. This is a problem that involves no neutral principle. The Constitution in Art. I, § 8, cl. 8, expresses the activist policy which Congress has enforced by statutes. It is that constitutional policy which we should enforce, not our individual notions of the public good.

I would affirm the judgment below.

SNOW ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 73–641. Argued April 16, 1974—Decided May 13, 1974

Petitioner Edwin A. Snow, who had advanced part of the capital in a partnership formed in 1966 to develop a special-purpose incinerator and had become a limited partner, was disallowed a deduction under § 174 (a) (1) of the Internal Revenue Code of 1954, on his individual income tax return for that year for his pro rata share of the partnership's operating loss. Though there were no sales in 1966, expectations were high and the inventor-partner was giving about a third of his time to the project, an outside engineering firm doing the shopwork. The Tax Court and the Court of Appeals both upheld disallowance of the deduction, which § 174 (a) (1) provides for "experimental expenditures which are paid or incurred by [the taxpayer] during the taxable year in connection with his trade or business as expenses which are not chargeable to capital account." *Held:* It was error to disallow the deduction, which was "in connection with" petitioner's trade or business, and the disallowance was contrary to the broad legislative objective of the Congress when it enacted § 174 to provide an economic incentive, especially for small and growing businesses, to engage in the search for new products and new inventions. Pp. 502–504.

482 F. 2d 1029, reversed.

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

Burgess L. Doan argued the cause and filed briefs for petitioners.

Stuart A. Smith argued the cause for respondent. With him on the brief were *Solicitor General Bork,*

Assistant Attorney General Crampton, Bennet N. Hollander, and *Jane M. Edmisten.**

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 174 (a)(1) of the Internal Revenue Code of 1954, 26 U. S. C. § 174 (a)(1), allows a taxpayer to take as a deduction "experimental expenditures which are paid or incurred by him during the taxable year in connection with his trade or business as expenses which are not chargeable to capital account." Petitioner Edwin A. Snow (hereafter petitioner) was disallowed as a deduction his distributive share of the net operating loss of a partnership, Burns Investment Company, for the taxable year 1966. The United States Tax Court sustained the Commissioner, 58 T. C. 585. The Court of Appeals for the Sixth Circuit affirmed, 482 F. 2d 1029 (1973). The case is here on a writ of certiorari because of an apparent conflict between that court and the Fourth Circuit in *Cleveland* v. *Commissioner,* 297 F. 2d 169 (1961).

Petitioner was a limited partner in Burns, having contributed $10,000 for a four-percent interest in Burns. The general partner was one Trott who had previously formed two other limited partnerships, one called Echo, to develop a telephone answering device and the other Courier, to develop an electronic tape recorder. Petitioner had become a limited partner in each of these other partnerships.[1]

**Charles H. Phillips* and *Ronald L. Blanc, pro se,* filed a brief as *amici curiae.*

[1] Both Echo and Courier claimed research and development expenses in 1965 and 1966; and they were not challenged by the Commissioner, apparently because their products were in a more

Burns was formed to develop "a special purpose incinerator for the consumer and industrial markets." Trott was the inventor and had conceived of this idea in 1964 and between then and 1966 had made a number of prototypes. His patent counsel had told him in 1965 that several features of the burner were in his view patentable but in 1966 advised him that the incinerator as a whole had not been sufficiently "reduced to practice" in order to develop it into a marketable product. At that point Trott formed Burns, petitioner putting up part of the capital. Thereafter various models of the burner were built and tested.

During 1966 Burns reported no sales of the incinerator or any other product but expectations were high; and Trott was giving about one-third of his time to the project, an outside engineering firm doing the shopwork.[2]

Trott obtained a patent on the incinerator in 1970, and it is currently being produced and marketed under the name Trash-Away.[3]

Section 174 was enacted in 1954 to dilute some of the conception of "ordinary and necessary" business expenses under § 162 (a) (then § 23 (a)(1) of the Internal Revenue Code of 1939) adumbrated by Mr. Justice Frankfurter in a concurring opinion in *Deputy* v. *Du Pont,* 308 U. S. 488, 499 (1940), where he said that

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advanced stage of development and were available for sale or licensing.

[2] Treasury Regulation § 1.174–2 (a)(2) provides: "The provisions of this section apply not only to costs paid or incurred by the taxpayer for research or experimentation undertaken directly by him but also to expenditures paid or incurred for research or experimentation carried on in his behalf by another person or organization (such as . . . [an] engineering company, or similar contractor). . . ."

[3] Prior to 1970 Burns was incorporated and it produces and markets Trash-Away, petitioner being its Chairman of the Board.

the section in question (old § 23 (a)) "involves holding one's self out to others as engaged in the selling of goods or services." The words "trade or business" appear, however, in about 60 different sections of the 1954 Act.[4] Those other sections are not helpful here because Congress wrote into § 174 (a)(1) "in connection with," and § 162 (a) is more narrowly written than is § 174, allowing "a deduction" of "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business." That and other sections are not helpful here.

The legislative history makes fairly clear the reasons. Established firms with ongoing business had continuous programs of research quite unlike small or pioneering business enterprises.[5] Mr. Reed of New York, Chairman of the House Committee on Ways and Means, made the point even more explicit when he addressed the House on the bill: [6]

> "Present law contains no statutory provision dealing expressly with the deduction of these expenses. The result has been confusion and uncertainty. Very often, under present law small businesses which are developing new products and do not have established research departments are not allowed to deduct these expenses despite the fact that their large and well-established competitors can obtain the deduction. . . . This provision will greatly stimulate the search for new products and new inventions upon which the future economic and military strength of our Nation depends. *It will be particularly valuable*

[4] Saunders, "Trade or Business," Its Meaning Under the Internal Revenue Code, U. So. Cal. 12th Inst. on Fed. Tax. 693 (1960).

[5] Hearings on H. R. 8300 before the Senate Committee on Finance, 83d Cong., 2d Sess., pt. 1, p. 105.

[6] 100 Cong. Rec. 3425 (1954).

to small and growing businesses." (Emphasis added.)

Congress may at times in its wisdom discriminate taxwise between various kinds of business, between old and oncoming business and the like. But we would defeat the congressional purpose somewhat to equalize the tax benefits of the ongoing companies and those that are upcoming and about to reach the market by perpetuating the discrimination created below and urged upon us here.

We read § 174 as did the Court of Appeals for the Fourth Circuit in *Cleveland* "to encourage expenditure for research and experimentation." 297 F. 2d, at 173. That incentive is embedded in § 174 because of "in connection with," making irrelevant whether petitioners were rich or poor.

We are invited to explore the treatment of "hobby-losses" under § 183. But that is far afield of the present inquiry for it is clear that in this case under § 174 the profit motive was the sole drive of the venture.

Reversed.

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

UNITED STATES *v.* GIORDANO ET AL.

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

No. 72–1057. Argued January 8, 1974—Decided May 13, 1974

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides in 18 U. S. C. § 2516 (1) that "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses; and further provides that the contents of intercepted communications, or evidence derived therefrom, may not be received in evidence at a trial if the disclosure of the information would violate Title III, 18 U. S. C. § 2515, and may be suppressed on the ground, *inter alia*, that the communication was "unlawfully intercepted," 18 U. S. C. § 2518 (10) (a) (i). In this case an application purportedly authorized by a specially designated Assistant Attorney General for an order permitting the wiretap of the telephone of respondent Giordano, a narcotics offense suspect, was submitted to the Chief Judge of the District Court, who then issued an interception order, and later an extension order based on a similar application but also including information obtained from the previously authorized interception and extending the authority to conversations of additional named individuals calling to or from Giordano's telephone. The interception was terminated when Giordano and the other respondents were arrested and charged with narcotics violations. During suppression hearings, it developed that the wiretap applications had not in fact been authorized by a specially designated Assistant Attorney General, but that the initial application was authorized by the Attorney General's Executive Assistant and the extension application had been approved by the Attorney General himself. The District Court sustained the motions to suppress on the ground that the Justice Department officer approving each application had been misidentified in the applications and intercept orders. The Court of Appeals affirmed, but on the ground that the initial authorization violated § 2516 (1), thereby requiring suppression of the wiretap

and derivative evidence under §§ 2515 and 2518 (10) (a) (i), *inter alia*. *Held:*

1. Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him. Pp. 512–523.

(a) Notwithstanding 28 U. S. C. § 510, which authorizes the Attorney General to delegate any of his functions to any other officer, employee, or agency of the Justice Department, § 2516 (1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate. Pp. 512–514.

(b) This interpretation of § 2516 (1) is strongly supported by the purpose of the Act effectively to prohibit all interceptions of oral and wire communications, except those specifically provided for, and by its legislative history. Pp. 514–523.

2. Primary or derivative evidence secured by wire interceptions pursuant to a court order issued in response to an application which was, in fact, not authorized by the Attorney General or a specially designated Assistant Attorney General must be suppressed under § 2515 upon a motion properly made under § 2518 (10) (a), and hence the evidence obtained from the interceptions pursuant to the initial court order was properly suppressed. Pp. 524–529.

(a) Under § 2518 (10) (a) (i) the words "unlawfully intercepted" are not limited to constitutional violations, but the statute was intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. Pp. 524–528.

(b) Since Congress intended to condition the use of intercept procedures upon the judgment of a senior Justice Department official that the situation is one of those warranting their use, thus precluding resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use, it is evident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored. Pp. 528–529.

3. Communications intercepted pursuant to the extension order were inadmissible, since they were evidence derived from the communications invalidly intercepted pursuant to the initial order. Pp. 529–533.

469 F. 2d 522, affirmed.

WHITE, J., delivered the opinion of the Court, in Parts I, II, and III of which all Members joined, and in Part IV of which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. DOUGLAS, J., filed a concurring opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post,* p. 580. POWELL, J., filed an opinion concurring in Parts I, II, and III of the Court's opinion and dissenting from Part IV, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post,* p. 548.

Solicitor General Bork argued the cause for the United States. With him on the brief were *Assistant Attorney General Petersen, Harriet S. Shapiro,* and *Sidney M. Glazer.*

H. Russel Smouse argued the cause for respondents and filed a brief for respondent Giordano.

MR. JUSTICE WHITE delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211–225, 18 U. S. C. §§ 2510–2520, prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses. The Court must here determine whether the Government sufficiently complied with the required application procedures in this case and whether, if not, evidence obtained as a result of such surveillance, under a court order based on the applications, is admissible at the criminal trial of those whose conversations were overheard. In particular, we must decide whether the provision of 18 U. S. C.

§ 2516 (1) [1] conferring power on the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses permits the Attorney General's Executive Assistant to validly authorize a wiretap application to be made. We conclude that Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him and that primary or derivative evidence secured by wire interceptions pursuant to a court order issued in response to an application which was, in fact, not authorized by one of the statutorily designated officials must be suppressed under 18 U. S. C. § 2515 upon a motion properly made under 18 U. S. C. § 2518 (10)(a). Accordingly, we affirm the judgment of the Court of Appeals.

I

In the course of an initial investigation of suspected narcotics dealings on the part of respondent Giordano, it developed that Giordano himself sold narcotics to an undercover agent on October 5, 1970, and also told an informant to call a specified number when interested in transacting narcotics business. Based on this and other information, Francis Brocato, an Assistant United States Attorney, on October 16, 1970, submitted an application to the Chief Judge of the District of Maryland for an order permitting interception of the communications of Giordano, and of others as yet unknown, to or from Giordano's telephone. The application recited that

[1] This and other relevant provisions of the statute are contained in the Appendix to this opinion, *post*, p. 534.

Assistant Attorney General Will Wilson had been specially designated by the Attorney General to authorize the application. Attached to the application was a letter from Will Wilson to Brocato which stated that Wilson had reviewed Brocato's request for authorization and had made the necessary probable-cause determinations and which then purported to authorize Brocato to proceed with the application to the court. Also attached were various affidavits of law enforcement officers stating the reasons and justification for the proposed interception. Upon reviewing the application, the Chief Judge issued an order on the same day authorizing the interception "pursuant to application authorized by the Assistant Attorney General . . . Will Wilson, who has been specially designated in this proceeding by the Attorney General . . . to exercise the powers conferred on him by [18 U. S. C. § 2516]." On November 6, the same judge extended the intercept authority based on an application similar in form to the original, but also including information obtained from the interception already authorized and carried out and extending the authority to conversations of additional named individuals calling from or to Giordano's telephone. The interception was terminated on November 18 when Giordano and the other respondents were arrested and charged with violations of the narcotics laws.

Suppression hearings followed pretrial notification by the Government, see § 2518 (9), that it intended to use in evidence the results of the court-authorized interceptions of communications on Giordano's telephone. It developed at the hearings that the applications for interception authority presented to the District Court had inaccurately described the official who had authorized the applications and that neither the initial application for the October 16 order nor the application for the

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November 6 extension order had been approved and authorized by Assistant Attorney General Will Wilson, as the applications had indicated. An affidavit of the Executive Assistant to the Attorney General divulged that he, the Executive Assistant, had reviewed the request for authorization to apply for the initial order, had concluded, from his "knowledge of the Attorney General's actions on previous cases, that he would approve the request if submitted to him," and, because the Attorney General was then on a trip away from Washington, D. C., and pursuant to authorization by the Attorney General for him to do so in such circumstances, had approved the request and caused the Attorney General's initials to be placed on a memorandum to Wilson instructing him to authorize Brocato to proceed. The affidavit also stated that the Attorney General himself had approved the November 6 request for extension and had initialed the memorandum to Wilson designating him to authorize Brocato to make application for an extension order. It was also revealed that although the applications recited that they had been authorized by Will Wilson, he had not himself reviewed Brocato's applications, and that his action was at best only formal authorization to Brocato. Furthermore, it became apparent that Wilson did not himself sign either of the letters bearing his name and accompanying the applications to the District Court. Instead, it appeared that someone in Wilson's office had affixed his signature after the signing of the letters had been authorized by a Deputy Assistant Attorney General in the Criminal Division who had, in turn, acted after the approval of the request for authorization had occurred in and had been received from the Office of the Attorney General.

The District Court sustained the motions to suppress on the ground that the officer in the Justice Department

approving each application had been misidentified in the applications and intercept orders, in violation of 18 U. S. C. §§ 2518 (1)(a) and (4)(d), *United States* v. *Focarile,* 340 F. Supp. 1033, 1060 (Md. 1972). On the Government's pretrial appeal under 18 U. S. C. § 3731, the Court of Appeals affirmed on the different ground that the authorization of the October 16 wiretap application by the Attorney General's Executive Assistant violated § 2516 (1) of the statute and struck at "the very heart" of Title III, thereby requiring suppression of the wiretap and derivative evidence under §§ 2515 and 2518 (10)(a)(i) and (ii).[2] 469 F. 2d 522, 531 (CA4 1972). We granted certiorari to resolve the conflict with decisions of the Court of Appeals for the Second Circuit [3]

[2] Evidence derived from the unlawful interceptions conducted pursuant to the October 16 wiretap order was held to include the evidence obtained under the November 6 wiretap extension order and also the evidence secured under court orders of October 22 and November 6 extending investigative authority to use a "pen register," *i. e.,* a device that records telephone numbers dialed from a particular phone, which had previously been used to monitor the numbers dialed from Giordano's phone pursuant to a court order of October 8. The applications presented to the District Court to extend wiretap and pen register authority each detailed at considerable length the contents of conversations intercepted pursuant to the October 16 order in support of the requests. We therefore agree with the Court of Appeals, for the reasons discussed in Part IV, *infra,* that evidence gathered under the wiretap and pen register extension orders is tainted by the use of unlawfully intercepted communications under the October 16 order to secure judicial approval for the extensions, and must be suppressed.

[3] The Second Circuit has held that approval of wiretap applications by the Attorney General's Executive Assistant complies with the dictates of § 2516 (1). In *United States* v. *Pisacano,* 459 F. 2d 259 (1972), the court refused to permit withdrawal of guilty pleas on the basis of subsequent discovery that the Executive Assistant had authorized the first of three wiretap applications, declaring that it was "not at all convinced that if this case had gone

with respect to the administration of the circumscribed authority Congress has granted in Title III for the use of wiretapping and wiretap evidence by law enforcement officers. 411 U. S. 905.

II

The United States contends that the authorization of intercept applications by the Attorney General's Executive Assistant was not inconsistent with the statute and that even if it were, there being no constitutional violation, the wiretap and derivative evidence should not have been ordered suppressed. We disagree with both contentions.[4]

Turning first to whether the statute permits the authorization of wiretap applications by the Attorney General's Executive Assistant, we begin with the lan-

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to trial and the court had refused to suppress evidence obtained by the wiretaps, we would have reversed," and that "the Justice Department's procedures were very likely consistent with the mandate of § 2516 (1)." *Id.*, at 264 and n. 5. Shortly thereafter a different panel of that Circuit affirmed judgments of convictions in a case raising the same issue, out of "adherence to the law of the circuit" so recently decided and with the admonition that its decision should "not . . . be construed as an approval of the procedure followed by the Attorney General and his staff." *United States* v. *Becker,* 461 F. 2d 230, 236 (1972). In every other circuit which has considered the issue, suppression of evidence derived from court-approved wire interceptions based on an application authorized by the Attorney General's Executive Assistant has been held to be required by Title III. *United States* v. *Mantello,* 156 U. S. App. D. C. 2, 478 F. 2d 671 (1973); *United States* v. *Roberts,* 477 F. 2d 57 (CA7 1973); *United States* v. *King,* 478 F. 2d 494 (CA9 1973). See also *United States* v. *Robinson,* 468 F. 2d 189 (CA5 1972), remanded for an evidentiary hearing to determine whether the applications were properly authorized under § 2516 (1), 472 F. 2d 973 (en banc 1973).

[4] Because of our disposition of this case, we do not reach the grounds relied upon by the District Court. The issue resolved in the District Court, however, is the subject of the companion case, *United States* v. *Chavez, post,* p. 562.

guage of § 2516 (1), which provides that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize" an application for intercept authority. Plainly enough, the Executive Assistant is neither the Attorney General nor a specially designated Assistant Attorney General; but the United States argues that 28 U. S. C. § 509,[5] deriving from the Reorganization Acts of 1949 and 1950, vests all functions of the Department of Justice, with some exceptions, in the Attorney General, and that Congress characteristically assigns newly created duties to the Attorney General rather than to the Department of Justice, thus making essential the provision for delegation appearing in 28 U. S. C. § 510:

> "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

It is therefore argued that merely vesting a duty in the Attorney General, as it is said Congress did in § 2516 (1), evinces no intention whatsoever to preclude delegation to other officers in the Department of Justice, including those on the Attorney General's own staff.

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[5] In full, 28 U. S. C. § 509 provides:

"§ 509. Functions of the Attorney General.

"All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

"(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

"(2) of the Federal Prison Industries, Inc.;

"(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

"(4) of the Board of Parole."

As a general proposition, the argument is unexceptionable. But here the matter of delegation is expressly addressed by § 2516, and the power of the Attorney General in this respect is specifically limited to delegating his authority to "any Assistant Attorney General specially designated by the Attorney General." Despite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated. Under the Civil Rights Act of 1968, for instance, certain prosecutions are authorized only on the certification of the Attorney General or the Deputy Attorney General, "which function of certification may not be delegated." 18 U. S. C. § 245 (a)(1). Equally precise language forbidding delegation was not employed in the legislation before us; but we think § 2516 (1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate. This interpretation of the statute is also strongly supported by its purpose and legislative history.

The purpose of the legislation, which was passed in 1968, was effectively to prohibit, on the pain of criminal and civil penalties,[6] all interceptions of oral and wire communications, except those specifically provided for in the Act, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with the investigation of the serious crimes listed in § 2516. Judicial wiretap orders must be preceded by applications containing prescribed information, § 2518 (1). The judge must make certain findings before authorizing interceptions, including the existence of probable cause, § 2518 (3). The orders themselves

[6] Criminal sanctions were provided in 18 U. S. C. § 2511, and a civil damages remedy was created by § 2520. See Appendix to this opinion, *post*, p. 534.

must particularize the extent and nature of the interceptions that they authorize, § 2518 (4), and they expire within a specified time unless expressly extended by a judge based on further application by enforcement officials, § 2518 (5). Judicial supervision of the progress of the interception is provided for, § 2518 (6), as is official control of the custody of any recordings or tapes produced by the interceptions carried out pursuant to the order, § 2518 (8). The Act also contains provisions specifying the circumstances and procedures under and by which aggrieved persons may seek and obtain orders for the suppression of intercepted wire or oral communications sought to be used in evidence by the Government. § 2518 (10)(a).

The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. §§ 2518 (1)(c) and (3)(c). The Act plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgment of a particular,

responsible Department of Justice official is interposed as a critical precondition to any judicial order.

The legislative history of the Act supports this view. As we have indicated, the Act was passed in 1968, but the provision of § 2516 requiring approval of applications by the Attorney General or a designated Assistant Attorney General dates from 1961, when a predecessor bill was being considered in the 87th Congress. Section 4 (b) of that bill, S. 1495, which was also aimed at prohibiting all but designated official interception, initially provided that the "Attorney General, or any officer of the Department of Justice or any United States Attorney specially designated by the Attorney General, may authorize any investigative or law enforcement officer of the United States or any Federal agency to apply to a judge" for a wire interception order. Hearings on Wiretapping and Eavesdropping Legislation before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 5 (1961). Under that phraseology, the authority was centered in the Attorney General, but he could empower any officer of the Department of Justice, including United States Attorneys and the Executive Assistant, to authorize applications for intercept orders. At hearings on the bill, the Assistant Attorney General in charge of the Criminal Division stated the views of the Department of Justice, and the Department later officially proposed, that the authority to approve applications be substantially narrowed so that the Attorney General could delegate his authority only to an Assistant Attorney General. The testimony was:

> "This is the approach of S. 1495, with which the Department of Justice is in general agreement. The bill makes wiretapping a crime unless specifically authorized by a Federal judge in situations involving

> specified crimes. As I understand the bill, the application for a court order could be made only by the authority of the Attorney General or an officer of the Department of Justice or U. S. Attorney authorized by him. I suggest that the bill should confine the power to authorize an application for a court order to the Attorney General and any assistant Attorney General whom he may designate. This would give greater assurance of a responsible executive determination of the need and justifiability of each interception." *Id.*, at 356.

The official proposal was that § 4 (b) be changed to provide that the "Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, may authorize" a wiretap application. *Id.*, at 372.

S. 1495 was not enacted, but its provision limiting those who could approve applications for court orders survived and was included in almost identical form in later legislative proposals, including the bill that became Title III of the Act now before us.[7] In the course of

[7] In 1967, a draft statute prepared by Professor G. Robert Blakey of the University of Notre Dame Law School to regulate the interception of wire and oral communications was published in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, Appendix C, at 106–113. In part, it would have added a provision to Title 18, United States Code, which empowered the "Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General" to authorize an application to a federal judge for an order to intercept wire or oral communications. *Id.*, at 108. Senator McClellan introduced a proposed "Federal Wire Interception Act," S. 675, on January 25, 1967, 113 Cong. Rec. 1491, containing, in § 5 (a), the same designations of which federal prosecuting officials could authorize a wiretap application. Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcommittee on Criminal Laws and Procedures of the Senate Com-

testimony before a House Committee in 1967, the draftsman of the bill containing the basic outline of Title III engaged in the following colloquy:

> "The CHAIRMAN. . . . About the origin of the application, as I understand it, your bill provides it must be originated by the Attorney General or an Assistant Attorney General. Am I correct in that regard?
>
> "Professor BLAKEY. Yes, you are, Mr. Chairman.
>
> . . . . .
>
> "The CHAIRMAN. The application must be made by the Attorney General or an Assistant Attorney General.
>
> "Professor BLAKEY. If I am not mistaken, the present procedure is before any wiretapping or electronic equipment is used now it is generally approved at that level anyway, Mr. Chairman, and I would not want this equipment used without high level responsible officials passing on it. It may very well be that in some number of cases there will not be time to get the Attorney General to approve it. I think we are going to have just [*sic*] to let those cases go, and that if this equipment is to be used it ought to be approved by the highest level in the

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mittee on the Judiciary, 90th Cong., 1st Sess., 76 (1967). Senator Hruska later introduced S. 2050 on June 29, 1967, 113 Cong. Rec. 18007, which would have provided for regulated use of electronic surveillance, as well as wiretapping, and which again made provision, in a new § 2516 to be added to Title 18, United States Code, for the same system of approval of applications for the interception of wire or oral communications as was present in the Blakey bill. Hearings, *supra*, at 1005. In the House of Representatives, the Blakey bill was introduced on October 3, 1967, in the form of H. R. 13275, 113 Cong. Rec. 27718. Ultimately, the same operative language was enacted in Title III.

Department of Justice. If we cannot make certain cases, that is going to have to be the price we will have to pay." Hearings on Anti-Crime Program before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 1379 (1967).[8]

[8] In the hearings on the McClellan bill, S. 675, see n. 7, *supra,* the limitation on the application authorization power was frequently brought to the fore. Thus, Chief Judge Lumbard of the United States Court of Appeals for the Second Circuit, who had earlier been United States Attorney for the Southern District of New York, noted in testimony on March 8, 1967, that the "application would require approval of the Attorney General or a designated assistant . . . ," and he urged, in support of his recommendation that it was unnecessary to limit the use of wiretapping to the investigation of a narrow group of serious crimes, the fact that there were other factors which would greatly limit the use of wiretapping, beginning with the observation that "the proposed statute, section 5a, provides that only the Attorney General, or any Assistant Attorney General specifically designated by him, may authorize the necessary application to a Federal judge for approval to wiretap. Thus the application will be carefully screened." Hearings on Controlling Crime Through More Effective Law Enforcement, *supra,* n. 7, at 171–172. A letter urging adoption of legislation to govern the area of wiretapping and electronic eavesdropping was sent to the subcommittee on March 7 by all living former United States Attorneys of the Southern District of New York, who recommended that interception be prohibited "unless authorized by a Federal judge on application of the Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, when such authorized interception or recording may provide evidence of an offense against the laws of the United States." *Id.,* at 511–512. And Senator McClellan himself commented to a judge testifying before the subcommittee:

"This legislation, as you know, requires rather thorough court supervision through the application for a court order made by the Attorney General or officials designated in the bill. A court, of course, would have to weigh the probable cause or the reasonable cause in support of such an application. I do not know how to tighten it up any more than we have in the bill. . . . Can you tell us how to tighten it up any more?" *Id.,* at 894–895.

As it turned out, the House Judiciary Committee did not report out a wiretap bill, but the House did pass H. R. 5037, entitled the "Law Enforcement and Criminal Justice Assistance Act of 1967," 113 Cong. Rec. 21861 (Aug. 8, 1967). The Senate amended that bill by adding to it Title III, which in turn essentially reflected the provisions of S. 917, which had been favorably reported by the Senate Judiciary Committee and which contained the Committee's own proposals with respect to the interception of oral and wire communications. The report on the bill stated:

> "Section 2516 of the new chapter authorizes the interception of particular wire or oral communication under court order pursuant to the authorization of the appropriate Federal, State, or local prosecuting officer.
>
> "Paragraph (1) . . . centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen." S. Rep. No. 1097, 90th Cong., 2d Sess., 96–97 (1968).

This report is particularly significant in that it not only recognizes that the authority to apply for court orders is to be narrowly confined but also declares that it is to be limited to those responsive to the political process, a category to which the Executive Assistant to the Attorney General obviously does not belong.[9]

[9] The Attorney General is appointed by the President, by and with the advice and consent of the Senate, 28 U. S. C. § 503, as

The Senate passed H. R. 5037, with the amendments tracking the provisions of S. 917, on May 23, 1968, as the Omnibus Crime Control and Safe Streets Act of 1968, 114 Cong. Rec. 14798 and 14889. During the proceedings leading to the passage of the bill, emphasis was again placed on § 2516. That the Attorney General had the exclusive authority to approve or provide for the approval of wiretap applications was reiterated, and it was made clear that as the bill was drafted no United States Attorney would have or could be given the authority to apply for an intercept order without the advance approval of a senior officer in the Department.[10]

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are the nine Assistant Attorneys General provided for in 28 U. S. C. § 506. The position of Executive Assistant, on the other hand, is established by regulation, to assist the Attorney General, *inter alia*, in the review of "matters submitted for the Attorney General's action" and to "[p]erform such other duties and functions as may be specially assigned from time to time by the Attorney General." 28 CFR § 0.6. It would appear from the Government's brief that the Executive Assistant involved in this case served as Executive Assistant to at least four Attorneys General.

[10] In debate on the Senate floor the day before Title III was adopted, Senator McClellan responded to an inquiry of Senator Lausche in the following matter:

"Mr. LAUSCHE. Does the bill as now written give absolute, unconditional power to stop searches or tapping, or to authorize tapping?

"Mr. McCLELLAN. No. We have to go first to the Attorney General in the case of the Federal Government, and to the chief law enforcement officers of a State . . . .

"Mr. LAUSCHE. There is, then, a prohibition against tapping unless the application is filed with the chief law enforcement official. He approves it and then the application is filed with the court, is that not correct?

"Mr. McCLELLAN. The chief law enforcement officer, like the Attorney General of the United States, must authorize the application . . . . A prosecuting attorney or a U. S. district attorney cannot, on his own motion, do it. He has to get the authority from the

There was no congressional attempt, however, to extend that authority beyond the Attorney General or his Assistant Attorney General designate.

The Government insists that because § 2516 (2) provides for a wider dispersal of authority among state officers to approve wiretap applications and leaves the matter of delegation up to state law,[11] it is inappropriate

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Attorney General of the United States first to submit the application to the court." 114 Cong. Rec. 14469.

During the same debate, Senator Long read from a report of the Association of the Bar of the City of New York, Committee on Federal Legislation, Committee on Civil Rights, "Proposed Legislation on Wiretapping and Eavesdropping after *Berger* v. *New York* and *Katz* v. *United States*," which commented on the application provisions of Title III in the following manner:

"Who May Apply

"The Blakey Bill provides that applications for wiretapping or eavesdropping orders may be made by only a limited number of persons. At the Federal level these are the Attorney General of the United States or an Assistant Attorney General and at the State level they are the State Attorney General or the principal prosecuting attorney of a political subdivision (such as a county or city District Attorney).

"We agree that responsibility should be focused on those public officials who will be principally accountable to the courts and the public for their actions. Police and investigative agencies should not have the power to make such applications on their own. On the other hand, it seems anomalous to permit only very high Federal officials to apply, excluding such officials as United States Attorneys for entire States or Districts like the Southern District of New York, while permitting county district attorneys with substantially less responsibility to make applications. . . .

"We also would seek to reduce the anomaly referred to above by providing that the Attorney General may delegate to United States Attorneys the power to initiate applications." 114 Cong. Rec. 14473–14474.

[11] The following comments concerning § 2516 (2) are found in S. Rep. No. 1097, 90th Cong., 2d Sess., 98 (1968):

"Paragraph (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political

to confine the authority so narrowly on the federal level. But it is apparent that Congress desired to centralize and limit this authority where it was feasible to do so, a desire easily implemented in the federal establishment by confining the authority to approve wiretap applications to the Attorney General or a designated Assistant Attorney General. To us, it appears wholly at odds with the scheme and history of the Act to construe § 2516 (1) to permit the Attorney General to delegate his authority at will, whether it be to his Executive Assistant or to any officer in the Department other than an Assistant Attorney General.[12]

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subdivision of a State may authorize an application to a State judge of competent jurisdiction . . . for an order authorizing the interception of wire or oral communications. The issue of delegation by that officer would be a question of State law. In most States, the principal prosecuting attorney of the State would be the attorney general. The important question, however, is not name but function. The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State. . . . Where no such office exists, policymaking would not be possible on a statewide basis; it would have to move down to the next level of government. In most States, the principal prosecuting attorney at the next political level of a State, usually the county, would be the district attorney, State's attorney, or county solicitor. The intent . . . is to centralize areawide law enforcement policy in him. . . . Where there are both an attorney general and a district attorney, either could authorize applications, the attorney general anywhere in the State and the district attorney anywhere in his county. The proposed provision does not envision a further breakdown. Although city attorneys may have in some places limited criminal prosecuting jurisdiction, the proposed provision is not intended to include them."

[12] We also deem it clear that the authority must be exercised *before* the application is presented to a federal judge. The suggestion that it is acceptable practice under § 2516 (1) for the Attorney General's Executive Assistant to approve wiretap applications in the Attorney General's absence if the Attorney General

III

We also reject the Government's contention that even if the approval by the Attorney General's Executive Assistant of the October 16 application did not comply with the statutory requirements, the evidence obtained from the interceptions should not have been suppressed. The issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III; and, in our view, the Court of Appeals correctly suppressed the challenged wiretap evidence.

Section 2515 provides that no part of the contents of any wire or oral communication, and no evidence derived therefrom, may be received at certain proceedings, including trials, "if the disclosure of that information would be in violation of this chapter." What disclosures are forbidden, and are subject to motions to suppress, is in turn governed by § 2518 (10)(a), which provides for suppression of evidence on the following grounds:

> "(i) the communication was unlawfully intercepted;

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subsequently, after a court order has issued, ratifies the giving of approval in the particular instance, either directly or by personally approving the submission of a further application for an extension order, as in this case, is wide of the mark. As the Court of Appeals for the Fifth Circuit noted in the panel decision in *United States* v. *Robinson*, 468 F. 2d, at 193, the Attorney General's "authority from Congress was to initiate wiretap applications, not to seek to have those terminated he found should never have been requested in the first place." It would ill serve the congressional policy of having the Attorney General or one of his Assistants screen the applications prior to their submission to court to have the screening process occur after the application is made and after investigative officials have already begun to intercept wire or oral communications under a court order predicated on the assumption that proper authorization to apply for intercept authority had been given.

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval." [13]

The Court of Appeals held that the communications the Government desired to offer in evidence had been "unlawfully intercepted" within the meaning of paragraph (i), because the October application had been approved by the Executive Assistant to the Attorney General rather than by the Attorney General himself or a designated Assistant Attorney General.[14] We have already determined that delegation to the Executive Assistant was indeed contrary to the statute; but the Government contends that approval by the wrong official is a statutory violation only and that paragraph (i) must be construed to reach constitutional, but not statutory, violations.[15] The argument is a straightforward one based on the structure of § 2518 (10) (a). On the one hand, the unlawful interceptions referred to in para-

[13] No question is raised in this case concerning the manner of conducting the court-approved interceptions of Giordano's telephone and thus § 2518 (10) (a) (iii) is inapplicable to the present situation.

[14] The Court of Appeals also held that suppression was required under subdivision (ii) on the theory that the absence of any valid authorization of the wiretap application was the equivalent of failing to identify at all in the interception order the person who authorized the application, rendering the order "insufficient on its face." Manifestly, however, the order, on its face, clearly, though erroneously, identified Assistant Attorney General Wilson as the Justice Department officer authorizing the application, pursuant to special designation by the Attorney General. As it stood, the intercept order was facially sufficient under § 2516 (1), and despite what was subsequently discovered, the Court of Appeals was in error in justifying suppression under § 2518 (10) (a) (ii).

[15] The Government suggested at oral argument that, in addition to constitutional violations, willful statutory violations might also fit within the terms of § 2518 (10) (a) (i). Tr. of Oral Arg. 33.

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graph (i) must include some constitutional violations. Suppression for lack of probable cause, for example, is not provided for in so many words and must fall within paragraph (i) unless, as is most unlikely, the statutory suppression procedures were not intended to reach constitutional violations at all. On the other hand paragraphs (ii) and (iii) plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under paragraph (i), else there would have been no necessity for paragraphs (ii) and (iii)—or to put the matter another way, if unlawful interceptions under paragraph (i) include purely statutory issues, paragraphs (ii) and (iii) are drained of all meaning and are surplusage. The conclusion of the argument is that if nonconstitutional omissions reached by paragraphs (ii) and (iii) are not unlawful interceptions under paragraph (i), then there is no basis for holding that "unlawful interceptions" include *any* such statutory matters; the *only* purely statutory transgressions warranting suppression are those falling within paragraphs (ii) and (iii).

The position gains some support from the fact that predecessor bills specified a fourth ground for suppression—the lack of probable cause—which was omitted in subsequent bills, apparently on the ground that it was not needed because official interceptions without probable cause would be unlawful within the meaning of paragraph (i).[16] Arguably, the inference is that since

[16] The draft statute prepared by Professor Blakey provided this fourth ground warranting suppression in cases where there was no probable cause for believing the existence of the grounds on which the interception order was issued. Task Force Report: Organized Crime, *supra*, n. 7, at 111, § 3803 (k)(1)(C). So did the McClellan bill, S. 675, which was introduced prior to *Berger* v. *New York*, 388 U. S. 41 (1967). Hearings on Controlling Crime Through More Effective Law Enforcement, *supra*, n. 7, at 78, § 8 (g)(3). But the

paragraphs (ii) and (iii) were retained, they must have been considered "necessary," that is, not covered by paragraph (i).

The argument of the United States has substance, and it does appear that paragraphs (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i). But it does not necessarily follow, and we cannot believe, that no statutory infringements whatsoever are also unlawful interceptions within the meaning of paragraph (i). The words "unlawfully intercepted" are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. We have already determined that Congress intended not only to limit resort to wiretapping to certain crimes and situations where probable cause is present but also to condition the use of intercept procedures upon the judgment of a senior official in the Department of Justice that the situation is one of those warranting their use. It is

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bill proposed by Senator Hruska after *Berger* (S. 2050) omitted this ground in a provision the language of which is substantially identical to § 2518 (10) (a) as finally enacted. *Id.*, at 1008, § 2518 (k) (1). An explanation for the omission is provided in an appendix comparing S. 675 with S. 2050, which was published by Senator Scott, a cosponsor of the latter bill, in an article in the Howard Law Journal, Wiretapping and Organized Crime, 14 How. L. J. 1 (1968), and which was reprinted in Senator Scott's remarks on the Senate floor concerning the Omnibus Crime Control and Safe Streets Act of 1968. 114 Cong. Rec. 13205–13211. It is there simply stated that "Senator Hruska's man says that the probable cause test is implied in (1)." *Id.*, at 13211.

reasonable to believe that such a precondition would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use. We are confident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored.

The principal piece of legislative history relative to this question is S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). The Government emphasizes that the report expressly states that § 2518 (10) (a) "largely reflects existing law" and that there was no intention to "press the scope of the suppression role beyond present search and seizure law." *Id.*, at 96. But the report also states that the section provides for suppression of evidence directly or indirectly obtained "in violation of the chapter" and that the provision "should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications." [17] Moreover, it would not extend existing search-

[17] In relevant part S. Rep. No. 1097, *supra*, n. 11, at 96, 106, provides:

"Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. . . . The provision must, of course, be read in light of section 2518 (10) (a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone* v. *United States*, 302 U. S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone* v. *United States*, 308 U. S. 338 (1939).) There is, however, no intention to change the attenuation rule. . . . Nor generally to press the scope of the suppression role beyond present search and seizure law. . . . But it does apply across the board in both Federal and State proceeding[s]. . . . And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. . . . The provision thus forms an integral part of the system of limita-

and-seizure law for Congress to provide for the suppression of evidence obtained in violation of explicit statutory prohibitions. *Nardone* v. *United States,* 302 U. S. 379 (1937); *Nardone* v. *United States,* 308 U. S. 338 (1939).[18]

IV

Even though suppression of the wire communications intercepted under the October 16, 1970, order is required, the Government nevertheless contends that com-

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tions designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.

. . . . . .

"[Section 2518 (10) (a)] must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. [Except for its inapplicability to grand jury proceedings and an absence of intent to grant jurisdiction to federal courts over Congress,] [o]therwise, the scope of the provision is intended to be comprehensive."

[18] We find without substance the Government's suggestion that since 18 U. S. C. § 2511 (1) (c) makes criminal the "willful" disclosure of the contents of an intercepted communication, "knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection," and § 2515 ties the propriety of suppression of evidence to the impropriety of its "disclosure," to hold that statutory violations committed in the Justice Department's internal approval and submission procedures with respect to wiretap applications preclude disclosure in court would be to attribute to Congress an intent to impose substantial criminal penalties for "every defect in processing applications." Brief for United States 38. Apart from the fact that a majority of the Court in *United States* v. *Chavez, post,* p. 562, has concluded that not every defect will warrant suppression, it is evident that § 2511 does not impose criminal liability unless disclosure is "willful" and unless the information was known to have been obtained in violation of § 2511 (1). Clearly, the circumstances under which suppression of evidence would be required are not necessarily the same as those under which a criminal violation of Title III would be found.

munications intercepted under the November 6 extension order are admissible because they are not "evidence derived" from the contents of communications intercepted under the October 16 order within the meaning of §§ 2515 and 2518 (10)(a). This position is untenable.

Under § 2518, extension orders do not stand on the same footing as original authorizations but are provided for separately. "Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section." § 2518 (5). Under subsection (1)(e), applications for extensions must reveal previous applications and orders, and under (1)(f) must contain "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." Based on the application, the court is required to make the same findings that are required in connection with the original order; that is, it must be found not only that there is probable cause in the traditional sense and that normal investigative procedures are unlikely to succeed but also that there is probable cause for believing that particular communications concerning the offense will be obtained through the interception and for believing that the facilities or place from which the wire or oral communications are to be intercepted are used or will be used in connection with the commission of such offense or are under lease to the suspect or commonly used by him. § 2518 (3).

In its November 6 application, the Government sought authority to intercept the conversations of not only Giordano, who alone was expressly named in the initial application and order, but of nine other named persons who were alleged to be involved with Giordano in narcotics violations. Based on the attached affidavit, it was alleged that there was probable cause to believe that

communications concerning the offense involved would be intercepted, particularly those between Giordano and the other named individuals, as well as those with others as yet unnamed, and that the telephone listed in the name of Giordano and whose monitoring was sought to be continued "has been used, and is being used and will be used, in connection with the commission of the offenses described." App. 62.

In the affidavit supporting the application, the United States set out the previous applications and orders, incorporated by reference and reasserted the "facts, details and conclusions contained in [the] affidavits" supporting the prior wiretap application, and set down in detail the relevant communications overheard under the existing order, as well as the physical movements of Giordano observed as the result of an around-the-clock surveillance that had been conducted by the authorities. App. 65–81. The Government concluded "[a]fter analyzing the intercepted conversations to and from [Giordano's telephone] and the results of BNDD surveillance" that nine listed individuals, some identified only by aliases, were associated with Giordano as suppliers or buyers in illegal narcotics trafficking and that certain other persons were perhaps connected with the operation in an as yet undisclosed fashion. *Id.*, at 79–80. It was also said that the full scope of Giordano's organization was not yet known. *Id.*, at 80. Assertedly, Giordano was extremely guarded in his telephone conversations, "any specific narcotics conversations he makes are from pay phones" and "[c]onventional surveillance would be completely ineffective except as an adjunct to electronic interception." *Id.*, at 81. The United States accordingly requested an extension of the interception order for no longer than a 15-day period.

It is apparent from the foregoing that the communications intercepted pursuant to the extension order were

evidence derived from the communications invalidly intercepted pursuant to the initial order. In the first place, the application sought and the order granted authority to intercept the communications of various named individuals not mentioned in the initial order. It is plain from the affidavit submitted that information about most of these persons was obtained through the initial illegal interceptions. It is equally plain that the telephone monitoring and accompanying surveillance were coordinated operations, necessarily intertwined. As the Government asserted, the surveillance and conventional investigative techniques "would be completely ineffective except as an adjunct to electronic interception." That the extension order and the interceptions under it were not in fact the product of the earlier electronic surveillance is incredible.

Second, an extension order could validly be granted *only* upon an application complying with subsection (1) of § 2518. Subsection (1)(e) requires that the fact of prior applications and orders be revealed, and (1)(f) directs that the application set out either the results obtained under the prior order or an explanation for the absence of such results. Plainly the function of § 2518 (1)(f) is to permit the court realistically to appraise the probability that relevant conversations will be overheard in the future. If during the initial period, no communications of the kind that had been anticipated had been overheard, the Act requires an adequate explanation for the failure before the necessary findings can be made as a predicate to an extension order. But here there were results, and they were set out in great detail. Had they been omitted no extension order at all could have been granted; but with them, there were sufficient facts to warrant the trial court's finding, in accordance with § 2518 (3)(b), of probable cause to believe that wire communications concerning the offenses involved "will

be obtained through the interception," App. 83, as well as the finding complying with § 2518 (3)(d) that there was probable cause to believe that Giordano's telephone "has been used, is being used, and will be used, in connection with the commission of the offenses described above and is commonly used by Nicholas Giordano . . ." and nine other named persons. *Ibid.*

It is urged in dissent that the information obtained from the illegal October 16 interception order may be ignored and that the remaining evidence submitted in the extension application was sufficient to support the extension order. But whether or not the application, without the facts obtained from monitoring Giordano's telephone, would independently support original wiretap authority, the Act itself forbids extensions of prior authorizations without consideration of the results meanwhile obtained. Obviously, those results were presented, considered, and relied on in this case. Moreover, as previously noted, the Government itself had stated that the wire interception was an indispensable factor in its investigation and that ordinary surveillance alone would have been insufficient. In our view, the results of the conversations overheard under the initial order were essential, both in fact and in law, to any extension of the intercept authority. Accordingly, communications intercepted under the extension order are derivative evidence and must be suppressed.[19] The judgment of the Court of Appeals is

Affirmed.

[For concurring opinion of MR. JUSTICE DOUGLAS, see *post,* p. 580.]

[19] We are also of the view that the evidence obtained from the extended authorizations of October 22 and November 6 for the installation and use of the pen register device on Giordano's

APPENDIX TO OPINION OF THE COURT

Relevant Provisions of Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520

§ 2511. Interception and disclosure of wire or oral communications prohibited.

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know,

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telephone was inadmissible because derived from the invalid wire interception that began on October 16. See n. 2, *supra*. The application for the October 22 extension attached the logs of telephone conversations monitored under the October 16 order and asserted that these logs revealed the "continued use of the telephone . . . for conversations regarding illegal trafficking in narcotics." App. 55. In these circumstances, it appears to us that the illegally monitored conversations should be considered a critical element in extending the pen register authority. We have been furnished with nothing to indicate that the pen register extension of November 6 should be accorded any different treatment.

that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition

of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

. . . . .

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501 (c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of

State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chap-

ter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

. . . . .

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications

sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications

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within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether

or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained

in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with

the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal

is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

. . . . .

§ 2520. Recovery of civil damages authorized.

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I agree with the majority that the authorization by the Executive Assistant to the Attorney General of the application for the October 16 interception order contravened 18 U. S. C. § 2516 (1) and that the statutory remedy is suppression of all evidence derived from interceptions made under that order. I therefore join Parts I, II, and III of the opinion of the Court. For the reasons stated below, however, I dissent from the Court's conclusion, stated in Part IV of its opinion, that evidence

obtained under the two "pen register" [1] extension orders and under the November 6 extension of the interception order must also be suppressed.

These are the pertinent facts. On October 8, 1970, the Chief Judge of the United States District Court for the District of Maryland authorized the use of a pen register device to monitor and record for a 14-day period all numbers dialed from a telephone listed to respondent Giordano. There is no dispute that the pen register order was based on probable cause and was therefore lawful under the Fourth Amendment. On October 16, 1970, the District Court issued an order authorizing the interception of wire communications to and from Giordano's telephone for a period not to exceed 21 days. There is likewise no dispute that the wiretap order was based on probable cause. The defect in the application for this order was not the strength of the Government's showing on the merits of its request but the authorization of the application by the Executive Assistant to the Attorney General rather than by one of the officials specifically designated in 18 U. S. C. § 2516 (1). As a result of this procedural irregularity both the contents of communications intercepted under the October 16 wiretap order and any "evidence derived therefrom" must be suppressed. 18 U. S. C. §§ 2515 and 2518 (10)(a).

The authorization for use of the pen register device was extended by orders dated October 22 and Novem-

[1] A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court. 340 F. Supp. 1033, 1038–1041 (Md. 1972).

ber 6, 1970. On the latter date the District Court also extended the intercept authority for a maximum additional period of 15 days. All three extension orders were based in part, *but only in part,* on evidence obtained under the invalid wiretap order of October 16. The wiretap extension order, unlike the original intercept order, was not marred by the defect of improper authorization.

The Government contends that, putting aside all evidence derived from the invalid original wiretap order, the independent and untainted evidence submitted to the District Court constituted probable cause for issuance of both pen register extension orders and the wiretap extension order, and in the latter case also satisfied the additional requirements imposed by 18 U. S. C. § 2518 (3).[2] Preoccupied with the larger issues in the case, the District Court summarily dismissed this contention insofar as it related to the pen register extension orders:

> "The subsequent extension orders are not supported by sufficient showings of probable cause,

[2] Under 18 U. S. C. § 2518 (3), the court is required to make the following determinations:

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

> however, for the reason that information was used to obtain those extension orders from a Title III wiretap which, for reasons appearing later in this opinion, was defective. The 'fruit of the poisonous tree' doctrine requires the suppression of all pen register information obtained under the subsequent orders. Nardone v. United States, 308 U. S. 338 . . . (1939); 18 U. S. C. § 2518 (10)(a)." 340 F. Supp. 1033, 1041 (Md. 1972).

The Court of Appeals did not mention the point. 469 F. 2d 522 (CA4 1972).

With respect to the wiretap extension, neither the District Court nor the Court of Appeals addressed the Government's contention that communications intercepted under the extension were not derivatively tainted by the improper authorization defect in the original wiretap order, and neither court made any finding on this contention. The District Court simply found the wiretap extension order invalid on a different ground applicable both to the extension and to the original order. Specifically, the court concluded that the original wiretap order was unlawful because the application for it misidentified the approving officer and therefore failed to comply strictly with the provisions of 18 U. S. C. §§ 2518 (1)(a) and (4)(d). The misidentification problem occurred in the application for the original wiretap order *and* in the application for the wiretap extension. The District Court held the extension order invalid on that basis alone and ordered the evidence obtained pursuant thereto suppressed for that reason.[3] The Court of

[3] Immediately after stating its conclusion that the misidentification problem required suppression, the District Court made its sole reference to the November 6 extension order:

"The application and order relating to the extension of the wire-

Appeals affirmed on a different ground entirely. It held the original order invalid because the application for it had been approved by the Executive Assistant to the Attorney General rather than by one of the officials designated in 18 U. S. C. § 2516 (1). The defect of improper authorization, unlike the misidentification problem, arose *only* in connection with the original wiretap order. Perhaps through simple oversight, the Court of Appeals failed to consider the fate of the evidence obtained under the extension. Thus neither of the lower courts ruled on the derivative evidence question.

Today we affirm the suppression of evidence obtained under the original wiretap order for the same reason adopted by the Court of Appeals—the defect of improper authorization. As noted above, this defect did not occur in the application for the wiretap extension order. Today we also hold that misidentification of the approving authority does not render inadmissible evidence obtained pursuant to a resulting interception order. *United States* v. *Chavez, post,* p. 562. This decision removes the sole basis advanced by the District Court for suppressing the telephone conversations intercepted under the wiretap extension order and requires us to consider whether that evidence should be suppressed by reason of the improper authorization of the application for the original order. In doing so it is important to note that we are the first court to consider this aspect of the case.

The majority holds that the invalidity of the original wiretap order requires suppression of all evidence

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tap are defective for the same reasons as the original application and order." 340 F. Supp., at 1060.

Plainly, this reference to the "same reasons" concerns the failure to comply literally with §§ 2518 (1)(a) and (4)(d) identification requirements and has nothing to do with any derivative-evidence rule.

obtained under the three extension orders. In my view the application to this case of well-established principles, principles developed by the courts to effectuate constitutional guarantees and adopted by Congress to effectuate the statutory guarantees of Title III, demonstrates that the majority's conclusion is error. As will appear, the same analysis governs all three extension orders, but it may clarify my position to deal with the two pen register extension orders in Part I, below, and to reserve discussion of the November 6 extension of the wiretap for Part II.

I

The installation of a pen register device to monitor and record the numbers dialed from a particular telephone line is not governed by Title III. This was the conclusion of the District Court in the instant case and of the courts in *United States* v. *King,* 335 F. Supp. 523, 548–549 (SD Cal. 1971), and in *United States* v. *Vega,* 52 F. R. D. 503, 507 (EDNY 1971). This conclusion rests on the fact that the device does not hear sound and therefore does not accomplish any "interception" of wire communications as that term is defined by 18 U. S. C. § 2510 (4)—"the *aural* acquisition of the *contents* of any wire or oral communication through the use of any electronic, mechanical, or other device" (emphasis added). Any doubt of the correctness of this interpretation is allayed by reference to the legislative history of Title III. The Report of the Senate Committee on the Judiciary in discussing the scope of the statute explicitly states "[t]he use of a 'pen register,' for example, would be permissible." S. Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968).

Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on com-

pliance with the constitutional requirements of the Fourth Amendment.[4] In this case the Government secured a court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register. The District Court seemed to assume that because these extension orders were based in part on tainted evidence, information obtained pursuant thereto must necessarily be suppressed under the "fruit of the poisonous tree" doctrine. 340 F. Supp., at 1041. That is not the law.

The District Court relied on *Nardone* v. *United States,* 308 U. S. 338 (1939). In that decision the Court held that a statutory prohibition of unlawfully obtained evidence encompassed derivative evidence as well. But the Court also reaffirmed that the connection between unlawful activity and evidence offered at trial may become "so attenuated as to dissipate the taint," *id.,* at 341, and that facts improperly obtained may nevertheless be proved if knowledge of them is based on an independent source. *Ibid.* In its constitutional aspect, the principle is illustrated by *Wong Sun* v. *United States,* 371 U. S. 471 (1963). It is, in essence, that the derivative taint of illegal activity does not extend to the ends of the earth but only until it is dissipated by an intervening event. Of course, the presence of an independent source would always suffice.

The independent-source rule has as much vitality in the context of a search warrant as in any other. Thus, for example, unlawfully discovered facts may serve as the basis for a valid search warrant if knowledge of them

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[4] The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case.

is obtained from an independent and lawful source. See, *e. g., Anderson* v. *United States,* 344 F. 2d 792 (CA10 1965). The obvious and well-established corollary is that the inclusion in an affidavit of indisputably tainted allegations does not necessarily render the resulting warrant invalid. The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause. *James* v. *United States,* 135 U. S. App. D. C. 314, 315, 418 F. 2d 1150, 1151 (1969); *United States* v. *Sterling,* 369 F. 2d 799, 802 (CA3 1966); *United States* v. *Tarrant,* 460 F. 2d 701, 703–704 (CA5 1972); *United States* v. *Koonce,* 485 F. 2d 374, 379 (CA8 1973); *Howell* v. *Cupp,* 427 F. 2d 36, 38 (CA9 1970); *Chin Kay* v. *United States,* 311 F. 2d 317, 321 (CA9 1962).[5] Judge

[5] All of the cases cited are directly on point. There are a few additional decisions that indirectly support the general proposition stated above. *United States* v. *Cantor,* 470 F. 2d 890 (CA3 1972), involved a defendant's claim that the Government violated his Fourth Amendment rights by refusing to disclose to him certain evidence that had been used to establish probable cause for issuance of a warrant. The court rejected that claim on the ground that there was adequate independent justification to find probable cause. *Id.,* at 893. The cases of *United States* v. *Jones,* 475 F. 2d 723 (CA5 1973), and *United States* v. *Upshaw,* 448 F. 2d 1218 (CA5 1971), stand for the proposition that the validity of a search warrant based in part on erroneous statements is determined by evaluating the sufficiency of the other allegations. Finally, *United States* v. *Lucarz,* 430 F. 2d 1051 (CA9 1970), involved a search warrant based on an affidavit containing two paragraphs that invited the magistrate to find probable cause by drawing a negative inference from the defendant's exercise of his constitutional right to the assistance of counsel. The court held the validity of the warrant was to be determined on the basis of the other allegations in the affidavit.

Weinfeld aptly stated the point in *United States* v. *Epstein*, 240 F. Supp. 80 (SDNY 1965):

> "There is authority, and none to the contrary, that when a warrant issues upon an affidavit containing both proper and improper grounds, and the proper grounds—considered alone—are more than sufficient to support a finding of probable cause, inclusion of the improper grounds does not vitiate the entire affidavit and invalidate the warrant." *Id.*, at 82.

I know of no precedent holding to the contrary.[6]

The application of this principle to the pen register extension orders is clear beyond doubt. The original pen register order was based on a showing of probable

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[6] In fact, there are only two cases lending even colorable support to a contrary view. Both are from the Sixth Circuit, and neither can be said to contradict the general proposition stated above. In *United States* v. *Langley*, 466 F. 2d 27 (1972), the court considered the validity of a warrant issued on the basis of information obtained in a previous warrantless search. The court held the prior search valid in large part and affirmed the validity of the warrant for the second search despite the inclusion in the affidavit of allegations based on the unlawful aspects of the first search. Although the case therefore illustrates the principle stated above, the court added the following comment: "It must be emphasized that where such tainted information comprises more than a *very minor portion* of that found in an affidavit supporting a warrant to search, the warrant must be held invalid." *Id.*, at 35 (emphasis in original). The other case is *United States* v. *Nelson*, 459 F. 2d 884 (1972), where the affidavit for a search warrant relied on information derived from two prior warrantless searches. Although the court suggested several reasons for suppressing the evidence seized pursuant to the warrant, the principal basis seems to have been the finding that the untainted allegations did not constitute probable cause. Thus neither case contradicts the decisions of the District of Columbia, Third, Fifth, Eighth, and Ninth Circuits cited in the text.

cause made prior to, and therefore undeniably independent of, the invalid wiretap. The affidavit supporting the first extension of the pen register order incorporated the allegations contained in the affidavit submitted for the original order and provided the additional untainted information that Giordano had sold heroin to a narcotics agent on October 17, 1970. The affidavit for the second extension of the pen register order is not included in the record, but there is no reason to doubt that it made a similar incorporation by reference of the earlier, untainted allegations. I would hold the evidence obtained under the first pen register extension order admissible and remand the case for determination of whether evidence obtained under the second extension should be admitted as well.

The basis for the majority's conclusion to the contrary is far from apparent. In the final footnote to its opinion, the Court states that the evidence obtained under the defective original wiretap order "should be considered a critical element in extending the pen register authority." The majority does not suggest, however, that the original pen register order was based on anything less than probable cause. Nor does it deny that the affidavit supporting the extension of the pen register authority fully incorporated the earlier untainted allegations. And, finally, the majority does not contradict the established principle that a warrant based on an affidavit containing tainted allegations may nevertheless be valid if the independent and lawful information stated in the affidavit shows probable cause. In light of these significant silences, the majority's bare assertion that the tainted evidence obtained under the original wiretap order was a "critical element" in the extension of the pen register authority is, to me, an unexplained conclusion—not a rationale.

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II

Unlike the pen register extensions, the wiretap extension order of November 6 is governed by Title III. The provisions of that statute prescribe an elaborate procedure for the lawful interception of wire communications. To the extent that the statutory requirements for issuance of an intercept order are nonconstitutional in nature, the exclusionary rule adopted to effectuate the Fourth Amendment does not pertain to their violation. The statute, however, contains its own exclusionary rule, 18 U. S. C. § 2518 (10)(a), and the scope of the suppression remedy is defined by 18 U. S. C. § 2515 to include derivative evidence:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . ."

The obvious and familiar model for the statutory ban on the use of derivative evidence was the constitutional doctrine of the "fruit of the poisonous tree," and the legislative history confirms that Congress intended the phrase "no evidence derived therefrom" to incorporate that doctrine and render it applicable to certain statutory violations of nonconstitutional dimensions. The Senate Report makes the point explicitly:

> "[Section 2515] largely reflects existing law. It applies to suppress evidence directly (*Nardone* v. *United States,* 302 U. S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone* v. *United States,* 308 U. S. 338 (1939).) There is, however, no intention to change the attenuation rule. See *Nardone* v. *United States,* 127 F. 2d 521 (2d), cert. denied, 316 U. S. 698 (1942); *Wong Sun*

v. *United States,* 371 U. S. 471 (1963)." S. Rep. No. 1097, 90th Cong., 2d Sess., 96.

Thus, although the validity of a wiretap order depends on the satisfaction of certain statutory conditions in addition to the constitutional requirement of probable cause, the principle developed in Part I of this opinion is fully applicable to the November 6 wiretap extension order. The question is not whether the application for that order relied in part on communications intercepted under the invalid original order but whether, putting aside that tainted evidence, the independent and lawful information stated in the supporting affidavit suffices to show both probable cause and satisfaction of the various additional requirements of Title III.[7] *United States* v.

[7] The majority seems to believe that this principle, while fully applicable to original wiretap orders, is wholly inapplicable to extension orders. This, at least, is the most reasonable construction of the majority's discussion of §§ 2518 (1) (e) and (f). *Ante,* at 532–533. Those provisions require that an application for an extension order include "a full and complete statement of the facts concerning all previous applications" and "a statement setting forth the results thus far obtained from the interception . . . ." According to the majority, the fact that law enforcement authorities complied with §§ 2518 (1) (e) and (f) by including in the application for the extension order information regarding the earlier wiretap necessarily and automatically rendered the extension order invalid, *regardless* of whether the independent and untainted information in the application for the extension satisfied the requirements of the Fourth Amendment and § 2518 (3).

With all respect, I find this a baffling interpretation of the statute. Certainly there is nothing in the language or history of §§ 2518 (1) (e) and (f) to suggest that Congress intended these provisions to except all extension orders from the independent-source doctrine. Nor is there any suggestion in the language or history of § 2515, which is the statutory analogue to the constitutional doctrine of the fruit of the poisonous tree, that Congress intended to distinguish between original wiretap orders and extension orders in determining the extent of the suppression remedy. Finally, there is nothing in logic

Iannelli, 339 F. Supp. 171 (WD Pa. 1972); *United States* v. *Ceraso,* 355 F. Supp. 126 (MD Pa. 1973).

The application for the wiretap extension order was supported by the affidavit of a group supervisor from the Bureau of Narcotics and Dangerous Drugs. The same officer had sworn to one of two affidavits submitted in support of the application for the original wiretap order. The other had been filed by a narcotics agent acting under his supervision and stated facts within their joint knowledge. In the affidavit for the extension order, the supervisor swore that he had reviewed both of the earlier affidavits, and he "reassert[ed] the facts, details and conclusions contained in those affidavits." App. 66. Those allegations not only established probable cause to believe that Giordano was engaged in the illegal sale and distribution of narcotics on a fairly substantial scale, 18 U. S. C. § 2518 (3)(a), they also satisfied the additional statutory criteria for issuance of an intercept order. They showed, for example, that Giordano had made numerous telephone calls to numbers listed to well-known narcotics violators and hence that there was probable cause to believe that communications concerning the illegal drug traffic were taking place on Giordano's telephone line. See 18 U. S. C. §§ 2518 (3)(b) and (d). The affidavits also established the inadequacy of alternative investigative means and demonstrated that without a wiretap of Giordano's telephone the narcotics agents would be unable to discover his source of supply or method of distribution. See 18 U. S. C. § 2518 (3)(c). All this was shown on the basis of wholly untainted evidence incorporated and reaffirmed in the affidavit sup-

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to indicate why Congress would have wanted to make such a distinction, and there is no basis in reason to suppose that Congress, if it had intended such a result, would have failed to leave any evidence of that intent.

porting the Government's request for the wiretap extension order.

The affidavit also provided additional untainted information to support the application for the extension order. It set forth, for example, the circumstances of Giordano's sale of $3,800 worth of heroin to an undercover agent on the day following issuance of the original wiretap order. Moreover, it recounted in great detail highly suspicious conduct observed by federal agents keeping Giordano under physical surveillance.[8] Like the allegations incorporated by reference from the earlier affidavits, this additional untainted information was relevant both to the constitutional requirement of probable cause and to the various statutory criteria for issuance of an intercept order. 18 U. S. C. § 2518 (3).

In light of the substantiality and detail of the untainted allegations offered in support of the application for the wiretap extension order, I find no basis for the majority's rather summary conclusion that the communications intercepted under that extension order were derivatively tainted by the improper authorization of the application for the original wiretap order. Because neither the District Court nor the Court of Appeals has considered this question, I would remand the case with instructions that the issue be settled in accord with the principles set forth in this opinion.

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[8] The detailed information lawfully obtained through surveillance and undercover work was aptly summarized in ¶ 77 of the affidavit supporting the extension order:

"Giordano exhibits the characteristics of a high-level narcotics trafficker—extreme caution. When travelling, he continually uses various counter-surveillance techniques. In his transactions, he limits his contacts to a small number of trusted individuals." App. 81.

UNITED STATES *v.* CHAVEZ ET AL.

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

No. 72–1319. Argued January 8, 1974—Decided May 13, 1974

Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 each application for a court order authorizing the interception of a wire or oral communication, 18 U. S. C. § 2518 (1) (a), and each interception order, 18 U. S. C. § 2518 (4) (d), must identify the officer authorizing the application, and the Attorney General, or an Assistant Attorney General specially designated by him, may authorize the application, 18 U. S. C. § 2516 (1). The contents of intercepted communications, or evidence derived therefrom, may not be received in evidence at a trial if the disclosure of the information would be "in violation of" Title III, 18 U. S. C. § 2515, and may be suppressed on the grounds, *inter alia*, that the communication was "unlawfully intercepted," 18 U. S. C. § 2518 (10) (a) (i), or that the interception order was "insufficient on its face," 18 U. S. C. § 2518 (10) (a) (ii). In this case the applications and orders to wiretap the telephones of respondents Chavez and Fernandez, two narcotics offense suspects, incorrectly identified an Assistant Attorney General as the official authorizing the applications, whereas with respect to Chavez it had been the Attorney General and with respect to Fernandez the Attorney General's Executive Assistant. After Chavez, Fernandez, and the other respondents were indicted, the District Court, on respondents' motions, held that the evidence secured through both wiretaps had to be suppressed for failure of the applications or orders to identify the individual who actually authorized the application, and further as to the Fernandez wiretap because neither the Attorney General nor a specially designated Assistant Attorney General authorized the application. The Court of Appeals affirmed in all respects. *Held:*

1. Because the application for the interception order on the Fernandez phone was authorized by the Attorney General's Executive Assistant, rather than by the Attorney General or any specially designated Assistant Attorney General, on whom alone § 2516 (1) confers such power, evidence secured under that order

was properly suppressed. *United States* v. *Giordano, ante,* p. 505. Pp. 569–570.

2. Misidentifying the Assistant Attorney General as the official authorizing the Chavez wiretap, when the Attorney General himself actually gave the approval, was in no sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III, and hence does not require suppression of the wiretap evidence. *United States* v. *Giordano, supra,* distinguished. Pp. 570–580.

(a) Where it is established that responsibility for approval of the application is fixed in the Attorney General, compliance with the screening requirements of Title III is assured, and there is no justification for suppression. Pp. 571–572.

(b) The interception order was not "insufficient on its face" within the meaning of § 2518 (10) (a) (ii), since the order clearly identified "on its face" the Assistant Attorney General as the person authorizing the application, he being a person who under § 2516 (1) could properly give such approval if specially designated to do so as the order recited, notwithstanding this was subsequently shown to be incorrect. Pp. 573–574.

(c) The misidentification of the officer authorizing the wiretap application did not affect the fulfillment of any of the reviewing or approval functions required by Congress, and, by itself, does not render the interception conducted under the order "unlawful" within the meaning of § 2518 (10) (a) (i) or the disclosure of the content of the interceptions, or derivative evidence, otherwise "in violation of" Title III within the meaning of § 2515, there being no legislative history concerning §§ 2518 (1) (a) and (4) (d) to suggest that they were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance. Pp. 574–580.

478 F. 2d 512, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post,* p. 580.

Solicitor General Bork argued the cause for the United States. With him on the brief were *Assistant Attorney*

General Petersen, Harriet S. Shapiro, and *Sidney M. Glazer.*

James F. Hewitt argued the cause and filed a brief for respondents.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case, like *United States* v. *Giordano, ante,* p. 505, concerns the validity of procedures followed by the Justice Department in obtaining judicial approval to intercept wire communications under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211–225, 18 U. S. C. §§ 2510–2520, and the propriety of suppressing evidence gathered from court-authorized wiretaps where the statutory application procedures have not been fully satisfied. As is more fully described in *Giordano,* Title III limits who, among federal officials, may approve submission of a wiretap application to the appropriate district court, to the Attorney General, or an Assistant Attorney General he specially designates, 18 U. S. C. § 2516 (1), and delineates the information each application must contain, upon what findings an interception order may be granted, and what the order shall specify, 18 U. S. C. §§ 2518 (1), (3), (4).[1] Within this general framework, two statutory requirements are of particular relevance to this case. Section 2518 (1)(a) provides that each application for a court order authorizing or approving the interception of a wire or oral communication shall include, among other information, "the identity of the . . . officer authorizing the application." Similarly, § 2518 (4)(d) provides that the order of authorization or approval itself shall specify, in part, "the identity of . . . the person authorizing the appli-

[1] The relevant statutory provisions are set forth in the Appendix to *United States* v. *Giordano, ante,* p. 534.

cation." The specific question for adjudication here, which it was unnecessary to resolve in *Giordano,* is whether, when the Attorney General has in fact authorized the application to be made, but the application and the court order incorrectly identify an Assistant Attorney General as the authorizing official, evidence obtained under the order must be suppressed. We hold that Title III does not mandate suppression under these circumstances.

I

Respondents were all indicted for conspiracy to import and distribute heroin in violation of 21 U. S. C. §§ 173, 174 (1964 ed.). In addition, respondent Umberto Chavez was separately charged under 18 U. S. C. § 1952 with using and causing others to use a telephone between California and Mexico, and performing other acts, in order to facilitate unlawful narcotics activity, and respondent James Fernandez was charged under § 1952 with traveling between California and Mexico, and performing other acts, for the same purpose. Upon notification that the Government intended to introduce evidence obtained from wiretaps of Chavez' and Fernandez' phones at trial, respondents filed motions to suppress, challenging the legality of the Justice Department's application procedures leading to the issuance by the District Court of the two orders permitting the wire interceptions. Affidavits filed in opposition by the Attorney General and his Executive Assistant represented that the application submitted for the February 18, 1971, order authorizing interception of wire communications to and from the Chavez phone had been personally approved by the Attorney General, whereas the application for the February 25, 1971, order to intercept communications to and from the Fernandez phone had been approved by his Executive Assistant at a time when the Attorney General

was unavailable, and pursuant to an understanding that the Executive Assistant, applying the Attorney General's standards as he understood them, could act for the Attorney General in such circumstances.

Each application to the court had recited, however, that the Attorney General, pursuant to 18 U. S. C. § 2516, had "specially designated" the Assistant Attorney General for the Criminal Division, Will Wilson, "to authorize [the applicant attorney] to make this application for an Order authorizing the interception of wire communications." Moreover, appended to each application was a form letter, addressed to the attorney making the application and purportedly signed by Will Wilson, stating that the signer had reviewed the attorney's request for authorization to apply for a wiretap order pursuant to 18 U. S. C. § 2518 and had made the requisite probable-cause and other statutory determinations from the "facts and circumstances detailed" in the request, and that "you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General . . . , pursuant to the power conferred on him by Section 2516 . . . to make application" for a wire interception order. Correspondingly, the District Court's intercept order in each case declared that court approval was given "pursuant to the application authorized by . . . Will Wilson, who has been specially designated in this proceeding by the Attorney General . . . John N. Mitchell, to exercise the powers conferred on the Attorney General" by § 2516.

The discrepancy between who had actually authorized the respective applications to be made, and the information transmitted to the District Court clearly indicating that Assistant Attorney General Wilson was the authorizing official, was explained as the result of a standard procedure followed within the Justice Department.

While the Attorney General had apparently refrained from designating any Assistant Attorney General to exercise the authorization power under § 2516 (1), form memoranda were routinely sent from his office, over his initials, to Assistant Attorney General Wilson, stating that "with regard to your recommendation that authorization be given" to make application for a court order permitting wire interception, "you are hereby specially designated" to exercise the power conferred on the Attorney General by § 2516 "for the purpose of authorizing" the applicant attorney to apply for a wiretap order. Evidently, this form was intended to reflect notice of approval by the Attorney General, though on its face it suggested that the decision whether to authorize the particular wiretap application would be made by Assistant Attorney General Wilson. In fact, as revealed by the affidavits of Wilson's then Deputy Assistants filed in opposition to respondents' suppression motions, "Wilson did not examine the files or expressly authorize the applications" for either the February 18 or February 25 interception orders, and they signed his name "in accordance with [his] authorization . . . and the standard procedures of the Criminal Division" to the respective letters of authorization to the applicant attorney, which were made exhibits to the applications. The signing of Wilson's name was regarded as a "ministerial act" because of Wilson's authorization to his Deputies "to sign his name to and dispatch such a letter of authorization in every instance in which the request had been favorably acted upon in the Office of the Attorney General."

The District Court held that the evidence secured through both wiretaps had to be suppressed for failure of either of the individuals who actually authorized the applications to be "identified to Chief Judge Carter, Congress or the public" in the application or orders, as

mandated by §§ 2518 (1)(a) and (4)(d), respectively. Moreover, evidence obtained under the February 25 wiretap order on the Fernandez phone was separately suppressed, because the Government admitted that "neither the Attorney General nor a specially designated Assistant Attorney General ever authorized the application," as § 2516 (1) requires.

The Court of Appeals affirmed in all respects. 478 F. 2d 512. With respect to the Chavez tap, the Court of Appeals assumed, as had the District Court, that the Attorney General had personally approved the request for authority to apply for the interception order, as his affidavit stated. Nonetheless, the misidentification of Assistant Attorney General Wilson as the authorizing official was deemed to be a "misrepresentation" and an "apparently deliberate deception of the courts by the highest law officers in the land," *id.*, at 515, 517, which required suppression of evidence gathered from the tap for failure to comply with 18 U. S. C. §§ 2518 (1)(a) and (4)(d). Congress was held to have "intended to eliminate any possibility that the authorization of wiretap applications would be institutional decisions," and the Court of Appeals was fearful that if the misidentification which occurred in this case were approved, "there would be nothing to prevent future Attorneys General from remaining silent if a particular wiretap proved embarrassing." 478 F. 2d, at 516.

We granted certiorari, 412 U. S. 905, to resolve the conflict between the position taken by the Ninth Circuit in this case on the issue of suppression because of inaccurate identification of the officer authorizing the application and the position taken by every other circuit that has considered the question.[2] We agree with those other

[2] In other instances where the Attorney General had personally authorized the application, but the application and order erroneously

courts of appeals that misidentifying the Assistant Attorney General as the official authorizing the wiretap application to be made does not require suppression of wiretap evidence when the Attorney General himself has actually given the approval; hence, we reverse that portion of the judgment suppressing the Chavez wiretap evidence, and remand for further proceedings to permit the District Court to address other challenges to the Chavez wiretap evidence which respondents had made but the District Court did not find it necessary to consider.[3] Because

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recited approval by Assistant Attorney General Wilson, suppression of wiretap evidence has been denied on the ground of substantial compliance with Title III requirements. *United States* v. *James,* 161 U. S. App. D. C. 88, 98, 494 F. 2d 1007, 1017 (1974) ("immaterial variance"); *United States* v. *Pisacano,* 459 F. 2d 259, 264 n. 5 (CA2 1972) ("discrepancy did not meaningfully subvert the congressional scheme"); *United States* v. *Becker,* 461 F. 2d 230, 235 (CA2 1972) ("harmless error"); *United States* v. *Ceraso,* 467 F. 2d 647, 652 (CA3 1972) ("subsequent identification of the authorizing officer is satisfactory"); *United States* v. *Bobo,* 477 F. 2d 974, 985 (CA4 1973) ("sufficient compliance"); *United States* v. *Cox,* 462 F. 2d 1293, 1300 (CA8 1972) ("it is irrelevant that the application and order recited the authorizing officer as Mr. Wilson rather than Mr. Mitchell"). See also *United States* v. *Roberts,* 477 F. 2d 57, 59 (CA7 1973), holding the authorization improper because given by the Executive Assistant, not the Attorney General, but suggesting that with respect to the misidentification of Assistant Attorney General Wilson "we would not be inclined to elevate form over substance to find a violation of 18 U. S. C. § 2518 (1)(a) and (4)(d) . . . ."

[3] The record discloses that respondents also based their motions to suppress the Chavez wiretap evidence on the failure of the Government's affidavits in support of the wiretap application to demonstrate a need for wiretapping as opposed to less intrusive means of investigation, 18 U. S. C. § 2518 (1)(c), to particularly describe the communications sought to be intercepted, § 2518 (1)(b)(iii), to allege facts sufficient to justify the uncertainty of the termination date for the interception, § 2518 (1)(d), or to adequately show probable cause to support the order, § 2518 (3); moreover, the

the application for the interception order on the Fernandez phone was authorized by the Attorney General's Executive Assistant, rather than by the Attorney General or any specially designated Assistant Attorney General, on whom alone 18 U. S. C. § 2516 (1) confers such power, evidence secured under that order was properly suppressed for the reasons stated in the opinion filed today in *United States* v. *Giordano, ante,* p. 505. Accordingly, that portion of the judgment suppressing the Fernandez wiretap evidence is affirmed.

II

The application and order for the Chavez wiretap did not correctly identify the individual authorizing the application, as 18 U. S. C. §§ 2518 (1)(a) and (4)(d) require. Of this there is no doubt. But it does not follow that because of this deficiency in reporting, evidence obtained pursuant to the order may not be used at a trial of respondents. There is no claim of any constitutional infirmity arising from this defect, nor would there be any merit to such a claim, and we must look to the statutory scheme to determine if Congress has provided that suppression is required for this particular procedural error.

Section 2515 provides that the contents of any intercepted wire or oral communication, and any derivative evidence, may not be used at a criminal trial, or in certain other proceedings, "if the disclosure of that information would be in violation of this chapter."

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sufficiency of the order's directive to minimize the interception of innocent conversations and compliance by the agents who conducted the wiretap with the order of minimization, § 2518 (5), were also challenged. R. 159–197. None of these questions is before us now, as neither the District Court nor the Court of Appeals passed on any of them.

Aggrieved persons may move, in a timely manner under § 2518 (10)(a), to suppress the use of such evidence at trial on the grounds that

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> "(iii) the interception was not made in conformity with the order of authorization or approval."

In *United States* v. *Giordano, supra,* we have concluded that Congress, in 18 U. S. C. § 2516 (1), made preliminary approval of submission of wiretap applications a central safeguard in preventing abuse of this means of investigative surveillance, and intentionally restricted the category of federal officials who could give such approval to only the Attorney General himself or any Assistant Attorney General he might specially designate for that purpose. Hence, failure to secure approval of one of these specified individuals prior to making application for judicial authority to wiretap renders the court authority invalid and the interception of communications pursuant to that authority "unlawful" within the meaning of 18 U. S. C. § 2518 (10)(a)(i). Failure to correctly report the identity of the person authorizing the application, however, when in fact the Attorney General has given the required preliminary approval to submit the application, does not represent a similar failure to follow Title III's precautions against the unwarranted use of wiretapping or electronic surveillance and does not warrant the suppression of evidence gathered pursuant to a court order resting upon the application.

There is little question that §§ 2518 (1)(a) and (4)(d) were intended to make clear who bore the responsibility for approval of the submission of a particular wiretap

application. Thus, the Senate Report accompanying the favorable recommendation of Title III states that § 2518 (1)(a) "requires the identity of the person who makes, and the person who authorized the application[,] to be set out. This fixes responsibility." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968). And § 2518 (4)(d) "requires that the order note the agency authorized to make the interception and the person who authorized the application so that responsibility will be fixed." *Id.*, at 103. Where it is established that responsibility for approval of the application is fixed in the Attorney General, however, compliance with the screening requirements of Title III is assured, and there is no justification for suppression.

Respondents suggest that the misidentification of Assistant Attorney General Wilson as the authorizing official was calculated to mislead the District Judge in considering the wire interception applications, and certainly had the effect of misleading him, since the interception order also misidentified the authorizing official in reliance on the statements made in the application. We do not perceive any purpose to be served by deliberate misrepresentation by the Government in these circumstances. To the contrary, we think it cannot be seriously contended that had the Attorney General been identified as the person authorizing the application, rather than his subordinate, Assistant Attorney General Wilson, the District Judge would have had any greater hesitation in issuing the interception order. The same could not be said, of course, if, as in *Giordano*, the correct information had revealed that none of the individuals in whom Congress reposed the responsibility for authorizing interception applications had satisfied this preliminary step. The District Court undoubtedly thought that Wilson had approved the Chavez and Fernandez wiretap applications, and we do not condone the Justice

Department's failure to comply in full with the reporting procedures Congress has established to assure that its more substantive safeguards are followed.[4] But we cannot say that misidentification was in any sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III.

Neither the District Court nor the Court of Appeals made clear which of the grounds set forth in § 2518 (10)(a) was relied upon to suppress the Chavez wiretap evidence. Respondents rely on each of the first two grounds, *i. e.,* that the communications were "unlawfully intercepted" and that the Chavez interception order is "insufficient on its face." Support for the latter claim is drawn from the District Court decision in *United States* v. *Focarile,* 340 F. Supp. 1033, 1057–1060 (Md.), aff'd on other grounds *sub nom. United States* v. *Giordano,* 469 F. 2d 522 (CA4 1972), aff'd, *ante,* p. 505, which concluded that an order incorrectly identifying who authorized the application is equivalent to an order failing to identify anyone at all as the authorizing official. We find neither of these contentions persuasive.

Here, the interception order clearly identified "on its face" Assistant Attorney General Wilson as the person who authorized the application to be made. Under § 2516 (1), he properly could give such approval had he been specially designated to do so by the Attorney Gen-

[4] The Government advises that in the spring of 1972 it revised the form memoranda by which the Attorney General had approved applications for wiretapping or electronic surveillance authority, and the form language in the letters sent to the applying attorneys, which are appended to the applications filed in the district courts, to accurately reflect that approval was obtained from the Attorney General, rather than a specially designated Assistant, unless the latter happens to be the case. Brief for United States in *United States* v. *Giordano* 9.

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eral, as the order recited. That this has subsequently been shown to be incorrect does not detract from the facial sufficiency of the order.[5] Moreover, even if we were to look behind the order despite the clear "on its face" language of § 2518 (10)(a)(ii), it appears that the Attorney General authorized the application, as he also had the power to do under § 2516 (1). In no realistic sense, therefore, can it be said that the order failed to identify an authorizing official who possessed statutory power to approve the making of the application.

The claim that communications to and from the Chavez phone were "unlawfully intercepted" is more plausible, but does not persuade us, given the purposes to be served by the identification requirements and their place in the statutory scheme of regulation. Though we rejected, in *Giordano,* the Government's claim that Congress intended "unlawfully intercepted" communications to mean only those intercepted in violation of constitutional requirements, we did not go so far as to suggest that every failure to comply fully with any

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[5] Respondents' attempt to analogize the facial insufficiency of a search warrant supported by an affidavit submitted under a false name of the affiant, a deficiency which has been held by some courts to require suppression under Fed. Rule Crim. Proc. 41, *King* v. *United States,* 282 F. 2d 398 (CA4 1960), or under the Fourth Amendment, *United States ex rel. Pugh* v. *Pate,* 401 F. 2d 6 (CA7 1968), cert. denied, 394 U. S. 999 (1969), to the asserted facial insufficiency of a wire interception order which incorrectly identifies who authorized the application for the order, must fail. Without passing on the soundness of these cases, it must be recalled that the misidentification of the officer authorizing a wiretap application is irrelevant to the issue of probable cause, which is supported by the separate affidavits of investigative officials. See 18 U. S. C. §§ 2518 (1) and (3). Moreover, no basis is provided in Title III for challenging the validity of the interception order depending on whether the application was approved by the Attorney General rather than a specially designated Assistant.

requirement provided in Title III would render the interception of wire or oral communications "unlawful." To establish such a rule would be at odds with the statute itself. Under § 2515, suppression is not mandated for every violation of Title III, but only if "disclosure" of the contents of intercepted communications, or derivative evidence, would be in violation of Title III. Moreover, as we suggested in *Giordano,* it is apparent from the scheme of the section that paragraph (i) was not intended to reach every failure to follow statutory procedures, else paragraphs (ii) and (iii) would be drained of meaning. *Giordano* holds that paragraph (i) does include any "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Ante,* at 527.

In the present case, the misidentification of the officer authorizing the wiretap application did not affect the fulfillment of any of the reviewing or approval functions required by Congress and is not within the reach of paragraphs (ii) and (iii). Requiring identification of the authorizing official in the application facilitates the court's ability to conclude that the application has been properly approved under § 2516; requiring identification in the court's order also serves to "fix responsibility" for the source of preliminary approval. This information contained in the application and order further aids the judge in making reports required under 18 U. S. C. § 2519.[6] That section requires the judge

[6] Section 2519 provides in full:

"§ 2519. Reports concerning intercepted wire or oral communications.

"(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an

who issues or denies an interception order to report his action and certain information about the application, including the "identity of . . . the person authorizing the

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order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

"(a) the fact that an order or extension was applied for;

"(b) the kind of order or extension applied for;

"(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(e) the offense specified in the order or application, or extension of an order;

"(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

"(g) the nature of the facilities from which or the place where communications were to be intercepted.

"(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

"(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

"(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

"(d) the number of trials resulting from such interceptions;

"(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

"(f) the number of convictions resulting from such interceptions

application," within 30 days, to the Administrative Office of the United States Courts, § 2519 (1)(f). An annual report of the authorizing officials designated in § 2516 must also be filed with that body, and is to contain the same information with respect to each application made as is required of the issuing or denying judge, § 2519 (2)(a). Finally, a summary of the information filed by the judges acting on applications and the prosecutors approving their submission is to be filed with Congress in April of each year by the Administrative Office, § 2519 (3). The purpose of these reports is "to form the basis for a public evaluation" of the operation of Title III and to "assure the community that the system of court-order[ed] electronic surveillance . . . is properly administered . . . ." S. Rep. No. 1097, 90th Cong., 2d Sess., 107. While adherence to the identification reporting requirements of §§ 2518 (1)(a) and (4)(d) thus can simplify the assurance that those whom Title III makes responsible for determining when and how wiretapping and electronic surveillance should be

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and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

"(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

"(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such reports shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section."

conducted have fulfilled their roles in each case, it does not establish a substantive role to be played in the regulatory system.

Nor is there any legislative history concerning these sections, as there is, for example, concerning § 2516 (1), see *United States* v. *Giordano, ante,* at 516 *et seq.,* to suggest that they were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance. Though legislation to regulate the interception of wire and oral communications had been considered by Congress earlier, the proposed statute drafted for the President's Commission on Law Enforcement and Administration of Justice appears to have been the first published proposal to contain a requirement that the application for interception authority should specify "who authorized the application." Task Force Report: Organized Crime, App. C, p. 109, § 3803 (a)(1) (1967). That proposed bill, which was substantially followed in Title III, also provided for reports like those now required by 18 U. S. C. § 2519, including information on "the identity of . . . who authorized the application." *Id.,* at 111, §§ 3804 (a)(6) and (b)(1). It did not, however, require the order to contain this information. *Id.,* at 110, § 3803 (e). S. 675, a bill introduced by Senator McClellan on January 25, 1967, as the "Federal Wire Interception Act," 113 Cong. Rec. 1491, did not contain any of these identification requirements. Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 77–78, §§ 8 (a), (d), 9 (a) (1967). S. 2050, however, a proposal by Senator Hruska to regulate both wiretapping and electronic surveillance, did. Section 2518 (a)(1) required an interception application

to include "the identity of the person who authorized the application," and §§ 2519 (a)(6) and (b)(1) provided that judges and authorizing prosecutors report "the identity of . . . who authorized the application," but did not require that the order contain this information, § 2518 (e). Hearings, *supra,* at 1006–1008. The requirement that this information be contained in the order, as well as in the application and required reports, first appeared in § 2518 (e)(4) of H. R. 13482, 90th Cong., 2d Sess. (1967). Though the House never reported out of committee any wiretapping bill, it was retained in S. 917, a combination of S. 675 and S. 2050, whose provisions ultimately were enacted as Title III. Despite the appearance and modification of the identification requirements during the legislative process, however, no real debate surrounded their adoption, and only the statements in S. Rep. No. 1097, *supra,* that they were designed to fix responsibility, give any indication of their purpose in the overall scheme of Title III. No role more significant than a reporting function designed to establish on paper that one of the major procedural protections of Title III had been properly accomplished is apparent.

When it is clearly established, therefore, that authorization of submission of a wiretap or electronic surveillance application has been given by the Attorney General himself, but the application, and, as a result, the interception order, incorrectly state that approval has instead been given by a specially designated Assistant Attorney General, the misidentification, by itself, will not render interceptions conducted under the order "unlawful" within the meaning of § 2518 (10)(a)(i) or the disclosure of the contents of intercepted communications, or derivative evidence, otherwise "in violation of" Title III within the meaning of § 2515. Hence, the suppression of the Chavez wiretap evidence on the basis

of the misidentification of Assistant Attorney General Wilson as the authorizing official was in error. Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought.

The judgment of the Court of Appeals is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part in No. 72–1319, *United States* v. *Chavez,* and concurring in No. 72–1057, *United States* v. *Giordano, ante,* p. 505.

The Court deals with two different Justice Department violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which imposes express limitations on the use of electronic surveillance. In *United States* v. *Giordano* the Court correctly finds that the violation of 18 U. S. C. § 2516 (1) is a violation of a statutory requirement which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." The Court also properly finds that a violation of such a statutory requirement mandates suppression of the evidence seized by the unlawful interception. I join the opinion of the Court in *Giordano.* The same violation of § 2516 (1) is also involved in the Fernandez wiretap in *United States* v. *Chavez,* and I therefore concur in the Court's suppression of the

evidence seized in that wiretap. In *Chavez,* however, the Court finds that suppression is not warranted for the violations of 18 U. S. C. §§ 2518 (1)(a) and 2518 (4)(d) which the Court admits occurred in the Chavez wiretap itself. I dissent from this conclusion, hereinafter referred to as the holding of *Chavez.*

I

Title III permits electronic surveillance to be employed only pursuant to a court order. It requires, *inter alia,* that a federal trial attorney desiring to apply to the District Court for such a wiretap order must first secure authorization from one of a group of specified officials in the Justice Department. *Giordano* represents a class of cases in which authorization for electronic surveillance was given by Sol Lindenbaum, the Executive Assistant to Attorney General John Mitchell, in violation of the "authorization requirement" of § 2516 (1) of Title III. This section provides that a wiretap order may be applied for only after authorization by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General." *Chavez,* on the other hand, represents a class of cases where the Justice Department violated the "identification requirement" of § 2518 (1)(a) of Title III, which requires that each application made to the District Court for a wiretap order "shall include . . . the identity of . . . the officer authorizing the application." Because the District Courts in this class of cases were supplied with misinformation as to the identity of the person who authorized the applications made to them, the orders they entered approving the use of electronic surveillance violated § 2518 (4)(d) of Title III, which provides that *such orders "shall specify . . . the identity*

of . . . the person authorizing the application." (Emphasis added.)

In the Justice Department between 1969 and 1972, a request from a federal trial attorney for authorization to apply for a wiretap order was reviewed in the Criminal Division before being sent to Attorney General Mitchell. According to the Solicitor General, in *Chavez* Attorney General Mitchell made the operative decision to authorize the wiretap application and signified this by sending a memorandum to Assistant Attorney General Will Wilson directing Wilson to authorize the trial attorney to submit the application to the District Court. The memorandum,[1] the Solicitor General admits, does not make clear that the operative decision was made in the Attorney General's Office; rather, it indicates that Wilson himself was designated to review and authorize the application.

At this point, a letter of authorization was sent to the trial attorney, which clearly identified Assistant Attorney General Wilson, and not Mitchell, as the person who had made the operative decision to authorize the wiretap.[2] Wilson, however, neither saw nor authorized

[1] The form memorandum employed by Mitchell stated in part:

"This is with regard to your recommendation that authorization be given to [the particular trial attorney] to make application for an Order of the Court under Title 18, United States Code, Section 2518, permitting the interception of wire communications for a [particular] period to and from telephone number [the listed telephone numbers of the particular criminal investigation] . . . .

"Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, *you are hereby specially designated to exercise those powers for the purpose of authorizing* [the particular trial attorney] to make the above-described application." (Emphasis added.)

[2] The letter sent over Wilson's signature in *Chavez* read:

"This is with regard to your request for authorization to make application pursuant to the provisions of Section 2518 of Title 18,

the Chavez wiretap application or any others; his signature was affixed to the authorization letters by a Deputy Assistant Attorney General, either Harold P. Shapiro or Henry E. Petersen.[3]

When the trial attorney applied for a wiretap order in the District Court, he attached the letter of authorization purportedly signed by Wilson, and naturally misidentified Wilson as the person who had authorized the application to be made,[4] in violation of the identification

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United States Code, for an Order of the Court authorizing the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs [to intercept wire communications at the particular number involved] . . . .

"*I have reviewed your request and the facts and circumstances detailed therein and have determined that there exists probable cause to believe* that [named individuals were committing certain offenses] . . . . *I have further determined* that there exists probable cause to believe that the above persons make use of the described facility in connection with those offenses, that wire communications concerning the offenses will be intercepted, and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.

"Accordingly, *you are hereby authorized under the power specially delegated to me* in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to Section 2518 of Title 18, United States Code [to intercept the described wire communications] . . . ." (Emphasis added.)

[3] In *Chavez*, the letter was signed by Petersen.

[4] The application stated:

"[T]he Honorable John N. Mitchell, has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire communications. This letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A."

requirement of § 2518 (1)(a). As a result, the District Court's order identified Wilson, and not Mitchell, as the Justice Department official who had authorized the trial attorney to apply for the Chavez wiretap order,[5] in violation of the identification requirement of § 2518 (4)(d).

In *Chavez,* Mitchell first acknowledged responsibility for authorizing the wiretap application in an affidavit filed with the District Court only after respondents had made a motion to suppress the evidence in the tap. Similar affidavits stating that Mitchell had authorized the application, rather than Wilson, were filed by Lindenbaum and Petersen. The courts below, on the strength of these affidavits, have held that Mitchell did in fact authorize the application to be made. Both, however, ordered the evidence which was seized by the surveillance to be suppressed, since the application misidentified Wilson as the responsible official. This Court reverses the Court of Appeals.

II

Deciding a question not reached in *Giordano,* the Court in *Chavez* holds that suppression is not dictated when there has been a violation of a provision of Title III which does not, in the view of the courts, "directly and substantially implement the congressional intention to limit the use of intercept procedures" to cases clearly calling for electronic surveillance. I cannot agree that Title III, fairly read, authorizes the courts to pick and choose among various statutory provisions, suppressing

[5] The order read in part:

"Special Agents . . . are authorized, pursuant to the application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, [to intercept wire communications] . . . ."

evidence only when they determine that a provision is "substantive," "central," or "directly and substantially" related to the congressional scheme.

Section 2515 of Title III unambiguously provides that no evidence derived from any intercepted communication may be received "in any trial . . . in or before any court . . . if the disclosure of that information would be in violation of this chapter." The Court acknowledges this provision in *Chavez, ante,* at 575, but disregards two sections of Title III explicitly dealing with disclosure in determining when disclosure is in fact "in violation of" Title III. Section 2511 (1), which provides criminal penalties for willful violations of Title III, prohibits in § 2511 (1)(c) knowing disclosure of communications intercepted in violation of subsection (1), and the subsection prohibits interception "[e]xcept as otherwise specifically provided in this chapter." § 2511 (1)(a). Section 2517 (3) authorizes the disclosure in a criminal proceeding of information received "by any means authorized by this chapter" or of evidence derived from a communication "intercepted in accordance with the provisions of this chapter." The statute does not distinguish between the various provisions of the Title, and it seems evident that disclosure is "in violation of" Title III when there has not been compliance with any of its requirements.

The Court fixes on § 2518 (10)(a), which defines the class of persons who may move to suppress the admission of evidence. This section provides that any aggrieved person may move to suppress evidence on the grounds that

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

Since paragraphs (ii) and (iii) reach some statutory violations, reasons the Court, paragraph (i) cannot reach all statutory violations or else paragraphs (ii) and (iii) would be "drained of all meaning."

The choice seems to be between attributing to Congress a degree of excessive cautiousness which led to some redundancy in drafting the protective provisions of § 2518 (10)(a), or foolishness which led Congress to enact statutory provisions for law enforcement officials to scurry about satisfying when it did not consider the provisions significant enough to enforce by suppression. In view of the express prohibition by §2515 of disclosure of information "in violation of" the chapter, I would opt for the conclusion that Congress was excessively cautious, and that "unlawfully intercepted" means what it says.

Congress could easily have given the judiciary discretion to apply the suppression remedy only for violations of "central" statutory provisions by using language such as "unlawfully intercepted in violation of important requirements of this chapter" in § 2518 (10)(a). But no such limitation appears. Further, the legislative history of Title III emphasizes Congress' intent to enforce every provision of the Title with the remedy provided in §§ 2515 and 2518 (10)(a). The Senate Report which accompanied Title III to the Congress states that "Section 2515 . . . imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter," and that § 2518 (10)(a) together with § 2515 "applies to suppress evidence directly . . . or indirectly obtained in violation of the chapter." S. Rep. No. 1097, 90th Cong., 2d Sess., 96 (1968).

Again, no distinction supports the conclusion that Congress considered any provision of Title III more

important than any other in the applications of the suppression remedy. Congress at no point indicated that it intended to give the courts the discretion to distinguish various provisions of Title III, never suppressing evidence for violations of some—such as §§ 2518 (1)(a) and (4)(d)—deemed not "directly and substantially" related to the congressional intent to limit the use of electronic surveillance. No matter how egregious or willful the violation of these provisions, it seems that suppression will not follow, and the Court opens the door to the creation of other non-"central" statutory requirements. This breadth of discretion is not part of the congressional scheme, and the Court oversteps its judicial role when it arrogates such discretion to itself.

III

Moreover, even under the test the Court defines in *Chavez,* that violations of only those statutory provisions "directly and substantially" limiting the use of electronic surveillance will warrant suppression, the violation of the identification requirements of §§ 2518 (1)(a) and (4)(d) mandates suppression in *Chavez.* For the requirement of § 2518 (1)(a) that the application for a wiretap "shall include . . . the identity of . . . the officer authorizing the application" together with that of § 2518 (4)(d) that the wiretap order contain the same information significantly implements the congressional intention to limit the use of electronic surveillance procedures.

In support of its conclusion that suppression is not mandated by the §§ 2518 (1)(a) and 2518 (4)(d) violations in *Chavez,* the Court states that while Congress expressed the intent that these provisions "fix responsibility" on the person who authorized the employment of electronic surveillance, "[w]here it is established that responsibility for approval of the application is fixed

in the Attorney General, however, compliance with the screening requirements of Title III [§ 2516] is assured, and there is no justification for suppression." *Ante,* at 572. To the Court, the provisions "[do] not establish a substantive role to be played in the regulatory system. . . . No role more significant than a reporting function designed to establish on paper that one of the major procedural protections of Title III [the authorization requirement of § 2516] had been properly accomplished is apparent." *Ante,* at 578, 579.

The Court reduces the statement of Congress that the identification provisions were created to "fix responsibility" for a wiretap authorization to meaning only that the provisions were drafted to assure the courts that there had been compliance with the authorization requirement of § 2516. And the Court finds it satisfactory that this responsibility is established by an *ex post facto* affidavit of the Attorney General, stating that he in fact authorized the Chavez surveillance.

It seems to me a complete misreading of Congress' attempt to "fix responsibility" in the application and order to reach these conclusions. Sections 2518 (1)(a) and 2518 (4)(d) are not part of the detailed and stringent guidelines of Title III through legislative inadvertence. They were not present in early proposals to regulate wiretapping, but were carefully inserted in later proposals, culminating in the draft which became Title III. A 1961 proposal to allow wiretapping under regulated conditions did not contain any identification requirement, although it contained provisions designating those who could authorize surveillance.[6] S. 675, introduced in the 90th Con-

[6] S. 1495, 87th Cong., 1st Sess., § 4 (b), printed in Hearings on Wiretapping and Eavesdropping Legislation before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 4, 5 (1961).

gress by Senator McClellan on January 25, 1967, 113 Cong. Rec. 1491, did not require either the application or the court order to identify the person who authorized the surveillance application.[7] S. 2050, introduced five months later by Senator Hruska, 113 Cong. Rec. 18007, expressly required that the application to the court set forth "the identity of the person who authorized the application," but did not require the court order to contain this information.[8] H. R. 13482, introduced in the House on October 12, 1967, 113 Cong. Rec. 28792, not only required that the application identify the person authorizing it, but also that the court order contain this information. Six months later, on April 29, 1968, the Senate Judiciary Committee reported S. 917, whose provisions ultimately were enacted as Title III, accompanying the bill with an extended explanation of every provision.[9] Though it noted that Title III is "essentially a combination" of S. 675 and S. 2050,[10] the Judiciary Committee went beyond either of those bills as to the identification requirements, mandating that both the application and the order identify the person who authorized the application.

In its discussion of the authorization requirement of § 2516, the Senate Report states:

> "This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will

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[7] Printed in Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 75 (1967).

[8] Printed in Hearings, *supra*, n. 7, at 1006.

[9] S. Rep. No. 1097, 90th Cong., 2d Sess. (1968).

[10] *Id.*, at 66.

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avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen." S. Rep. No. 1097, 90th Cong., 2d Sess., 97 (1968).

But this alone was not sufficient. The Report continues:

"The application must be made to a Federal judge of competent jurisdiction, as defined in section 2510 (9), discussed above. *The application must conform to section 2518, discussed below.*" *Ibid.* (Emphasis added.)

The Committee's discussion of § 2518 states:

"Section 2518 of the new chapter sets out in detail the procedure to be followed in the interception of wire or oral communications.

. . . . .

"Subparagraph [2518 (1)(a)] *requires* the identity of the person who makes, and the person who authorized the application to be set out. *This fixes responsibility.*

. . . . .

"Subparagraph [2518 (4)(d)] requires that the order note the agency authorized to make the interception and the person who authorized the application *so that responsibility will be fixed.*" *Id.,* at 100, 101, 103. (Emphasis added.)

The crucial concept is Congress' expression of intention that §§ 2518 (1)(a) and (4)(d) should be complied with, so that the application and order would fix responsibility.

Clearly, no such responsibility was fixed on Mitchell,

the authorizing official, in *Chavez.* As the Court of Appeals noted, 478 F. 2d 512, 515, 516, there

> "was a misrepresentation, in circumstantial and carefully phrased detail, all pointing to Wilson as the officer authorizing the application, when in fact he did no such thing.
>
> ". . . The Wilson letter and the Mitchell memorandum . . . create the illusion of compliance with the Act. Without Mitchell's affidavit, the lines of responsibility lead to Wilson, not to Mitchell."

Yet Wilson never saw the application for which Mitchell now accepts responsibility. Before the affidavits submitted to the District Court in response to the motion to suppress, about one year after the application was initially authorized, responsibility pointed directly at Wilson, and no document implicated Mitchell.

It is simply not enough that Mitchell's responsibility is established only after a prosecution is under way and a motion to suppress filed. After-the-fact acceptance for the Chavez surveillance was made at no cost. The surveillance was productive and was directed against an alleged drug trafficker, a pariah of society. Accepting responsibility at this point, further, helped Mitchell and the Justice Department avoid the acute embarrassment of losing this prosecution. But this was not the scheme created by the Congress. By creating the identification provisions, which required the authorizing official to be made known at the time of an application, it established a mechanism by which a person's responsibility was to be acknowledged immediately, not a device by which the identity of the person authorizing the application would remain hidden until it was discovered that an instance of electronic surveillance had been productive and not offensive to public sensibilities.

Immediate acknowledgment of responsibility for authorizing electronic surveillance is not an idle gesture. It lessens or eliminates the ability of officials to later disavow their responsibility for surveillance. By adding the identification provisions of § 2518, Congress took a step toward stripping from responsible officials the ability to choose after the fact whether to accept or deny that responsibility by coming forward and filing an affidavit. "Fixing" of responsibility in the application and order can have no other meaning; it simply does not comprehend a situation where responsibility is concealed or unsettled. Had Congress been content with compliance with § 2516 being proved and responsibility for surveillance being established by later testimony and affidavits, it could easily have left the legislation in its early form without adding the express requirements of §§ 2518 (1)(a) and (4)(d) to the Act.[11]

The Court's treatment of the identification requirements trivializes Congress' efforts in adding them to Title III. In *Giordano,* the Court relies on Congress' clearly expressed desire that an official, responsible to the political process, should make the decision authorizing electronic surveillance and bear the scrutiny of Congress and the public for that decision. As noted, the Senate Report which accompanied Title III to Congress stated that § 2516 "centralizes in a publicly responsible official subject to the political process" the formulation of electronic surveillance policy so that "[s]hould abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guar-

[11] The Court in *Chavez* finds some guidance in the fact that "no real debate surrounded" the adoption of the identification requirements. This is not surprising, in that the provisions were added to wiretapping legislation in committee, and justified in the Judiciary Committee's report.

anteeing that no abuses will happen." S. Rep. No. 1097, 90th Cong., 2d Sess., 97 (1968). Similarly, Senator Long, in support of the bill, read from a report which stated: "We agree that responsibility should be focused on those public officials who will be principally accountable to the courts and the public for their actions." [12] Speaking to a related provision requiring that politically responsible state prosecuting officials authorize state applications, Professor Blakey of Notre Dame, instrumental in the drafting of Title III, stated:

> "Now, the reason [for this requirement] is that unless we involve someone in the process of using this equipment who is politically responsible, that is, someone who must return to the people periodically and be reelected, it seems to me we miss a significant check on possible abuse. As a practical matter, if there is police abuse, the remedies that we can take against them are limited. If we involve the responsible judgment of a political official in the use of this equipment, and it is then abused, the people have a very quick and effective remedy at the next election." [13]

But it is clear that this personal responsibility and political accountability, relied on by Congress to check the reckless use of electronic surveillance, is rendered a mere chimera when the official actually authorizing a wiretap application is not identified until years after the

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[12] 114 Cong. Rec. 14474. The Report was by the Association of the Bar of the City of New York, Committee on Federal Legislation, Committee on Civil Rights, entitled "Proposed Legislation on Wiretapping and Eavesdropping after *Berger* v. *New York* and *Katz* v. *United States*."

[13] Hearings on Anti-Crime Program before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 1380 (1967).

tap has occurred, when he might already be out of office, when the usefulness of the tap is already established, when it is clear that the surveillance was not abusive, and then only through voluntary admissions or the sifting of potentially contradictory affidavits. Responsibility is hardly "focused," and the "lines of responsibility" are gossamer at best. This is why Congress added the demand that responsibility be immediately *fixed*. The procedures which the Court sanctions in *Chavez* stretch the unequivocally expressed desire of Congress to *fix responsibility* in the application and order well beyond the breaking point.

In eviscerating Congress' intent to fix responsibility in the application and order, the Court destroys a significant deterrent to reckless or needless electronic surveillance. It allows the official authorizing a wiretap to remain out of the harsh light of public scrutiny at the crucial beginning of the wiretap process, only to emerge later when he chooses to identify himself. Knowledge that personal responsibility would be immediately focused and immutably fixed, whatever the outcome of surveillance, be it profitable or profligate, successful or embarrassing, forces an official to be circumspect in initially authorizing an electronic invasion of privacy. This is why Title III requires more than a judicial determination of probable cause; it also requires an accountable political official to exercise political judgment, and it requires that the political official be immediately identified and his responsibility fixed when an application is filed. The identification procedures, by fixing responsibility, obviously serve to "limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device," thereby requiring suppression even under the test the Court adopts in *Chavez*.

IV

The Court mentions in passing the reporting requirements of Title III, noting the information furnished the judge pursuant to § 2518 (1)(a) is useful in making the reports required of him under § 2519. This section requires the judge to report, *inter alia,* the name of the party who authorized each wiretap application made to him to the Administrative Office of the United States Courts within 30 days after surveillance has been completed. § 2519 (1)(f). At the same time, § 2519 (2) requires the authorizing prosecuting officials designated in § 2516 to file a report in January of each year, which also must include the name of the person who authorized applications made during the previous calendar year. In reliance on this information, the Administrative Office is to report such information to the Congress for public scrutiny. § 2519 (3). Like the applications and wiretap orders themselves, this report is to include the names of those persons responsible for authorizing electronic surveillance.

In the set of cases represented by *Chavez,* of course, the person actually authorizing the applications, Mitchell, was not made known to the courts which approved them, and so the reports filed with the Administrative Office by the judiciary did not identify him as the responsible official. The potential for public accountability through this channel was foreclosed by the misinformation given the courts. While the report filed by the office of the Attorney General in January 1970 did state that the 1969 applications filed in Wilson's name had been personally approved by Mitchell, the Solicitor General informs us that the reports filed by the Attorney General regarding instances of electronic surveillance for 1970 and after, including the Giordano wiretap (1970) and the Chavez tap (1971), did not acknowledge that

Mitchell had personally authorized the surveillance attributed to his subordinates.[14] The failure of the Attorney General's office to document the actual personal responsibility of Mitchell for surveillance authorizations occurred as those authorizations proliferated: there were only 34 instances of federal surveillance reported under Title III for 1969, but that number rose to 183 in 1970 and 238 in 1971.[15] *Ex post facto* acknowledgment of responsibility by Mitchell in the annual reports filed pursuant to § 2519 (2) could not, of course, cure the violation of the express congressional mandate of § 2518 (1)(a), any more than did Mitchell's filing of an affidavit. Nevertheless, not even these reports for years after 1969 provided documentation that Mitchell was the Justice Department official actually responsible for authorizing electronic surveillance. While Congress demanded the openness of political accountability, Justice Department documents drew a veil of secrecy, and no personal responsibility was attributed in any documents to Mitchell, the person actually responsible for authorizing the electronic surveillance.

V

As the Court recognized in *Gelbard* v. *United States*, 408 U. S. 41, 48, the protection of privacy was an overriding concern of Congress when it established the requirements of Title III in 1968:

> "The need for comprehensive, fair and effective reform setting uniform standards is obvious. New

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[14] The Administrative Office, nonetheless, repeated the statement made for 1969 that Mitchell had "personally" authorized the applications.

[15] See Administrative Office of United States Courts, Reports on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, 1969, 1970, 1971.

> protections for privacy must be enacted." S. Rep. No. 1097, 90th Cong., 2d Sess., 69.

Electronic surveillance was a serious political issue, and these detailed and comprehensive requirements are not portions of a hastily conceived piece of legislation. As noted above, electronic surveillance legislation was introduced long before 1968, and the provisions of Title III are the culmination of a long evolutionary process. The Title was accompanied by an exhaustive and studied report in which the Senate Judiciary Committee offered an explanation and justification for each clause of the bill. I cannot believe that Congress perversely required law enforcement officials to jump through statutory hoops it considered unnecessary to the goal of protecting individual privacy from unwarranted electronic invasions.

On the contrary, the history of Title III reflects a desire that its provisions be strictly construed. Senator McClellan, sponsor of S. 675, one of the bases for Title III, and chairman of the committee which reported Title III to Congress, stated during hearings on his bill:

> "I would not want any loose administration of this law.
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> . . . . . .
>
> "But [I would] have it very strictly observed. It is not to become a catchall for promiscuous use. I want to see this law strictly observed with the courts adhering to the spirit and intent of it in granting the orders.
>
> . . . . . .
>
> "I think it ought to be tight, very definitely as free from loopholes as it can possibly be made . . . ." [16]

[16] Hearings on Controlling Crime Through More Effective Law Enforcement before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st

Subsequently, McClellan's committee closed yet another loophole in the law by inserting the identification requirements of Title III, attempting thereby to fix responsibility at the time of the application for a wiretap order, requirements which this Court now nullifies.

Mr. Justice Holmes observed in dissent 70 years ago:

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401.

Sess., 508, 869. In addition, in reporting to the Senate in 1969 on the operation of Title III during its first year, Senator McClellan stated:

"I do, however, want to admonish every law enforcement officer, prosecutor, and judge involved in this area that the only way this legislation will be effective in combating crime is by strict adherence to the standards it contains.

. . . . . .

". . . This is an invaluable and powerful tool that must not be subjected to abuse. Those who violate the standards can and must either be punished and if they cannot learn to follow the law they must face loss of this law enforcement tool. . . .

. . . . . .

"Mr. President, my purpose in making these remarks has been to help assure that this legislation will be, in fact, followed to the strictest letter of the law—both bringing criminals to book and protecting citizens' privacy. That is the only way in which it can be utilized as an effective tool in reducing crime. . . . Let us make sure that none of those who may be convicted can ask for a reversal because the law was not strictly followed." 115 Cong. Rec. 23241–23242.

The Solicitor General reminds us that substantial effort on the part of the Organized Crime Section of the Criminal Division of the Department of Justice is implicated, for the violations of Title III reflected in these two cases are not isolated occurrences. The failure of Attorney General Mitchell properly to authorize applications involves 60 cases and 626 defendants. The failure of surveillance applications to fix responsibility on Mitchell, when he did in fact authorize the applications, involves an additional 99 cases and 807 defendants. Yet the magnitude of the effect of suppression of unlawfully obtained evidence for these violations of Title III does not vitiate our duty to enforce the congressional scheme as written. The failure of a prosecution in a particular case pales in comparison with the duty of this Court to nourish and enhance respect for the evenhanded application of the law. I accordingly dissent in part in *Chavez*.

MITCHELL *v.* W. T. GRANT CO.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 72–6160. Argued December 4, 1973—Decided May 13, 1974

The Louisiana Code of Civil Procedure makes available to a mortgage or lien holder a writ of sequestration to forestall waste or alienation of the encumbered property. While the writ is obtainable on the creditor's *ex parte* application without notice to the debtor or an opportunity for hearing, the writ will issue only upon a verified affidavit and upon a judge's authority (with respect to the parish involved in this case) after the creditor has filed a sufficient bond. The debtor may immediately seek dissolution of the writ, which must be ordered unless the creditor proves the grounds for issuance (existence of the debt, lien, and delinquency), failing which the court may order return of the property and assess damages, including attorney's fees, in the debtor's favor. Respondent seller filed suit against petitioner in the New Orleans City Court for the overdue balance of the price of certain personal property that petitioner had purchased under an installment sales contract and on which respondent had a vendor's lien. On respondent's application, the trial judge in accordance with the Louisiana procedure ordered sequestration of the property without prior notice or opportunity for a hearing, and denied petitioner's motion to dissolve the writ on the asserted ground, *inter alia,* that the seizure violated the Due Process Clause of the Fourteenth Amendment. The appellate courts affirmed. *Held:* The Louisiana sequestration procedure is not invalid, either on its face or as applied, and, considering the procedure as a whole, it effects a constitutional accommodation of the respective interests of the buyer and seller by providing for judicial control of the process from beginning to end, thus minimizing the risk of the creditor's wrongful interim possession, by protecting the debtor's interest in every way except to allow him initial possession, and by putting the property in the possession of the party who is able to furnish protection against loss or damage pending trial on the merits. *Fuentes* v. *Shevin,* 407 U. S. 67, distinguished. Pp. 603–620.

263 La. 627, 269 So. 2d 186, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post,* p. 623. BRENNAN, J., filed a dissenting statement, *post,* p. 636. STEWART, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, and in which BRENNAN, J., joined in part, *post,* p. 629.

Robert J. Hobbs argued the cause for petitioner. With him on the briefs was *John W. Reed.*

Thomas J. O'Sullivan argued the cause for respondent. With him on the brief was *Marshall J. Favret.**

MR. JUSTICE WHITE delivered the opinion of the Court.

In this case, a state trial judge in Louisiana ordered the sequestration of personal property on the application of a creditor who had made an installment sale of the goods to petitioner and whose affidavit asserted delinquency and prayed for sequestration to enforce a vendor's lien under state law. The issue is whether the sequestration violated the Due Process Clause of the Fourteenth Amendment because it was ordered *ex parte,* without prior notice or opportunity for a hearing.

I

On February 2, 1972, respondent W. T. Grant Co. filed suit in the First City Court of the City of New Orleans, Louisiana, against petitioner, Lawrence Mitchell. The petition alleged the sale by Grant to Mitchell of a refrigerator, range, stereo, and washing machine, and an overdue and unpaid balance of the purchase price for said items in the amount of $574.17. Judgment for

**William J. Guste, Jr.,* Attorney General, *Warren E. Mouledoux,* First Assistant Attorney General, and *Louis M. Jones,* Assistant Attorney General, filed a brief for the State of Louisiana as *amicus curiae.*

that sum was demanded. It was further alleged that Grant had a vendor's lien on the goods and that a writ of sequestration should issue to sequester the merchandise pending the outcome of the suit. The accompanying affidavit of Grant's credit manager swore to the truth of the facts alleged in the complaint. It also asserted that Grant had reason to believe petitioner would "encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises." Based on the foregoing petition and affidavit, and without prior notice to Mitchell or affording him opportunity for hearing, the judge of the First City Court, Arthur J. O'Keefe, then signed an order that "a writ of sequestration issue herein" and that "the Constable of this court sequester and take into his possession the articles of merchandise described in the foregoing petition, upon plaintiff furnishing bond in the amount of $1,125." Bond in that amount having been filed by the respondent, the writ of sequestration issued, along with citation to petitioner Mitchell, citing him to file a pleading or make appearance in the First City Court of the city of New Orleans within five days. The citation recited the filing of the writ of sequestration and the accompanying affidavit, order, and bond. On March 3 Mitchell filed a motion to dissolve the writ of sequestration issued on February 2.[1] The motion asserted that the personal property at issue had been seized under the writ on February 7, 1972, and claimed, first, that the goods were exempt from seizure under state law and, second, that the seizure violated the Due Process Clauses of the State and Federal Constitutions

[1] The motion asked for dissolution of the writ with respect to the refrigerator, stove, and washer. For some reason, unexplained by the parties, the motion was not addressed to the stereo.

in that it had occurred without prior notice and opportunity to defend petitioner's right to possession of the property.[2] The motion came on for hearing on March 14. It was then stipulated that a vendor's lien existed on the items, arguments of counsel were heard, and on March 16 the motion to dissolve was denied. The goods were held not exempt from seizure under state law. The trial court also ruled that "the provisional seizure enforced through sequestration" was not a denial of due process of law. "To the contrary," the trial judge said, "plaintiff insured defendant's right to due process by proceeding in accordance with Louisiana Law as opposed to any type of self-help seizure which would have denied defendant possession of his property without due process." The appellate courts of Louisiana refused to disturb the rulings of the trial court, the Supreme Court of Louisiana expressly rejecting petitioner's due process claims pressed under the Federal Constitution. 263 La. 627, 269 So. 2d 186 (1972). We granted certiorari, 411 U. S. 981 (1973), and now affirm the judgment of the Louisiana Supreme Court.

II

Petitioner's basic proposition is that because he had possession of and a substantial interest in the sequestered property, the Due Process Clause of the Fourteenth Amendment necessarily forbade the seizure without prior notice and opportunity for a hearing. In the circumstances presented here, we cannot agree.

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[2] There is some dispute between the parties as to when the writ was actually executed by the sheriff. The sheriff's return, furnished by petitioner but apparently not in the record below, indicates that execution was on the 18th of February, rather than on the 7th. The Louisiana Supreme Court assumed that the writ was executed on the 7th. Because we see no legal consequence attaching to a choice of dates, we assume for purposes of decision that the writ was executed on the 7th.

Petitioner no doubt "owned" the goods he had purchased under an installment sales contract, but his title was heavily encumbered. The seller, W. T. Grant Co., also had an interest in the property, for state law provided it with a vendor's lien to secure the unpaid balance of the purchase price. Because of the lien, Mitchell's right to possession and his title were subject to defeasance in the event of default in paying the installments due from him. His interest in the property, until the purchase price was paid in full, was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims. See La. Code Civ. Proc. Ann., Art. 2373 (1961).[3] The interest of Grant, as seller of the property and holder of a vendor's lien, was measured by the unpaid balance of the purchase price. The monetary value of that interest in the property diminished as payments were made, but the value of the property as security also steadily diminished over time as it was put to its intended use by the purchaser.

Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite,* where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.

With this duality in mind, we are convinced that the

[3] Article 2373 and other pertinent provisions of the Code, including those referred to in the text, are set out in the Appendix to this opinion.

Louisiana sequestration procedure is not invalid, either on its face or as applied. Sequestration under the Louisiana statutes is the modern counterpart of an ancient civil law device to resolve conflicting claims to property. Historically, the two principal concerns have been that, pending resolution of the dispute, the property would deteriorate or be wasted in the hands of the possessor and that the latter might sell or otherwise dispose of the goods. A minor theme was that official intervention would forestall violent self-help and retaliation. See Millar, Judicial Sequestration in Louisiana: Some Account of Its Sources, 30 Tul. L. Rev. 201, 206 (1956).

Louisiana statutes provide for sequestration where "one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." Art. 3571. The writ, however, will not issue on the conclusory allegation of ownership or possessory rights. Article 3501 [4] provides that the writ of sequestration shall issue "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by a verified petition or affidavit. In the parish where this

[4] Historically, the writ would issue only if the creditor had "good reason to fear" that the debtor would damage, alienate or waste the goods, and the creditor was required to show the grounds for such fear. Under present law, however, the apprehension of the creditor is no longer the issue, and the writ may be obtained when the goods are within the power of the debtor. Reporter's Comment (a) to La. Code Civ. Proc. Ann., Art. 3571. The necessity of showing such "power" is not irrelevant, because the vendor's privilege will not lie against goods not within the "power" of the debtor. Margolin, Civil Law, Vendor's Privilege, 4 Tul. L. Rev. 239 (1930); H. Daggett, On Louisiana Privileges and Chattel Mortgages § 51 (1942).

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case arose, the clear showing required must be made to a judge,[5] and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond [6] to protect the vendee against all damages in the event the sequestration is shown to have been improvident.[7] Arts. 3501 and 3574.

The writ is obtainable on the creditor's *ex parte* application, without notice to the debtor or opportunity for a hearing, but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor "proves the grounds upon which the writ was issued," Art. 3506, the existence of the debt, lien, and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees.[8]

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[5] Articles 282 and 283 of the Code provide, generally, that the court clerk may issue writs of sequestration. But Art. 281 confines the authority to the judge in Orleans Parish. There is no dispute in this case that judicial authority for the writ was required and that it was obtained as the statute requires. The validity of procedures obtaining in areas outside Orleans Parish is not at issue.

[6] As previously noted, the judgment prayed for in this case was in the amount of $574.17. Grant was ordered to furnish security in the amount of $1,125.

[7] When a writ is issued by the judge, it is served upon the debtor by the sheriff, Art. 3504, who thereafter becomes responsible for the property's safekeeping. See Johnson, Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure, 38 Tul. L. Rev. 1, 21–22 (1963). The plaintiff-creditor, however, see Art. 3576, may himself take possession of the goods if the defendant within 10 days does not secure possession of the goods by posting his own bond as permitted by Art. 3507, but he has no right to sell the goods until final judgment on the merits. Art. 3510.

[8] Damages would compensate for the period during which the buyer was deprived of the use of the property, but are not restricted to pecuniary loss. They may encompass injury to social standing or reputation as well as humiliation and mortification. Johnson, *supra,* n. 7, at 28.

The debtor, with or without moving to dissolve the sequestration, may also regain possession by filing his own bond to protect the creditor against interim damage to him should he ultimately win his case and have judgment against the debtor for the unpaid balance of the purchase price which was the object of the suit and of the sequestration. Arts. 3507 and 3508.[9]

In our view, this statutory procedure effects a constitutional accommodation of the conflicting interests of the parties. We cannot accept petitioner's broad assertion that the Due Process Clause of the Fourteenth Amendment guaranteed to him the use and possession of the goods until all issues in the case were judicially resolved after full adversary proceedings had been completed. It is certainly clear under this Court's precedents that issues can be limited in actions for possession. Indeed, in *Grant Timber & Mfg. Co.* v. *Gray,* 236 U. S. 133 (1915) (Holmes, J.), the Court upheld such limitations in possessory actions for real property in Louisiana. See also *Bianchi* v. *Morales,* 262 U. S. 170 (1923); *Lindsey* v. *Normet,* 405 U. S. 56 (1972). Petitioner's claim must accordingly be narrowed to one for a hearing on the issues in the possessory action—default, the existence of a lien, and possession of the debtor—before property is taken.

As to this claim, the seller here, with a vendor's lien to secure payment of the unpaid balance of purchase price, had the right either to be paid in accordance with its contract or to have possession of the goods for the purpose of foreclosing its lien and recovering the unpaid balance. By complaint and affidavit, the seller swore

[9] The debtor's bond necessary to repossess the property "shall exceed by one-fourth the value of the property as determined by the court, or shall exceed by one-fourth the amount of the claim, whichever is the lesser." Art. 3508.

to facts that would entitle it to immediate possession of the goods under its contract, undiminished in value by further deterioration through use of the property by the buyer. Wholly aside from whether the buyer, with possession and power over the property, will destroy or make away with the goods, the buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time. Any installment seller anticipates as much, but he is normally protected because the buyer's installment payments keep pace with the deterioration in value of the security. Clearly, if payments cease and possession and use by the buyer continue, the seller's interest in the property as security is steadily and irretrievably eroded until the time at which the full hearing is held.

The State of Louisiana was entitled to recognize this reality and to provide somewhat more protection for the seller. This it did in Orleans Parish by authorizing the sequestration of property by a judge. At the same time, the buyer being deprived of possession, the seller was required to put up a bond to guarantee the buyer against damage or expense, including attorney's fees, in the event the sequestration is shown to be mistaken or otherwise improvident. The buyer is permitted to regain possession by putting up his own bond to protect the seller. Absent that bond, which petitioner did not file in this case, the seller would be unprotected against the inevitable deterioration in the value of his security if the buyer remained in possession pending trial on the merits. The debtor, unlike the creditor, does not stand ready to make the opposing party whole, if his possession, pending a prior hearing, turns out to be wrongful.

Second, there is the real risk that the buyer, with possession and power over the goods, will conceal or

transfer the merchandise to the damage of the seller. This is one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property. An important factor in this connection is that under Louisiana law, the vendor's lien expires if the buyer transfers possession. It follows that if the vendor is to retain his lien, superior to the rights of other creditors of the buyer, it is imperative when default occurs that the property be sequestered in order to foreclose the possibility that the buyer will sell or otherwise convey the property to third parties against whom the vendor's lien will not survive. The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith.

Third, there is scant support in our cases for the proposition that there must be final judicial determination of the seller's entitlement before the buyer may be even temporarily deprived of possession of the purchased goods. On the contrary, it seems apparent that the seller with his own interest in the disputed merchandise would need to establish in any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit. Cf. *Bell* v. *Burson,* 402 U. S. 535 (1971); *Ewing* v. *Mytinger & Casselberry,* 339 U. S. 594 (1950). The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn *ex parte* documents, followed by the early opportunity to put the creditor to his proof. The nature of the issues at stake minimizes the risk that the

writ will be wrongfully issued by a judge. The potential damages award available, if there is a successful motion to dissolve the writ, as well as the creditor's own interest in avoiding interrupting the transaction, also contributes to minimizing this risk.

Fourth, we remain unconvinced that the impact on the debtor of deprivation of the household goods here in question overrides his inability to make the creditor whole for wrongful possession, the risk of destruction or alienation if notice and a prior hearing are supplied, and the low risk of a wrongful determination of possession through the procedures now employed.

Finally, the debtor may immediately have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor- or court-supervised possession. The debtor in this case, who did not avail himself of this opportunity, can hardly expect that his argument on the severity of deprivation will carry much weight, and even assuming that there is real impact on the debtor from loss of these goods, pending the hearing on possession, his basic source of income is unimpaired.

The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis,* 325 U. S. 697, 710 (1945). Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB* v. *Mackay Co.,* 304 U. S. 333, 351 (1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961); *Stanley* v. *Illinois,* 405 U. S. 645, 650 (1972). Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller.

III

Petitioner asserts that his right to a hearing before his possession is in any way disturbed is nonetheless mandated by a long line of cases in this Court, culminating in *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U. S. 67 (1972). The pre-*Sniadach* cases are said by petitioner to hold that "the opportunity to be heard must precede any actual deprivation of private property." [10] Their import, however, is not so clear as petitioner would have it: they merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597 (1931). See also *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611, 632 (1905); *Springer*

[10] Petitioner relies particularly on: *Covey* v. *Town of Somers*, 351 U. S. 141 (1956); *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293 (1953); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950); *Griffin* v. *Griffin*, 327 U. S. 220 (1946); *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (1941); *West Ohio Gas Co.* v. *Pub. Util. Comm'n*, 294 U. S. 63 (1935); *United States* v. *Illinois Central R. Co.*, 291 U. S. 457 (1934); *Southern R. Co.* v. *Virginia*, 290 U. S. 190 (1933); *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117 (1926); *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413 (1915); *Londoner* v. *Denver*, 210 U. S. 373 (1908); *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127 (1907); *Roller* v. *Holly*, 176 U. S. 398 (1900); *Hovey* v. *Elliott*, 167 U. S. 409 (1897); *Scott* v. *McNeal*, 154 U. S. 34 (1894); *Windsor* v. *McVeigh*, 93 U. S. 274 (1876); *Ray* v. *Norseworthy*, 23 Wall. 128 (1875); *Rees* v. *City of Watertown*, 19 Wall. 107 (1874); *Baldwin* v. *Hale*, 1 Wall. 223 (1864). Brief for Petitioner 10–11.

v. *United States,* 102 U. S. 586, 593–594 (1881). This generality sufficed to decide relatively modern cases. For example, in *Ewing* v. *Mytinger & Casselberry,* 339 U. S. 594 (1950), the statute at issue permitted multiple seizures of misbranded articles in commerce " 'when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer.' " *Id.,* at 595–596. The specific seizure challenged, made administratively without prior notice or hearing, concerned a concentrate of alfalfa, watercress, parsley, and synthetic vitamins, combined in a package with mineral tablets. There was no claim or suggestion of any possible threat to health. The sole official claim was that the labeling was misleading to the alleged damage of the purchaser. The Court sustained the *ex parte* seizure saying that "[w]e have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." *Id.,* at 598. "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." *Id.,* at 599.[11]

[11] Conceding that the multiple seizure might cause irreparable damage to a business, the Court responded:

"The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. See *Beavers* v. *Henkel,* 194 U. S. 73, 85; *Ex parte United States,* 287 U. S. 241, 250. The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property

More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing, or judicial order, saying that "nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit." "The fact that the execution is issued in the first instance by an agent of the State but not from a Court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection." *Coffin Bros.* v. *Bennett,* 277 U. S. 29, 31 (1928). To the same effect was the earlier case of *Ownbey* v. *Morgan,* 256 U. S. 94 (1921). Furthermore, based on *Ownbey* and *Coffin,* the Court later sustained the constitutionality of the Maine attachment statute. *McKay* v. *McInnes,* 279 U. S. 820 (1929). In that case, a nonresident of Maine sued in the Maine courts to collect a debt from a resident of the State. As permitted by statute, and as an integral part of instituting the suit, the creditor attached the properties of the defendant, without notice and without judicial process of any kind. In sustaining the procedure, the Maine Supreme Court, 127 Me. 110, 141 A. 699 (1928), described the attachment as designed to create a lien for the creditor at the outset of the litigation. "Its purpose is simply to secure to the creditor the property which the debtor has at the time it is made so that it may be seized and levied upon in satisfaction of the debt after judgment and execution may be obtained." *Id.,*

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and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised." 339 U. S., at 599.

at 115, 141 A., at 702. The attachment was deemed "part of the remedy provided for the collection of the debt," *ibid.*, and represented a practice that "had become fully established in Massachusetts, part of which Maine was at the time of the adoption of the Federal Constitution." *Id.*, at 114, 141 A., at 702. The judgment of the Maine court was affirmed without opinion, citing *Ownbey* and *Coffin*.

In *Sniadach* v. *Family Finance Corp., supra,* it was said that *McKay* and like cases dealt with "[a] procedural rule that may satisfy due process for attachments in general" but one that would not "necessarily satisfy procedural due process in every case," nor one that "gives necessary protection to all property in its modern forms." 395 U. S., at 340. *Sniadach* involved the prejudgment garnishment of wages—"a specialized type of property presenting distinct problems in our economic system." *Ibid.* Because "[t]he leverage of the creditor on the wage earner is enormous" and because "prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall," it was held that the Due Process Clause forbade such garnishment absent notice and prior hearing. *Id.*, at 341–342. In *Sniadach,* the Court also observed that garnishment was subject to abuse by creditors without valid claims, a risk minimized by the nature of the security interest here at stake and the protections to the debtor offered by Louisiana procedure. Nor was it apparent in *Sniadach* with what speed the debtor could challenge the validity of the garnishment, and obviously the creditor's claim could not rest on the danger of destruction of wages, the property seized, since their availability to satisfy the debt remained within the power of the debtor who could simply leave his job. The suing creditor in *Sniadach* had no prior interest in the property attached, and the opinion did not purport to govern the typical case of

the installment seller who brings a suit to collect an unpaid balance and who does not seek to attach wages pending the outcome of the suit but to repossess the sold property on which he had retained a lien to secure the purchase price. This very case soon came before the Court in *Fuentes* v. *Shevin,* where the constitutionality of the Florida and Pennsylvania replevin statutes was at issue. Those statutes permitted the secured installment seller to repossess the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. Because carried out without notice or opportunity for hearing and without judicial participation, this kind of seizure was held violative of the Due Process Clause. This holding is the mainstay of petitioner's submission here. But we are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case.

The Florida law under examination in *Fuentes* authorized repossession of the sold goods without judicial order, approval, or participation. A writ of replevin was employed, but it was issued by the court clerk. As the Florida law was perceived by this Court, "[t]here is no requirement that the applicant make a convincing showing before the seizure," 407 U. S., at 73–74; the law required only "the bare assertion of the party seeking the writ that he is entitled to one" as a condition to the clerk's issuance of the writ. *Id.,* at 74. The Court also said that under the statute the defendant-buyer would "eventually" have an opportunity for a hearing, "as the defendant in the trial of the court action for repossession . . . ." *Id.,* at 75. The Pennsylvania law was considered to be essentially the same as that

of Florida except that it did "not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property." *Id.*, at 77. The party seeking the writ was not obliged to initiate a court action for repossession, was not required formally to allege that he was entitled to the property and had only to file an affidavit of the value of the property sought to be replevied. The Court distinguished the Pennsylvania and Florida procedures from that of the common law where, the Court said, "a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them." *Id.*, at 80.

The Louisiana sequestration statute followed in this case mandates a considerably different procedure. A writ of sequestration is available to a mortgage or lien holder to forestall waste or alienation of the property, but, different from the Florida and Pennsylvania systems, bare, conclusory claims of ownership or lien will not suffice under the Louisiana statute. Article 3501 authorizes the writ "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by verified petition or affidavit. Moreover, in the parish where this case arose, the requisite showing must be made to a judge, and judicial authorization obtained. Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end.[12] This control is one of the measures

[12] The approval of a writ of sequestration is not, as petitioner contends, a mere ministerial act. "Since a writ of sequestration issues without a hearing, specific facts as to the grounds relied upon for issuance must be contained in the verified petition in order that the issuing judge can properly evaluate the grounds." *Wright* v.

adopted by the State to minimize the risk that the *ex parte* procedure will lead to a wrongful taking. It is buttressed by the provision that should the writ be dissolved there are "damages for the wrongful issuance of a writ" and for attorney's fees "whether the writ is dissolved on motion or after trial on the merits." Art. 3506.

The risk of wrongful use of the procedure must also be judged in the context of the issues which are to be determined at that proceeding. In Florida and Pennsylvania property was only to be replevied in accord with state policy if it had been "wrongfully detained." This broad "fault" standard is inherently subject to factual determination and adversarial input. As in *Bell* v. *Burson,* where a driver's license was suspended without a prior hearing, when the suspension was premised on a fault standard, see *Vlandis* v. *Kline,* 412 U. S. 441, 446–447 (1973), in *Fuentes* this fault standard for replevin was thought ill-suited for preliminary *ex parte* determination. In Louisiana, on the other hand, the facts relevant to obtaining a writ of sequestration are narrowly confined. As we have indicated, docu-

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Hughes, 254 So. 2d 293, 296–297 (La. Ct. App. 1971) (on rehearing). To the same effect is *Hancock Bank* v. *Alexander,* 256 La. 643, 237 So. 2d 669 (1970), where the court held that a simple allegation of indebtedness for money due on an automobile, where no deed of trust was referred to or produced, did not satisfy the "specific facts" test. The court stated:

"*Strict application* of the rules established for the issuance of conservatory writs has been uniformly required by the Courts in the past. It is implicit in those remedies that they should not be availed of unless the conditions which permit them exist; that is to say, it is a prerequisite to their issuance that proper grounds be alleged and sworn to." *Id.,* at 653–654, 237 So. 2d, at 672. (Emphasis added.) *Zion Mercantile Co.* v. *Pierce,* 163 La. 477, 112 So. 371 (1927), upon which petitioner relies, is not to the contrary. The Louisiana court merely held there that it is not necessary to "file" papers requesting the writ with the clerk, or pay court costs, before the judge is empowered to issue the writ.

mentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.

Of course, as in *Fuentes,* consideration of the impact on the debtor remains. Under Louisiana procedure, however, the debtor, Mitchell, was not left in limbo to await a hearing that might or might not "eventually" occur, as the debtors were under the statutory schemes before the Court in *Fuentes.* Louisiana law expressly provides for an immediate hearing and dissolution of the writ "unless the plaintiff proves the grounds upon which the writ was issued." Art. 3506.

To summarize, the Louisiana system seeks to minimize the risk of error of a wrongful interim possession by the creditor. The system protects the debtor's interest in every conceivable way, except allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits.

The Court must be sensitive to the possible consequences, already foreseen in antiquity, of invalidating this state statute. Doing so might not increase private violence, but self-help repossession could easily lessen protections for the debtor. See, for example, *Adams* v. *Southern California First National Bank,* 492 F. 2d 324 (CA9 1973).[13] Here, the initial hardship to the debtor

[13] The advisability of requiring prior notice and hearing before repossession has been under study for several years. A number of possibilities have been put forward to modify summary creditor

is limited, the seller has a strong interest, the process proceeds under judicial supervision and management, and the prevailing party is protected against all loss. Our conclusion is that the Louisiana standards regulating the use of the writ of sequestration are constitutional. Mitchell

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remedies, whether taken through some form of court process or effected by self-help under Art. 9 of the Uniform Commercial Code, § 9–503. Influenced by *Sniadach,* and providing preseizure notice and hearing, are two model acts drafted by the National Consumer Law Center: National Consumer Act §§ 5.206–5.208 (1970), and Model Consumer Credit Act § 7.205 (1973). Other similar reforms are reflected in the Report of the National Commission on Consumer Finance, Consumer Credit in the United States 30–31 (1972); the Wisconsin Consumer Act, Wis. Stat. Ann. §§ 421.101–427.105 (special pamphlet 1973); and the amendments to the Illinois Replevin Statute, Public Act 78–287, Ill. Laws 1973. Looking in the other direction and leaving summary procedures intact for the most part are the National Conference of Commissioners on Uniform State Laws, Committee on Uniform Consumer Credit Code, Uniform Consumer Credit Code, Working Redraft No. 5, Nov. 1973, §§ 5.110, 5.112; and the Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Art. 9 of the Uniform Commercial Code, Final Report, § 9–503 (Apr. 25, 1971), together with revised Art. 9 of the U. C. C., 1972 Official Text and Comments, § 9–503.

As revealed in the various studies and proposals, the principal question yet to be satisfactorily answered is the impact of prior notice and hearing on the price of credit, and, more particularly, of the mix of procedural requirements necessary to minimize the cost. The commentators are in the throes of debate, see, *e. g.,* Symposium, Creditors' Rights, 47 S. Cal. L. Rev. 1–164 (1973), and basic questions remain unanswered. See generally Note, Self-Help Repossession; the Constitutional Attack, the Legislative Response, and the Economic Implications, 62 Geo. L. J. 273 (1973).

We indicate no view whatsoever on the desirability of one or more of the proposed reforms. The uncertainty evident in the current debate suggests caution in the adoption of an inflexible constitutional rule. Our holding in this case is limited to the constitutionality of the Louisiana sequestration procedures.

was not deprived of procedural due process in this case.[14] The judgment of the Supreme Court of Louisiana is affirmed.

So ordered.

APPENDIX TO OPINION OF THE COURT

STATUTES

PROVISIONS OF THE LOUISIANA CODE OF CIVIL PROCEDURE

Art. 281. Certain articles not applicable to Civil District Court for the Parish of Orleans

The provisions of Articles 282 through 286 do not apply to the clerk and the deputy clerks of the Civil District Court for the Parish of Orleans.

Art. 282. Acts which may be done by district court clerk

The clerk of a district court may:

(1) Grant an appeal and fix the return day thereof; fix the amount of the bond for an appeal, or for the issuance of a writ of attachment or of sequestration, or for the release of property seized under any writ, unless fixed by law; appoint an attorney at law to represent a nonresident, absent, incompetent, or unrepresented defendant; or dismiss without prejudice, on application of plaintiff, an action or proceeding in which no exception, answer, or intervention has been filed; and . . . .

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[14] We are advised by counsel for petitioner of a tide of cases following *Fuentes* and are cautioned that affirmance in this case would set off a riptide with considerable consequences. We perceive no such result. Our decision will not affect recent cases dealing with garnishment or summary self-help remedies of secured creditors or landlords. Nor is it at all clear, with an exception or two, that the reported cases invalidating replevin or similar statutes dealt with situations where there was judicial supervision of seizure or foreclosure from the outset.

Art. 283. Orders and judgments which may be signed by district court clerk

. . . . . .

(2) An order for the issuance of executory process, of a writ of attachment or of sequestration, or of garnishment process under a writ of fieri facias, attachment, or of sequestration; the release under bond of property seized under a writ of attachment or of sequestration; or to permit the filing of an intervention . . . .

. . . . . .

Art. 325. Right of entry for execution; may require assistance of others if resistance offered or threatened

In the execution of a writ, mandate, order, or judgment of a court, the sheriff may enter on the lands, and into the residence or other building, owned or occupied by the judgment debtor or defendant. . . .

Art. 2373. Distribution of proceeds of sale

After deducting the costs, the sheriff shall first pay the amount due the seizing creditor, then the inferior mortgages, liens, and privileges on the property sold, and shall pay to the debtor whatever surplus may remain.

Art. 3501. Petition; affidavit; security

A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully.

Art. 3504. Return of sheriff; inventory

The sheriff, after executing a writ of attachment or of sequestration, shall deliver to the clerk of the court from

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which the writ issued a written return stating the manner in which he executed the writ. He shall annex to the return an inventory of the property seized.

Art. 3506. Dissolution of writ; damages

The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of attachment or of sequestration is dissolved, the action shall then proceed as if no writ had been issued.

The court may allow damages for the wrongful issuance of a writ of attachment or of sequestration on a motion to dissolve, or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits.

Art. 3507. Release of property by defendant; security

A defendant may obtain the release of the property seized under a writ of attachment or of sequestration by furnishing security for the satisfaction of any judgment which may be rendered against him.

Art. 3508. Amount of security for release of attached or sequestered property

The security for the release of property seized under a writ of attachment or of sequestration shall exceed by one-fourth the value of the property as determined by the court, or shall exceed by one-fourth the amount of the claim, whichever is the lesser.

Art. 3510. Necessity for judgment and execution

Except as provided in Article 3513 [perishables], a final judgment must be obtained in an action where a writ of attachment or of sequestration has issued before the property seized can be sold to satisfy the claim.

Art. 3571. Grounds for sequestration

When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

Art. 3574. Plaintiff's security

An applicant for a writ of sequestration shall furnish security for an amount determined by the court to be sufficient to protect the defendant against any damage resulting from a wrongful issuance, unless security is dispensed with by law.

Art. 3576. Release of property under sequestration

If the defendant does not effect the release of property seized under a writ of sequestration, as permitted by Article 3507, within ten days of the seizure, the plaintiff may effect the release thereof by furnishing the security required by Article 3508.

MR. JUSTICE POWELL, concurring.

In sweeping language, *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property. The Court's decision today withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that the *Fuentes* opinion is overruled.

I could have agreed that the Florida and Pennsylvania statutes in *Fuentes* were violative of due process be-

cause of their arbitrary and unreasonable provisions. It seems to me, however, that it was unnecessary for the *Fuentes* opinion to have adopted so broad and inflexible a rule, especially one that considerably altered settled law with respect to commercial transactions and basic creditor-debtor understandings. Narrower grounds existed for invalidating the replevin statutes in that case.

I

The constitutional guarantee of procedural due process applies to governmental deprivation of a legitimate "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment. It requires that any such deprivation be accompanied by minimum procedural safeguards, including some form of notice and a hearing. *Arnett* v. *Kennedy, ante,* p. 164 (separate opinion of POWELL, J.); *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Perry* v. *Sindermann,* 408 U. S. 593 (1972). In the present case, there can be no doubt that under state law both petitioner and respondent had property interests in the goods sought to be sequestered. Petitioner, as the vendee-debtor under an installment sales contract, had both title and possession of the goods subject to his contractual obligation to continue the installment payments. Respondent, as the vendor-creditor, had a vendor's lien on the goods as security for the unpaid balance.

The determination of what due process requires in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected. *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 895 (1961); *Goldberg* v. *Kelly,* 397 U. S. 254, 263–266 (1970). The governmental function in the instant case is to provide a reasonable and fair framework of rules which facilitate commercial transactions on a

credit basis. The Louisiana sequestration statute is designed to protect the legitimate interests of both creditor and debtor. As to the creditor, there is the obvious risk that a defaulting debtor may conceal, destroy, or further encumber the goods and thus deprive the creditor of his security. This danger is particularly acute where, as here, the vendor's lien may be vitiated merely by transferring the goods from the debtor's possession. In addition, the debtor's continued use of the goods diminishes their resale value. In these circumstances, a requirement of notice and an adversary hearing *before* sequestration would impose a serious risk that a creditor could be deprived of his security.

Against this concern must be balanced the debtor's real interest in uninterrupted possession of the goods, especially if the sequestration proves to be unjustified. To be sure, repossession of certain items of personal property, even for a brief period, may cause significant inconvenience. But it can hardly be said that temporary deprivation of such property would necessarily place a debtor in a "brutal need" situation. *Goldberg* v. *Kelly, supra; Arnett* v. *Kennedy, supra.*

In my view, the constitutional guarantee of procedural due process is fully satisfied in cases of this kind where state law requires, as a precondition to invoking the State's aid to sequester property of a defaulting debtor, that the creditor furnish adequate security and make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested. An opportunity for an adversary hearing must then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor.

The Louisiana statute *sub judice* satisfies these requirements and differs materially from the Florida and

Pennsylvania statutes in *Fuentes*.[1] Those statutes did not require an applicant for a writ of replevin to make any factually convincing showing that the property was wrongfully detained or that he was entitled to the writ. Moreover, the Florida statute provided only that a post-seizure hearing be held eventually on the merits of the competing claims, and it required the debtor to initiate that proceeding. The Pennsylvania statute made no provision for a hearing at any time.

By contrast, the Louisiana statute applicable in Orleans Parish authorizes issuance of a writ of sequestration "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon . . . clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent." La. Code Civ. Proc. Ann., Art. 3501 (1961). The Louisiana statute also provides for an immediate hearing, and the writ is dissolved "unless the

[1] The Court outlined the deficiencies of the statutes in *Fuentes*:

"There is [under the Florida statute] no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, 'wrongfully detained.' Rather, Florida law automatically relies on the *bare* assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is 'lawfully entitled to the possession' of the property, and that he file a security bond . . . ." 407 U. S., at 73–74 (emphasis added).

The Court noted that the Pennsylvania statute required even less than the Florida statute, since the party seeking the writ "need not even formally allege that he is lawfully entitled to the property." *Id.*, at 78. All that was required was the filing of an " 'affidavit of the value of the property to be replevied.' " *Ibid.* Moreover, the Pennsylvania law did "not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property." *Id.*, at 77.

[creditor] proves the grounds upon which the writ was issued." Art. 3506.

The Court's opinion makes these points well, and I need not elaborate them further. In brief, the Louisiana statute satisfies the essential prerequisites of procedural due process and represents a fairer balancing of the interests of the respective parties than the statutes in *Fuentes*. I therefore agree that the Louisiana procedure should be sustained against petitioner's challenge.

II

MR. JUSTICE STEWART reproves the Court for not adhering strictly to the doctrine of *stare decisis*. *Post*, at 634–636. To be sure, *stare decisis* promotes the important considerations of consistency and predictability in judicial decisions and represents a wise and appropriate policy in most instances. But that doctrine has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation.[2] Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into

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[2] See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 93 (1936) (Stone and Cardozo, JJ., concurring in result); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405, 406–408 (1932) (Brandeis, J., dissenting). For the view that *stare decisis* need not always apply even to questions of statutory interpretation, see *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, 255 (1970) (Stewart, J., concurring).

question. And if the precedent or its rationale is of doubtful validity, then it should not stand. As Mr. Chief Justice Taney commented more than a century ago, a constitutional decision of this Court should be "always open to discussion when it is supposed to have been founded in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." *Passenger Cases,* 7 How. 283, 470 (1849).

Moreover, reconsideration is particularly appropriate in the present case. To the extent that the *Fuentes* opinion established a Procrustean rule of a prior adversary hearing, it marked a significant departure from past teachings as to the meaning of due process.[3] As the Court stated in *Cafeteria Workers* v. *McElroy,* 367 U. S., at 895, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." The *Fuentes* opinion not only eviscerated that principle but also sounded a potential death knell for a panoply of statutes in the com-

[3] The *Fuentes* opinion relied primarily on *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969). That case involved a prejudgment garnishment of wages in which the creditor had no pre-existing property interest. It is readily distinguishable from the instant case where the creditor does have a pre-existing property interest as a result of the vendor's lien which attached upon execution of the installment sales contract. Indeed, depending on the number of installments which have been paid, the creditor's interest may often be greater than the debtor's. Thus, we deal here with mutual property interests, both of which are entitled to be safeguarded. *Fuentes* overlooked this vital point.

In addition, the Court recognized in *Sniadach* that prejudgment garnishment of wages could as a practical matter "impose tremendous hardship" and "drive a wage-earning family to the wall." *Id.,* at 340, 341–342. By contrast, there is no basis for assuming that sequestration of a debtor's goods would necessarily place him in such a "brutal need" situation.

mercial field.[4] This fact alone justifies a re-examination of its premises. The Court today reviews these at length, and I join its opinion because I think it represents a reaffirmation of the traditional meaning of procedural due process.

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

The Louisiana sequestration procedure now before us is remarkably similar to the statutory provisions at issue in *Fuentes* v. *Shevin*, 407 U. S. 67 (1972). In both cases the purchaser-in-possession of the property is not afforded any prior notice of the seizure or any opportunity to rebut the allegations of the vendor before the property is summarily taken from him by agents of the State. In both cases all that is required to support the issuance of the writ and seizure of the goods is the filing of a complaint and an affidavit containing *pro forma* allegations in support of the seller's purported entitlement to the goods in question. Since the procedure in both cases is completely *ex parte*, the state official charged with issuing the writ can do little more than determine the formal sufficiency of the plaintiff's allegations before ordering the state agents to take the goods from the defendant's possession.[1]

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[4] For a discussion of the far-reaching implications of the *Fuentes* rationale, see Clark & Landers, *Sniadach, Fuentes* and Beyond: The Creditor Meets the Constitution, 59 Va. L. Rev. 335 (1973). The authors suggest that *Fuentes* could require invalidation of many summary creditor remedies in their present form.

[1] The Louisiana Supreme Court held that *Fuentes* did not govern the present case. Essentially, that court held that because the Louisiana vendor's privilege is defeated if the vendee alienates the property over which the vendor has the privilege, this case falls within the language in *Fuentes* that "[t]here may be cases in which a creditor could make a showing of immediate danger that a debtor

The question before the Court in *Fuentes* was what procedures are required by the Due Process Clause of the Fourteenth Amendment when a State, at the behest of a private claimant, seizes goods in the possession of another, pending judicial resolution of the claimant's assertion of superior right to possess the property. The Court's analysis of this question began with the proposition that, except in exceptional circumstances,[2] the deprivation of a property interest encompassed within the Fourteenth Amendment's protection must be preceded by notice to the affected party and an opportunity to be heard. The Court then went on to hold that a debtor-vendee's interest in the continued possession of purchased goods was "property" within the Fourteenth Amendment's protection and that the "temporary, nonfinal deprivation of [this] property [is] . . . a 'deprivation' in the terms of the Fourteenth Amendment." 407 U. S., at 85. Accordingly, *Fuentes* held that such a deprivation of property must be preceded by notice to the possessor and by an opportunity for a hearing appropriate under the circumstances. Matters such as

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will destroy or conceal disputed goods." *Fuentes* v. *Shevin*, 407 U. S. 67, 93 (1972). The Court today quite correctly does not embrace this rationale. In discussing the " 'extraordinary situations' " that might justify the summary seizure of goods, the *Fuentes* opinion stressed that these situations "must be truly unusual." *Id.*, at 90. Specifically, it referred to "special situations demanding prompt action." *Id.*, at 93. In effect, the Louisiana Supreme Court held that *all* vendor-creditors in the State can be conclusively presumed to be in this "special" situation, regardless of whether the individual vendor could make a showing of immediate danger in his particular case. But if the situation of all such vendors in a State could be conclusively presumed to meet the "extraordinary," "unusual," and "special" conditions referred to in *Fuentes*, the basic constitutional rule of that case would be wholly obliterated in the State.

[2] 407 U. S., at 90–93.

requirements for the posting of bond and the filing of sworn factual allegations, the length and severity of the deprivation, the relative simplicity of the issues underlying the creditor's claim to possession, and the comparative "importance" or "necessity" of the goods involved were held to be relevant to determining the form of notice and hearing to be provided, but not to the constitutional need for notice and an opportunity for a hearing of some kind.

The deprivation of property in this case is identical to that at issue in *Fuentes,* and the Court does not say otherwise. Thus, under *Fuentes,* due process of law permits Louisiana to effect this deprivation only after notice to the possessor and opportunity for a hearing. Because I would adhere to the holding of *Fuentes,* I dissent from the Court's opinion and judgment upholding Louisiana's *ex parte* sequestration procedure, which provides that the possessor of the property shall never have advance notice or a hearing of any kind.

As already noted, the deprivation of property in this case is identical to that in *Fuentes.* But the Court says that this is a different case for three reasons: (1) the plaintiff who seeks the seizure of the property must file an affidavit stating "specific facts" that justify the sequestration; (2) the state official who issues the writ of sequestration is a judge instead of a clerk of the court; and (3) the issues that govern the plaintiff's right to sequestration are limited to "the existence of a vendor's lien and the issue of default," and "[t]here is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing," *ante,* at 618. The Court's opinion in *Fuentes,* however, explicitly rejected each of these factors as a ground for a difference in decision.

The first two purported distinctions relate solely to

the procedure by which the creditor-vendor secures the State's aid in summarily taking goods from the purchaser's possession. But so long as the Louisiana law routinely permits an *ex parte* seizure without notice to the purchaser, these procedural distinctions make no constitutional difference.

The Louisiana affidavit requirement can be met by any plaintiff who fills in the blanks on the appropriate form documents and presents the completed forms to the court. Although the standardized form in this case called for somewhat more information than that required by the Florida and Pennsylvania statutes challenged in *Fuentes*, such *ex parte* allegations "are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation." 407 U. S., at 83.

Similarly, the fact that the official who signs the writ after the *ex parte* application is a judge instead of a court clerk is of no constitutional significance. Outside Orleans Parish, this same function is performed by the court clerk. There is nothing to suggest that the nature of this duty was at all changed when the law was amended to vest it in a judge rather than a clerk in this one parish. Indeed, the official comments declare that this statutory revision was intended to "mak[e] no change in the law." [3] Whether the issuing functionary be a judge or a court clerk, he can in any event do no more than ascertain the formal sufficiency of the plaintiff's allegations, after

[3] La. Code Civ. Proc. Ann., Art. 281 (1961).

which the issuance of the summary writ becomes a simple ministerial act.[4]

The third distinction the Court finds between this case and *Fuentes* is equally insubstantial. The Court says the issues in this case are "particularly suited" to *ex parte* determination, in contrast to the issues in *Fuentes,* which were "inherently subject to factual determination and adversarial input," *ante,* at 617, 618. There is, however, absolutely no support for this purported distinction. In this case the Court states the factual issues as "the existence of a vendor's lien and the issue of default." *Ante,* at 618. The issues upon which replevin depended in *Fuentes* were no different; the creditor-vendor needed only to establish his security interest and the debtor-vendee's default. As MR. JUSTICE WHITE acknowledged in his *Fuentes* dissent, the essential issue at any hearing would be whether "there is reasonable basis for his [the creditor-vendor's] claim of default." 407 U. S., at 99–100. Thus, the Court produces this final attempted distinction out of whole cloth.

Moreover, *Fuentes* held that the relative complexity of the issues in dispute is not relevant to determining whether a prior hearing is required by due process. "The issues decisive of the ultimate right to continued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality or scheduling of a prior hearing. But it certainly cannot undercut the right to a prior hearing of some kind." *Id.,* at 87 n. 18 (citation omitted). Similarly, the probability of suc-

[4] The Louisiana authorities cited by the Court are not to the contrary. *Wright* v. *Hughes,* 254 So. 2d 293 (La. Ct. App. 1971), and *Hancock Bank* v. *Alexander,* 256 La. 643, 237 So. 2d 669 (1970), stand only for the proposition that a writ should not issue unless the sworn allegations are formally sufficient, which may mean nothing more than that the proper standardized form be completely filled in.

cess on the factual issue does not affect the right to prior notice and an opportunity to be heard.

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods." *Id.*, at 87 (internal quotation marks and citation omitted).

In short, this case is constitutionally indistinguishable from *Fuentes* v. *Shevin,* and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent. In light of all that has been written in *Fuentes* and in this case, it seems pointless to prolong the debate. Suffice it to say that I would reverse the judgment before us because the Louisiana sequestration procedure fails to comport with the requirements of due process of law.

I would add, however, a word of concern. It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so. Cf. *Roofing Wholesale Co.* v. *Palmer,* 108 Ariz. 508, 502 P. 2d 1327 (1972). A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environ-

ment.[5] Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of *stare decisis.*

The *Fuentes* decision was in a direct line of recent cases in this Court that have applied the procedural due process commands of the Fourteenth Amendment to prohibit governmental action that deprives a person of a statutory or contractual property interest with no advance notice or opportunity to be heard.[6] In the short time that has elapsed since the *Fuentes* case was decided, many state and federal courts have followed it in assessing the constitutional validity of state replevin statutes and other comparable state laws.[7] No data have been brought to our attention to indicate that these decisions, granting to otherwise defenseless consumers the simple rudiments of due process of law, have worked any untoward change in the consumer credit market or in other commercial relationships. The only perceivable change that has occurred since *Fuentes* is in the makeup of this Court.[8]

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[5] See, *e. g., North Dakota Board of Pharmacy* v. *Snyder's Drug Stores,* 414 U. S. 156 (1973); *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

[6] See, *e. g., Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); and *Bell* v. *Burson,* 402 U. S. 535 (1971).

[7] See, *e. g., Turner* v. *Colonial Finance Corp.,* 467 F. 2d 202 (CA5 1972); *Sena* v. *Montoya,* 346 F. Supp. 5 (NM 1972); *Dorsey* v. *Community Stores Corp.,* 346 F. Supp. 103 (ED Wis. 1972); *Thorp Credit, Inc.* v. *Barr,* 200 N. W. 2d 535 (Iowa 1972); *Inter City Motor Sales* v. *Common Pleas Judge,* 42 Mich. App. 112, 201 N. W. 2d 378 (1972); and *Montoya* v. *Blackhurst,* 84 N. M. 91, 500 P. 2d 176 (1972).

[8] Although MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

MR. JUSTICE BRENNAN is in agreement that *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), requires reversal of the judgment of the Supreme Court of Louisiana.

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were Members of the Court at the time that *Fuentes* v. *Shevin* was announced, they were not Members of the Court when that case was argued, and they did not participate in its "consideration or decision." 407 U. S., at 97.

Syllabus

DONNELLY *v.* DeCHRISTOFORO

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

No. 72–1570. Argued February 20, 1974—Decided May 13, 1974

During the course of a joint first-degree murder trial, respondent's codefendant pleaded guilty to second-degree murder, of which the trial court advised the jury, stating that the trial against respondent would continue. In his summation, the prosecutor stated that respondent and his counsel had said that they "hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." Respondent's counsel objected and later sought an instruction that the remark was improper and should be disregarded. In its instructions, the trial court, after re-emphasizing the prosecutor's statement that his argument was not evidence, declared that the challenged remark was unsupported, and admonished the jury to ignore it. Respondent was convicted of first-degree murder. The State's highest court ruled that the prosecutor's remark, though improper, was not so prejudicial as to warrant a mistrial and that the trial court's instruction sufficed to safeguard respondent's rights. The District Court denied respondent's petition for a writ of habeas corpus. The Court of Appeals reversed, concluding that the challenged comment implied that respondent, like his codefendant, had offered to plead guilty to a lesser offense, but was refused and that the comment was thus potentially so misleading and prejudicial as to deprive respondent of a constitutionally fair trial. *Held:* In the circumstances of this case, where the prosecutor's ambiguous remark in the course of an extended trial was followed by the trial court's specific disapproving instructions, no prejudice amounting to a denial of constitutional due process was shown. *Miller* v. *Pate,* 386 U. S. 1; *Brady* v. *Maryland,* 373 U. S. 83, distinguished. Pp. 642–648.

473 F. 2d 1236, 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, in which WHITE, J.,

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joined, *post*, p. 648. DOUGLAS, J., filed a dissenting opinion, in Part II of which BRENNAN and MARSHALL, JJ., joined, *post*, p. 648.

David A. Mills, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the brief were *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, and *Barbara A. H. Smith*, Assistant Attorneys General.

Paul T. Smith argued the cause for respondent. With him on the brief were *Harvey R. Peters* and *Jeffrey M. Smith*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.[1] The jury recommended that the death penalty not be imposed, and respondent was sentenced to life imprisonment. He appealed to the Supreme Judicial Court of Massachusetts contending, *inter alia*, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court affirmed.[2] That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to require reversal.

Respondent then sought habeas corpus relief in the United States District Court for the District of Massa-

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**Melvin B. Lewis* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

[1] Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. The conviction is in no way related to the issues before the Court in this case.

[2] *Commonwealth* v. *DeChristoforo*, — Mass. —, 277 N. E. 2d 100 (1971).

chusetts. The District Court denied relief, stating: "[T]he prosecutor's arguments were not so prejudicial as to deprive [DeChristoforo] of his constitutional right to a fair trial." [3] The Court of Appeals for the First Circuit reversed by a divided vote.[4] The majority held that the prosecutor's remarks deliberately conveyed the false impression that respondent had unsuccessfully sought to plead to a lesser charge and that this conduct was a denial of due process. We granted certiorari, 414 U. S. 974 (1973), to consider whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights. We hold they were not and so reverse.

I

Respondent and two companions were indicted for the first-degree murder of Joseph Lanzi, a passenger in the car in which the defendants were riding. Police had stopped the car at approximately 4 a. m. on April 18, 1967, and had discovered Lanzi's dead body along with two firearms, one of which had been fired. A second gun, also recently fired, was found a short distance away. Respondent and one companion avoided apprehension at that time, but the third defendant was taken into custody. He later pleaded guilty to second-degree murder.

Respondent and the other defendant, Gagliardi, were finally captured and tried jointly. The prosecutor made little claim that respondent fired any shots but argued that he willingly assisted in the killing. Respondent, on the other hand, maintained that he was an innocent passenger. At the close of the evidence but before final argument, Gagliardi elected to plead guilty to a charge of second-degree murder. The court advised the jury that

[3] App. 231.

[4] 473 F. 2d 1236 (1973).

Gagliardi had pleaded guilty and that respondent's trial would continue.[5] Respondent did not seek an instruction that the jury was to draw no inference from the plea, and no such instruction was given.

Respondent's claims of constitutional error focus on two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury. The first involved the expression of a personal opinion as to guilt,[6] perhaps offered to rebut a somewhat personalized argument by respondent's counsel. The majority of the Court of Appeals agreed with the Supreme Judicial Court of Massachusetts that this remark was improper, but declined to rest its holding of a violation of due process on that remark.[7] It turned to a second remark that it deemed "more serious."

The prosecutor's second challenged comment was directed at respondent's motives in standing trial: "They [the respondent and his counsel] said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder."[8] Respondent's counsel objected immediately to the statement and later sought an instruction that the remark was improper and should

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[5] The trial court stated:

"Mr. Foreman, madam and gentlemen of the jury. You will notice that the defendant Gagliardi is not in the dock. He has pleaded 'guilty,' and his case has been disposed of.

"We will, therefore, go forward with the trial of the case of Commonwealth vs DeChristoforo." App. 99.

[6] The challenged remark was: "I honestly and sincerely believe that there is no doubt in this case, none whatsoever." *Id.*, at 130.

[7] The Court of Appeals noted: "[A]t least the jury knows that the prosecutor is an advocate and it may be expected, to some degree, to discount such remarks as seller's talk." 473 F. 2d, at 1238.

[8] App. 129.

be disregarded.[9] The court then gave the following instruction:

> "Closing arguments are not evidence for your consideration. . . .
>
> "Now in his closing, the District Attorney, I noted, made a statement: 'I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.' There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney.
>
> "Consider the case as though no such statement was made." [10]

The majority of the Supreme Judicial Court of Massachusetts, though again not disputing that the remark was improper, held that it was not so prejudicial as to require a mistrial and further stated that the trial judge's instruction "was sufficient to safeguard the defendant's rights." [11] Despite this decision and the District Court's denial of a writ of habeas corpus, the Court of Appeals found that the comment was potentially so misleading and prejudicial that it deprived respondent of a constitutionally fair trial.

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[9] No instruction was sought at the time although the court apparently was willing to give one. The trial judge later told counsel: "[H]ad there been a motion made by you at that time to have me instruct the jury along the lines of eliminating that from their minds, or something of that nature, I certainly would have complied, because I did consider at the time the argument was beyond the grounds of complete propriety, but certainly far from being grounds for a mistrial." *Id.*, at 133.

[10] *Id.*, at 143–144.

[11] —— Mass., at ——, 277 N. E. 2d, at 105.

The Court of Appeals reasoned that the jury would be naturally curious about respondent's failure to plead guilty and that this curiosity would be heightened by Gagliardi's decision to plead guilty at the close of the evidence. In this context, the court thought, the prosecutor's comment that respondent hoped for conviction on a lesser offense would suggest to the jury that respondent had sought to plead guilty but had been refused. Since the prosecutor was in a position to know such facts, the jury may well have surmised that respondent had already admitted guilt in an attempt to secure reduced charges. This, said the Court of Appeals, is the inverse of, but a parallel to, intentional suppression of favorable evidence. The prosecutor had deliberately misled the jury, and even if the statement was made thoughtlessly, "in a first degree murder case there must be some duty on a prosecutor to be thoughtful." [12] Therefore, the District Court had erred in denying respondent's petition.

II

The Court of Appeals in this case noted, as petitioner urged, that its review was "the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." [13] We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California,* 314 U. S. 219, 236 (1941). We stated only this Term in *Cupp* v. *Naughten,* 414 U. S. 141 (1973), when reviewing an instruction given in a state court:

"Before a federal court may overturn a conviction

[12] 473 F. 2d, at 1240.

[13] *Id.,* at 1238.

> resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." [14]

This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. *Griffin* v. *California,* 380 U. S. 609 (1965).[15] When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention.

Conflicting inferences have been drawn from the prosecutor's statement by the courts below. Although the Court of Appeals stated flatly that "the prosecuting attorney turned Gagliardi's plea into a telling stroke against [DeChristoforo]" [16] by implying respondent had

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[14] 414 U. S., at 146.

[15] Respondent does suggest that the prosecutor's statements may have deprived him of the right to confrontation. See *Pointer* v. *Texas,* 380 U. S. 400 (1965). But this argument is without merit, for the prosecutor here simply stated his own opinions and introduced no statements made by persons unavailable for questioning at trial.

[16] 473 F. 2d, at 1239.

offered to plead guilty as well, the dissent found the inference to be "far less obvious." [17] The Supreme Judicial Court of Massachusetts stated that it considered the same argument illogical:

> "It is not logical to conclude that the jury would accept any implied argument of the prosecutor that, because one of the men whom the defendant blamed for the murder had pleaded guilty, the defendant was any less firm in his assertion that he himself was not guilty of any crime whatsoever." [18]

Thus it is by no means clear that the jury did engage in the hypothetical analysis suggested by the majority of the Court of Appeals, or even probable that it would seize such a comment out of context and attach this particular meaning to it. Five Justices of the Supreme Judicial Court of Massachusetts and at least one federal judge have all confessed difficulty in making this speculative connection.

In addition, the trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case. The prosecutor, as is customary, had previously told the jury that his argument was not evidence,[19] and the trial judge specifically re-emphasized that point. Then the judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it.[20] Although some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character.

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[17] *Id.*, at 1241 (Campbell, J., dissenting).

[18] App. 157.

[19] *Id.*, at 119.

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

In *Cupp* v. *Naughten, supra,* the respondent had challenged his conviction on the ground that a "presumption of truthfulness" instruction, given by the state trial court, had deprived him of the presumption of innocence and had shifted the State's burden of proof to himself. Holding that the instruction, although perhaps not advisable, did not violate due process, we stated:

> "In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd* v. *United States,* 271 U. S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States,* 409 U. S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." [21]

Similarly, the prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process.

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[21] 414 U. S., at 146–147.

III

We do not find the cases cited by the Court of Appeals to require a different result. In *Miller* v. *Pate,* 386 U. S. 1 (1967), the principal case relied upon, this Court held that a state prisoner was entitled to federal habeas relief upon a showing that a pair of stained undershorts, allegedly belonging to the prisoner and repeatedly described by the State during trial as stained with blood, was in fact stained with paint. In the course of its opinion, this Court said:

> "It was further established that counsel for the prosecution had known at the time of the trial that the shorts were stained with paint. . . .
>
> ". . . The record of the petitioner's trial reflects the prosecution's consistent and repeated misrepresentation that People's Exhibit 3 was, indeed, 'a garment heavily stained with blood.' " *Id.,* at 6.

A long series of decisions in this Court,[22] of course, had established the proposition that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Id.,* at 7. The Court in *Miller* found those cases controlling.

We countenance no retreat from that proposition in observing that it falls far short of embracing the prosecutor's remark in this case. The "consistent and repeated misrepresentation" of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed

[22] See, *e. g., Mooney* v. *Holohan,* 294 U. S. 103 (1935); *Napue* v. *Illinois,* 360 U. S. 264 (1959).

in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

The Court of Appeals' reliance on *Brady* v. *Maryland,* 373 U. S. 83 (1963), is likewise misplaced. In *Brady,* the prosecutor had withheld evidence, a statement by the petitioner's codefendant, which was directly relevant to the extent of the petitioner's involvement in the crime. Since the petitioner had testified that his codefendant had done the actual shooting and since the petitioner's counsel was not contesting guilt but merely seeking to avoid the death penalty, evidence of the degree of the petitioner's participation was highly significant to the primary jury issue. As in *Miller,* manipulation of the evidence by the prosecution was likely to have an important effect on the jury's determination. But here there was neither the introduction of specific misleading evidence important to the prosecution's case in chief nor the nondisclosure of specific evidence valuable to the accused's defense. There were instead a few brief sentences in the prosecutor's long and expectably hortatory closing argument which might or might not suggest to a jury that the respondent had unsuccessfully sought to bargain for a lesser charge. We find nothing in *Brady* to suggest that due process is so easily denied.

The result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in *Miller* and *Brady, supra,* to

amount to a denial of constitutional due process.[23] Since we believe that distinction should continue to be observed, we reverse the judgment of the Court of Appeals.

It is so ordered.

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

I agree with my Brother DOUGLAS that, when no new principle of law is presented, we should generally leave undisturbed the decision of a court of appeals that upon the particular facts of any case habeas corpus relief should be granted—or denied. For this reason I think it was a mistake to grant a writ of certiorari in this case, and I would now dismiss the writ as improvidently granted.

We are bound here, however, by the "rule of four." That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court. See *Ferguson* v. *Moore-McCormack Lines,* 352 U. S. 521, 559 (separate opinion of Harlan, J.).

Upon this premise, I join the Court's opinion.

MR. JUSTICE DOUGLAS, dissenting.

The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as pos-

[23] We do not, by this decision, in any way condone prosecutorial misconduct, and we believe that trial courts, by admonition and instruction, and appellate courts, by proper exercise of their supervisory power, will continue to discourage it. We only say that, in the circumstances of the case, no prejudice amounting to a denial of constitutional due process was shown.

sible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial. As stated by the Court in *Berger* v. *United States,* 295 U. S. 78, 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We have here a state case, not a federal one; and the prosecutor is a state official. But we deal with an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the States are bound. *Chambers* v. *Mississippi,* 410 U. S. 284; *Sheppard* v. *Maxwell,* 384 U. S. 333; *Turner* v. *Louisiana,* 379 U. S. 466; *Irvin* v. *Dowd,* 366 U. S. 717.

In this case respondent was charged with first-degree murder and was convicted in the state court by a jury. At no time did he seek to plead guilty to a lesser offense. It is stipulated:

> "[A]t no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth

> seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial."

A codefendant pleaded guilty to second-degree murder and the jury was advised of the fact.

As to the guilt of respondent the prosecutor told the jury: "I honestly and sincerely believe that there is no doubt in this case, none whatsoever."

And he went on to say: "I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder."

These statements in the setting of the case and in light of the fact that the jury knew the codefendant had pleaded guilty to second-degree murder, are a subtle equivalent of a statement by the prosecutor that respondent sought a lesser penalty. Counsel for respondent immediately objected but the court at the time did not admonish the prosecutor or tell the jury to disregard the statement, though it did cover the matter later in its general instructions.

I

As a matter of federal law the introduction of a withdrawn plea of guilty is not admissible evidence, *Kercheval* v. *United States,* 274 U. S. 220. As a matter of procedural due process the Confrontation Clause of the Sixth Amendment, applicable to the States by reason of the Fourteenth Amendment, *Pointer* v. *Texas,* 380 U. S. 400, would bar a person from testifying that the defendant had sought a guilty plea unless the right of cross-examination of the witness was afforded, *id.,* at 406–408. That requirement of procedural due process should be sedulously enforced (save for the recognized exceptions of dying declarations and the like, *id.,* at 407) lest the theory that the end justifies the means gains further footholds here. The prosecutor is not a witness; and he should not be permitted to add to the record either by subtle

or gross improprieties. Those who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair trial. The assurance of the Court that we make no retreat from constitutional government by today's decision has therefore a hollow ring.

Activist judges have brought federal habeas corpus into disrepute at the present time. It is guaranteed by the Constitution. It is a built-in restraint on judges—both state and federal; and it is also a restraint on prosecutors who are officers of the court. Our activist tendencies should promote not law and order, but *constitutional* law and order. Judges, too, can be tyrants and often have been. Prosecutors are often eager to take almost any shortcut to win, yet as I have said they represent not an ordinary party but We the People. As I have noted, their duty is as much "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one," *Berger* v. *United States, supra,* at 88.

It is, I submit, quite "improper" for a prosecutor to insinuate to the jury the existence of evidence not in the record and which could not be introduced without the privilege of cross-examination.

II

The Supreme Judicial Court of Massachusetts had difficulty with this case when it came before it on direct appeal, two Justices, which included the Chief Justice, dissenting,* *Commonwealth* v. *DeChristoforo,* ——

*Chief Justice Tauro said in dissent:

"The prosecutor's argument in the instant case permitted or perhaps even suggested an inference that the defendant had conceded his guilt and was merely hoping for something a little less than a verdict of murder in the first degree. This diminished his

Mass. —, 277 N. E. 2d 100. The Court of Appeals was also divided, 473 F. 2d 1236. Our federal district courts and courts of appeals are much closer to law administration in the respective States than are we in Washington, D. C. They are responsible federal judges who know the Federal Constitution as well as we do. Their error in issuing the Great Writ—or in refusing to do so—would in my judgment have to be egregious for us to grant a petition for certiorari. When a court of appeals honors the Constitution by granting the Great Writ or in its solemn judgment denies it, we should let the matter rest there, save for manifest error.

I would affirm the judgment below.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would affirm the judgment below for the reasons stated in Part II of the dissent of MR. JUSTICE DOUGLAS.

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chance for a fair trial to a far greater degree than would have the publication in a newspaper of his criminal background. Unlike a newspaper, the prosecutor ostensibly speaks with the authority of his office. The prosecutor's 'personal status and his role as a spokesman for the government tend[ed] to give to what he . . . [said] the ring of authenticity . . . tend[ing] to impart an implicit stamp of believability.' Hall v. United States, 419 F. 2d 582, 583–584 (5th Cir.). The prosecutor's remarks probably called for a mistrial. In any event the judge's failure to instruct the jury adequately and with sufficient force to eliminate the serious prejudice to the defendant constitutes fatal error. Moreover, the judge's routine final instructions to the jury were far from sufficient to correct the error. By then the defendant's position had so deteriorated that his chances for a fair deliberation of his fate by the jury were virtually eliminated." — Mass., at —, 277 N. E. 2d, at 112.

Syllabus

BEASLEY ET AL. *v.* FOOD FAIR OF NORTH CAROLINA, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 72–1597. Argued February 19, 1974—Decided May 15, 1974

Following discharge of petitioners, managers of meat departments in respondent Food Fair's stores, because of their union membership, the union filed unfair labor practice charges with the National Labor Relations Board, which were dismissed on the ground that the protection of the National Labor Relations Act (NLRA) did not extend to "supervisors" like petitioners. Thereupon petitioners brought suit in state court, under § 95–83 of North Carolina's right-to-work law. The trial court granted respondents' motion for summary judgment. On the ground that enforcing the state law in favor of petitioners was barred by the second clause of § 14 (a) of the NLRA ("no employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining"), the State Supreme Court ultimately upheld that ruling. *Held:* The second clause of § 14 (a) applies to any law requiring an employer to accord to supervisors like petitioners, who are "the front line of management," the "anomalous status of employees," and enforcement of the North Carolina law would thus flout the national policy against compulsion upon employers from either federal or state authorities to treat supervisors as employees. Pp. 656–662.

282 N. C. 530, 193 S. E. 2d 911, affirmed.

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

Larry L. Eubanks argued the cause and filed a brief for petitioners.

Ralph M. Stockton, Jr., argued the cause for respondents. With him on the brief were *J. Robert Elster* and *James H. Kelly, Jr.**

*Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin,* and

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MR. JUSTICE BRENNAN delivered the opinion of the Court.

Taft-Hartley amendments [1] of the National Labor Relations Act excluded supervisors from the protections of the Act and thus freed employers to discharge supervisors without violating the Act's restraints against

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Norton J. Come for the National Labor Relations Board, and by *James M. Miles* for Associated Industries, Inc., et al.

[1] Labor Management Relations Act, 1947, c. 120, 61 Stat. 136. The three amendments relevant to this case provide:

§ 2 (3). "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." 61 Stat. 137, 29 U. S. C. § 152 (3).

§ 2 (11). "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 61 Stat. 138, 29 U. S. C. § 152 (11).

§ 14 (a) "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 61 Stat. 151, 29 U. S. C. § 164 (a).

discharges on account of labor union membership. The question in this case is whether those amendments also freed the employer from liability in damages to the discharged supervisors under §§ 95–81 and 95–83 of North Carolina's right-to-work law that provides such an action for employees discharged for union membership.[2]

Respondent Food Fair of North Carolina, Inc. (Food Fair), a grocery chain, operates stores throughout North Carolina. Petitioners were managers of meat departments in Food Fair Stores in the Winston-Salem area. When Local 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, organized the stores' meatcutters, petitioners also joined the union. Food Fair discharged them, allegedly on account of their union membership, immediately after Local 525 won a representation election conducted by the National Labor Relations Board. The Local claimed that the discharges constituted an unfair labor practice and filed charges with the Regional Director of the NLRB. The Regional Director refused to issue a complaint on the ground that petitioners were "supervisors" excluded from the Act's protection. On appeal, the NLRB General

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[2] Those sections provide:

"§ 95–81. Nonmembership as condition of employment prohibited.—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment." N. C. Gen. Stat. § 95–81 (1965).

"§ 95–83. Recovery of damages by persons denied employment.—Any person who may be denied employment or be deprived of continuation of his employment in violation of §§ 95–80, 95–81 and 95–82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment." N. C. Gen. Stat. § 95–83 (1965).

Counsel refused to issue a complaint, on the same ground.[3] Petitioners thereupon brought this suit in state court against Food Fair under § 95–83. Food Fair contended successfully that the second clause of § 14 (a) of the National Labor Relations Act, 29 U. S. C. § 164 (a)—"but no employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining"—prohibited enforcement of the state law in favor of supervisors, and was granted summary judgment. The North Carolina Court of Appeals reversed in reliance upon *Hanna Mining* v. *Marine Engineers,* 382 U. S. 181 (1965). 15 N. C. App. 323, 190 S. E. 2d 333 (1972). The North Carolina Supreme Court in turn reversed the Court of Appeals and reinstated the summary judgment. 282 N. C. 530, 193 S. E. 2d 911 (1973). We granted certiorari, 414 U. S. 907 (1973). We affirm.

Petitioners concede that the Taft-Hartley amendments exclude supervisors from the protection of the Act. And it is undisputed that petitioners' status as "supervisors" has been settled by the determinations of the Regional Director and General Counsel of the NLRB. See n. 3, *supra; Hanna Mining* v. *Marine Engineers, supra,* at 190; Brief for Respondents 7. The Act therefore did not protect petitioners against discharge by Food Fair solely because of their membership in Local 525. *Oil City Brass Works* v. *NLRB,* 357 F. 2d 466 (CA5 1966); *NLRB* v.

[3] The position of the General Counsel was unequivocally set forth in the letter of denial, quoted by the North Carolina Court of Appeals: "Your appeal in the above matter has been duly considered. The appeal is denied. The four alleged discriminatees involved herein were supervisors within the meaning of Section 2 (11) of the Act and hence were not entitled, in the circumstances herein, to the protection of the Act." 15 N. C. App. 323, 325, 190 S. E. 2d 333, 334 (1972).

Fullerton Publishing Co., 283 F. 2d 545 (CA9 1960). See *NLRB* v. *Inter-City Advertising Co.*, 190 F. 2d 420 (CA4 1951); *NLRB* v. *Griggs Equipment, Inc.*, 307 F. 2d 275 (CA5 1962); *NLRB* v. *Big Three Welding Equipment Co.*, 359 F. 2d 77 (CA5 1966); Brief for Petitioners 8–9.

Our inquiry is thus narrowed to the determination of whether Congress, in addition to denying the protections of the federal law to supervisors discharged for union membership, should be taken as having also precluded North Carolina from affording petitioners its state damages remedy for such discharges. Section 14 (a) does not wholly foreclose state regulations respecting the status of supervisors, but its two clauses require individualized consideration in view of the Court of Appeals' reliance on *Hanna Mining*. *Hanna,* construing the first clause—"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization"—held that "certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing," 382 U. S., at 190. The Court accordingly held that the Wisconsin anti-picketing statutes—that furthered, not hindered, the Act's limitations—could be applied to activity by a union of supervisors.

That construction, of course, is consistent with the objectives of the section. But the second clause is a broad command that no employer shall be compelled to treat supervisors as employees for the purpose of "any law, either national or local, relating to collective bargaining." Consistently with this broader command, and *Hanna*'s further statement that "Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees," 382 U. S., at 189, the North Carolina Supreme Court concluded that §§ 95–81 and 95–83 of the State's right-

to-work law contravened the congressional objective. That court held: "To permit a state law to deprive an employer of his right to discharge his supervisor for membership in a union would completely frustrate the congressional determination to leave this weapon of self-help to the employer." 282 N. C., at 541, 193 S. E. 2d, at 918.

Petitioners argue, however, that Congress must have meant that the reach of the limitation of the second clause that "no employer . . . shall be compelled to deem . . . supervisors as employees for the purpose of any law, either national or local, relating to *collective bargaining*" (emphasis supplied) did not bar state damages remedies for the discharge of supervisors for union membership but was a limited prohibition against state regulations that compel the employer to bargain collectively with unions that include supervisors as members. The legislative history of § 14 (a), read with its companion amendments, §§ 2 (3) and 2 (11), satisfies us that Congress embraced laws like North Carolina's §§ 95–81 and 95–83 within the prohibition against "any [local] law . . . relating to collective bargaining."

Section 2 (3) of the National Labor Relations Act before the 1947 Taft-Hartley amendments provided that "[t]he term 'employee' shall include any employee . . . ." 49 Stat. 450. The NLRB, after much vacillation,[4] interpreted this term as including supervisors. *Packard*

[4] The Board initially held that supervisors may organize in independent or affiliated unions, *Union Collieries Coal Co.*, 41 N. L. R. B. 961 (1942); *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874 (1942). Then, following introduction of proposed corrective legislation, see H. R. Rep. No. 245, 80th Cong., 1st Sess., 13 (1947), the Board announced that it would not find any organization of supervisors an appropriate bargaining unit, *Maryland Drydock Co.*, 49 N. L. R. B. 733 (1943). Finally, in *Packard Motor Co.*, 61 N. L. R. B. 4 (1945), the Board reverted to its initial position.

Motor Car Co. v. *NLRB,* 330 U. S. 485 (1947), sustained the Board. Congress reacted by amending §§ 2 (3) and 2 (11), and enacting § 14 (a) for the express purpose of relieving employers of obligations under the Act when supervisors, if employees under the Act, would be the focus of concern. *Hanna Mining* v. *Marine Engineers, supra,* at 188. Those amendments were the product of compromise of H. R. 3020 and S. 1126, 80th Cong., 1st Sess. (1947). There were differences in the specific provisions addressed to supervisory employees,[5] but no difference in objective. Employers were not to be obliged to recognize and bargain with unions including or composed of supervisors,[6] because supervisors were manage-

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[5] Although H. R. 3020 lacked a counterpart to § 14 (a) in S. 1126, it contained a more detailed, and expansive, definition of "supervisor," including individuals with "hire-and-fire" authority, those who worked in "labor relations, personnel, employment, police, or time-study matters . . . or who [are] employed to act in other respects for the employer in dealing with other individuals employed by the employer," and those with access to information "of a confidential nature." § 101, amending § 2 (12) of NLRA, H. R. 3020, 80th Cong., 1st Sess. (1947).

Aside from the use of the Senate's proposals for §§ 2 (3), 2 (11), and 14 (a) in the final amendments, the only pertinent congressional action during passage was the addition of the words "or responsibility to direct them" to § 2 (11) on the floor of the Senate. 93 Cong. Rec. 4677–4678 (1947).

[6] The legislative history is determinative of any contention that a different rule should be applied for unions composed entirely of supervisors, on the one hand, and for unions of the rank and file as well as supervisors, on the other. The House Report emphatically stated:

"If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into*

ment obliged to be loyal to their employer's interests, and their identity with the interests of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation. Thus the House Report stated:

> "*Management, like labor, must have faithful agents.*—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations." H. R. Rep. No. 245, 80th Cong., 1st Sess., 16 (1947).

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unions that claim to be independent of the unions of the rank and file." H. R. Rep. No. 245, 80th Cong., 1st Sess., 15 (1947) (emphasis in original.)

The Senate Report displays equally careful consideration and firm rejection of such a distinction:

"Before formulating this definition [in § 2 (11)], the committee considered a proposal, occasionally advanced, which would have limited the protection of foremen to joining or organizing unions whose membership was confined to supervisory personnel and not affiliated with either of the major labor federations. After considerable discussion, the committee decided that any such compromise would be completely unrealistic. There is nothing in the record developed before this committee to justify the conclusion that there is such a thing as a really independent foremen's organization." S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947).

Further:

> "The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." *Id.*, at 17 (emphasis in original).

The same theme—that unionizing supervisors threatened realization of the basic objectives of the Act to increase the output of goods in commerce by promoting labor peace—is repeated in the Senate Report. The Report refers to the NLRB rulings that included supervisors as protected employees as

> "[a] recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process . . . .
>
> "The folly of permitting a continuation of this policy is dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protection of the act. Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled." S. Rep. No. 105, 80th Cong., 1st Sess. 3, 4 (1947).

This history compels the conclusion that Congress' dominant purpose in amending §§ 2 (3) and 2 (11), and enacting § 14 (a) was to redress a perceived imbalance in

labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests. See generally *NLRB* v. *Bell Aerospace Co., ante,* p. 267. We conclude, therefore, that the second clause of § 14 (a) relieving the employer of obligations under "any law either national or local, relating to collective bargaining" applies to any law that requires an employer "to accord to the front line of management the anomalous status of employees." S. Rep. No. 105, *supra,* at 5. Enforcement against respondents in this case of §§ 95–81 and 95–83 would plainly put pressure on respondents "to accord to the front line of management the anomalous status of employees," and would therefore flout the national policy against compulsion upon employers from either federal or state agencies to treat supervisors as employees. Cf. *Teamsters Union* v. *Morton,* 377 U. S. 252, 258–260 (1964).[7]

Affirmed.

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[7] Petitioners also argue that § 14 (b) supports their contention. That section provides that "[n]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." The section obviously has no relevancy to the provisions of §§ 95–81 and 95–83. It is relevant primarily to § 95–79, which declares illegal certain agreements making union membership a condition of employment. See *Retail Clerks* v. *Schermerhorn,* 373 U. S. 746 and 375 U. S. 96 (1963); *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U. S. 301 (1949).

CALERO-TOLEDO ET AL. *v.* PEARSON YACHT LEASING CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

No. 73–157. Argued January 7, 1974—Decided May 15, 1974

A pleasure yacht, which appellee had leased to Puerto Rican residents, was seized, pursuant to Puerto Rican statutes providing for forfeiture of vessels used for unlawful purposes, without prior notice to appellee or the lessees and without a prior adversary hearing, after authorities had discovered marihuana aboard her. Appellee was neither involved in nor aware of a lessee's wrongful use of the yacht. Appellee then brought suit challenging the constitutionality of the statutory scheme. A three-judge District Court, relying principally on *Fuentes* v. *Shevin,* 407 U. S. 67, held that the statutes' failure to provide for preseizure notice and hearing rendered them unconstitutional and that, as applied to forfeit appellee's interest in the yacht, they unconstitutionally deprived an innocent party of property without just compensation. *Held:*

1. The statutes of Puerto Rico are "State statute[s]" for purposes of the Three-Judge Court Act, and hence a three-judge court was properly convened under that Act and direct appeal to this Court was proper under 28 U. S. C. § 1253. Pp. 669–676.

2. This case presents an "extraordinary" situation in which postponement of notice and hearing until after seizure did not deny due process, since (1) seizure under the statutes serves significant governmental purposes by permitting Puerto Rico to assert *in rem* jurisdiction over the property in forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions; (2) preseizure notice and hearing might frustrate the interests served by the statutes, the property seized often being of the sort, as here, that could be removed from the jurisdiction, destroyed, or concealed, if advance notice were given; and (3), unlike the situation in *Fuentes* v. *Shevin, supra,* seizure is not initiated by self-interested private parties but by government officials. Pp. 676–680.

3. Statutory forfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocents, and here the Puerto Rican statutes, which further punitive and deterrent purposes, were validly applied to appellee's yacht. Pp. 680–690.

363 F. Supp. 1337, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Parts I and II of which STEWART, J., joined. WHITE, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 691. STEWART, J., filed a separate statement, *post*, p. 690. DOUGLAS, J., filed an opinion dissenting in part, in which STEWART, J., joined in part, *post*, p. 691.

Lynn R. Coleman argued the cause for appellants. With him on the brief were *Francisco de Jesus-Schuck*, Attorney General of Puerto Rico, and *Miriam Naviera de Rodon*, Solicitor General.

Gustavo A. Gelpi argued the cause and filed a brief for appellee.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether the Constitution is violated by application to appellee, the lessor of a yacht, of Puerto Rican statutes providing for seizure and forfeiture of vessels used for unlawful purposes when (1) the yacht was seized without prior notice or hearing after allegedly being used by a lessee for an unlawful purpose, and (2) the appellee was neither involved in nor aware of the act of the lessee which resulted in the forfeiture.

**Solicitor General Bork, Assistant Attorney General Petersen, Deputy Solicitor General Frey, Gerald P. Norton, Jerome M. Feit,* and *Joseph S. Davies, Jr.*, filed a brief for the United States as *amicus curiae* urging reversal.

In March 1971, appellee, Pearson Yacht Leasing Co., leased a pleasure yacht to two Puerto Rican residents. Puerto Rican authorities discovered marihuana on board the yacht in early May 1972, and charged one of the lessees with violation of the Controlled Substances Act of Puerto Rico, P. R. Laws Ann., Tit. 24, § 2101 *et seq.* (Supp. 1973). On July 11, 1972, the Superintendent of Police seized the yacht pursuant to P. R. Laws Ann., Tit. 24, §§ 2512 (a)(4), (b) (Supp. 1973),[1] and Tit. 34, § 1722 (1971),[2] which provide that vessels used to

[1] Title 24, §§ 2512 (a)(4) and (b) provide:

"(a) The following shall be subject to forfeiture to the Commonwealth of Puerto Rico:

. . . . . .

"(4) All conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in clauses (1) and (2) of this subsection;

. . . . . .

"(b) Any property subject to forfeiture under clause (4) of subsection (a) of this section shall be seized by process issued pursuant to Act No. 39, of June 4, 1960, as amended, known as the Uniform Vehicle, Mount, Vessel and Plane Seizure Act, sections 1721 and 1722 of Title 34."

[2] Title 34, § 1722, provides:

"Whenever any vehicle, mount, or other vessel or plane is seized . . . such seizure shall be conducted as follows:

"(a) The proceedings shall be begun by the seizure of the property by the Secretary of Justice, the Secretary of the Treasury or the Police Superintendent, through their delegates, policemen or other peace officers. The officer under whose authority the action is taken shall serve notice on the owner of the property seized or the person in charge thereof or any person having any known right or interest therein, of the seizure and of the appraisal of the properties so seized, said notice to be served in an authentic manner, within ten (10) days following such seizure and such notice shall be understood to have been served upon the mailing thereof with return receipt requested. The owners, persons in charge, and

transport, or to facilitate the transportation of, controlled substances, including marihuana, are subject to seizure and forfeiture to the Commonwealth

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other persons having a known interest in the property so seized may challenge the confiscation within the fifteen (15) days following the service of the notice on them, through a complaint against the officer under whose authority the confiscation has been made, on whom notice shall be served, and which complaint shall be filed in the Part of the Superior Court corresponding to the place where the seizure was made and shall be heard without subjection to docket. All questions that may arise shall be decided and all other proceedings shall be conducted as in an ordinary civil action. Against the judgment entered no remedy shall lie other than a certiorari before the Supreme Court, limited to issues of law. The filing of such complaint within the period herein established shall be considered a jurisdictional prerequisite for the availing of the action herein authorized.

"(b) Every vehicle, mount, or any vessel or plane so seized shall be appraised as soon as taken possession of by the officer under whose authority the seizure took place, or by his delegate, with the exception of motor vehicles, which shall be placed under the custody of the Office of Transportation of the Commonwealth of Puerto Rico, which shall appraise same immediately upon receipt thereof.

"In the event of a judicial challenge of the seizure, the court shall, upon request of the plaintiff and after hearing the parties, determine the reasonableness of the appraisal as an incident of the challenge.

"Within ten (10) days after the filing of the challenge, the plaintiff shall have the right to give bond in favor of the Commonwealth of Puerto Rico before the pertinent court's clerk to the satisfaction of the court, for the amount of the assessed value of the seized property, which bond may be in legal tender, by certified check, hypothecary debentures, or by insurance companies. Upon the acceptance of the bond, the court shall direct that the property be returned to the owner thereof. In such case, the provisions of the following paragraphs (c), (d) and (e) shall not apply.

"When bond is accepted the subsequent substitution of the seized property in lieu of the bond shall not be permitted, said bond to answer for the seizure if the lawfulness of the latter is upheld, and the court shall provide in the resolution issued to that effect, for

of Puerto Rico. The vessel was seized without prior notice to appellee or either lessee and without a prior adversary hearing. The lessees, who had registered the yacht with the Ports Authority of the Commonwealth, were thereafter given notice within 10 days of the

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the summary forfeiture execution of said bond by the clerk of the court and for the covering of such bond into the general funds of the Government of Puerto Rico in case it may be in legal tender or by certified check; the hypothecary debentures or debentures of insurance companies shall be transmitted by the pertinent clerk of the court to the Secretary of Justice for execution.

"(c) After fifteen (15) days have elapsed since service of notice of the seizure without the person or persons with interest in the property seized have [*sic*] filed the corresponding challenge, or after twenty-five (25) days have elapsed since service of notice of the seizure without the court's having directed that the seized property be returned on account of the bond to that effect having been given, the officer under whose authority the seizure took place, the delegate thereof, or the Office of Transportation, as the case may be, may provide for the sale at auction of the seized property, or may set the same aside for official use of the Government of Puerto Rico. In case the seized property cannot be sold at auction or set aside for official use of the Government, the property may be destroyed by the officer in charge, setting forth in a minute which he shall draw up for the purpose, the description of the property, the reasons for its destruction and the date and place where it is destroyed, and he shall serve notice with a copy thereof on the Secretary of Justice.

"(d) In case the vehicle, mount, or vessel or plane is sold at auction, the proceeds from the sale shall be covered into the general fund of the Government of Puerto Rico, after deducting and reimbursing expenses incurred.

"(e) If the seizure is judicially challenged and the court declares same illegal, the Secretary of the Treasury of Puerto Rico shall, upon presentation of a certified copy of the final decision or judgment of the court, pay to the challenger the amount of the appraisal or the proceeds from the public auction sale of such property, whichever sum is the highest, plus interest thereon at the rate of 6% per annum, counting from the date of the seizure."

seizure, as required by § 1722 (a).[3] But when a challenge to the seizure was not made within 15 days after service of the notice, the yacht was forfeited for official use of the Government of Puerto Rico pursuant to § 1722 (c).[4] Appellee shortly thereafter first learned of the seizure and forfeiture when attempting to repossess the yacht from the lessees, because of their apparent failure to pay rent. It is conceded that appellee was "in no way . . . involved in the criminal enterprise carried on by [the] lessee" and "had no knowledge that its property was being used in connection with or in violation of [Puerto Rican Law]."

On November 6, 1972, appellee filed this suit, seeking a declaration that application of P. R. Laws Ann., Tit. 24, §§ 2512 (a)(4), (b), and Tit. 34, § 1722, had (1) unconstitutionally denied it due process of law insofar as the statutes authorized appellants, the Superintendent of Police and the Chief of the Office of Transportation of the Commonwealth, to seize the yacht without notice or a prior adversary hearing, and (2) unconstitutionally deprived appellee of its property without just compensation.[5] Injunctive relief was also sought.

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[3] P. R. Laws Ann., Tit. 23, §§ 451 (e), 451b, and 451c, provide that no person shall "operate or give permission for the operation of" a vessel in Commonwealth waters without registering his interest in the vessel. Only the lessees had registered the yacht, and this led the District Court to conclude that "[f]rom the record in this case, we are not disposed to rule that the Commonwealth of Puerto Rico did not have reason to believe that [postseizure] notice to the owner was, in fact, given." 363 F. Supp. 1337, 1342 (PR 1973). Appellee does not contest this ruling.

[4] It is agreed that the yacht was appraised at a value of $19,800, and that the Chief of the Office of Transportation of the Commonwealth purports to maintain possession of the yacht as legal owner.

[5] Unconstitutionality of the statutes was alleged under both the Fifth and Fourteenth Amendments. The District Court deemed it unnecessary to determine which Amendment applied to Puerto Rico,

A three-judge District Court,[6] relying principally upon *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), held that the failure of the statutes to provide for preseizure notice and hearing rendered them constitutionally defective. 363 F. Supp. 1337, 1342–1343 (PR 1973). Viewing *United States* v. *United States Coin & Currency,* 401 U. S. 715 (1971), as having effectively overruled our prior decisions that the property owner's innocence has no constitutional significance for purposes of forfeiture, the District Court further declared that the Puerto Rican statutes, insofar as applied to forfeit appellee's interest in the yacht, unconstitutionally deprived it of property without just compensation. 363 F. Supp., at 1341–1342. Appellants were accordingly enjoined from enforcing the statutes "insofar as they deny the owner or person in charge of property an opportunity for a hearing due to the lack of notice, before the seizure and forfeiture of its property and insofar as a penalty is imposed upon innocent parties." *Id.,* at 1343–1344. We noted probable jurisdiction. 414 U. S. 816 (1973). We reverse.

I

Although the parties consented to the convening of the three-judge court and hence do not challenge our juris-

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see *Fornaris* v. *Ridge Tool Co.,* 400 U. S. 41, 43–44 (1970), and we agree. The Joint Resolution of Congress approving the Constitution of the Commonwealth of Puerto Rico, subjects its government to "the applicable provisions of the Constitution of the United States," 66 Stat. 327, and "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." *Mora* v. *Mejias,* 206 F. 2d 377, 382 (CA1 1953) (Magruder, C. J.). See 48 U. S. C. § 737.

[6] Appellants initially opposed the convening of a three-judge court, arguing that the District Court should abstain. After a hearing, appellants withdrew their opposition and consented to the convening of a three-judge court.

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diction to decide this direct appeal, we nevertheless may not entertain the appeal under 28 U. S. C. § 1253 [7] unless statutes of Puerto Rico are "State statute[s]" for purposes of the Three-Judge Court Act, 28 U. S. C. § 2281.[8] We therefore turn first to that question.

In *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368 (1949), this Court held that enactments of the Territory of Hawaii were not "State statute[s]" for purposes of Judicial Code § 266, the predecessor to 28 U. S. C. § 2281, reasoning:

> "While, of course, great respect is to be paid to the enactments of a territorial legislature by all courts as it is to the adjudications of territorial courts, the predominant reason for the enactment of Judicial Code § 266 does not exist as respects territories. *This reason was a congressional purpose to avoid unnecessary interference with the laws of a sovereign state.* In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state

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[7] That section provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges.*" (Emphasis added.)

[8] That section 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 exceution 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." (Emphasis added.)

> legislative action beyond that required for the laws of a territory. A territory is subject to congressional regulation." 336 U. S., at 377–378 (footnotes omitted) (emphasis added).

Similar reasoning—that the purpose of insulating a sovereign State's laws from interference by a single judge would not be furthered by broadly interpreting the word "State"—led the Court of Appeals for the First Circuit some 55 years ago to hold § 266 inapplicable to the laws of the Territory of Puerto Rico. *Benedicto* v. *West India & Panama Tel. Co.*, 256 F. 417 (1919).

Congress, however, created the Commonwealth of Puerto Rico after *Benedicto* was decided. Following the Spanish-American War, Puerto Rico was ceded to this country in the Treaty of Paris, 30 Stat. 1754 (1898). A brief interlude of military control was followed by congressional enactment of a series of Organic Acts for the government of the island. Initially these enactments established a local governmental structure with high officials appointed by the President. These Acts also retained veto power in the President and Congress over local legislation. By 1950, however, pressures for greater autonomy led to congressional enactment of Pub. L. 600, 64 Stat. 319, which offered the people of Puerto Rico a compact whereby they might establish a government under their own constitution. Puerto Rico accepted the compact, and on July 3, 1952, Congress approved, with minor amendments, a constitution adopted by the Puerto Rican populace, 66 Stat. 327; see note accompanying 48 U. S. C. § 731d. Pursuant to that constitution the Commonwealth now "elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code." Leibowitz, The Applicability of Fed-

eral Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219, 221 (1967); see 28 Dept. of State Bull. 584–589 (1953); *Americana of Puerto Rico, Inc.* v. *Kaplus,* 368 F. 2d 431 (CA3 1966); Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1 (1953).

These significant changes in Puerto Rico's governmental structure formed the backdrop to Judge Magruder's observations in *Mora* v. *Mejias,* 206 F. 2d 377 (CA1 1953):

> "[I]t may be that the Commonwealth of Puerto Rico—'El Estado Libre Asociado de Puerto Rico' in the Spanish version—organized as a body politic by the people of Puerto Rico under their own constitution, pursuant to the terms of the compact offered to them in Pub. L. 600, and by them accepted, is a State within the meaning of 28 U. S. C. § 2281. The preamble to this constitution refers to the Commonwealth . . . which 'in the exercise of our natural rights, we [the people of Puerto Rico] now create within our union with the United States of America.' Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word. Cf. *State of Texas* v. *White,* 1868, 7 Wall. 700, 721. . . . It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.
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> "A serious argument could therefore be made that the Commonwealth of Puerto Rico is a State within the intendment and policy of 28 U. S. C. § 2281. . . . If the constitution of the Commonwealth of Puerto Rico is really a 'constitution'—as the Congress says it is, 66 Stat. 327,—and not just another Organic

> Act approved and enacted by the Congress, then the question is whether the Commonwealth of Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution' of the United States and thus a 'State' within the policy of 28 U. S. C. § 2281, which enactment, in prescribing a three-judge federal district court, expresses 'a deference to state legislative action beyond that required for the laws of a territory' [*Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S., at 378] whose local affairs are subject to congressional regulation." 206 F. 2d, at 387–388 (footnote omitted).

Lower federal courts since 1953 have adopted this analysis and concluded that Puerto Rico is to be deemed "sovereign over matters not ruled by the Constitution" and thus a State within the policy of the Three-Judge Court Act. See *Mora* v. *Mejias,* 115 F. Supp. 610 (PR 1953);[9] *Marin* v. *University of Puerto Rico,* 346 F.

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[9] The court in *Mora* quoted from the statement of the United States to the Secretary General of the United Nations explaining its decision to cease transmission of information concerning Puerto Rico under Art. 73 (e) of the United Nations Charter, which requires the communication of certain technical information by countries responsible for administering territories whose people have not yet attained a full measure of self-government, 115 F. Supp., at 612: " 'By the various actions taken by the Congress and the people of Puerto Rico, Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by Judicial decision. Those laws which directed or authorized interference with matters of local government by the Federal Government have been repealed.' "

28 Dept. of State Bull. 584, 587 (1953). But cf. Note, Puerto Rico; Colony or Commonwealth? 6 N. Y. U. J. Int'l L. & P. 115 (1973).

Supp. 470, 481 (PR 1972); *Suarez* v. *Administrador del Deporte Hipico de Puerto Rico,* 354 F. Supp. 320 (PR 1972). And in *Wackenhut Corp.* v. *Aponte,* 386 U. S. 268 (1967), we summarily affirmed the decision of a three-judge court for the District of Puerto Rico that had ordered abstention and said:

> "[A]pplication of the doctrine of abstention is particularly appropriate in a case . . . involv[ing] the construction and validity of a statute of the Commonwealth of Puerto Rico. For a due regard for the status of that Commonwealth under its compact with the Congress of the United States dictates, we believe, that it should have the primary opportunity through its courts to determine the intended scope of its own legislation and to pass upon the validity of that legislation under its own constitution as well as under the Constitution of the United States." 266 F. Supp. 401, 405 (1966).

Although the question of Puerto Rico's status under 28 U. S. C. § 2281 was raised in neither the Jurisdictional Statement nor the Motion to Affirm in *Wackenhut,* and we do not normally feel ourselves bound by a *sub silentio* exercise of jurisdiction, see *Hagans* v. *Lavine,* 415 U. S. 528, 533–535, n. 5 (1974); *United States* v. *More,* 3 Cranch 159, 172 (1805), this Court has noted that in three-judge court cases, "where . . . the responsibility [is] on the courts to see that the three-judge rule [is] followed," unexplained action may take on added significance. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S., at 379–380. This is particularly so, when as in *Wackenhut,* the opinion supporting the judgment over which we exercised appellate jurisdiction had expressed the view that abstention was appropriate for reasons of comity, an oft-repeated justification for the abstention doctrine, see, *e. g., Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U. S.

496, 500 (1941),[10] as well as the principal underpinning of the Three-Judge Court Act. See *Steffel* v. *Thompson,* 415 U. S. 452, 465–466 (1974).

While still of the view that § 2281 is not "a measure of broad social policy to be construed with great liberality," *Phillips* v. *United States,* 312 U. S. 246, 251 (1941), we believe that the established federal judicial practice of treating enactments of the Commonwealth of Puerto Rico as "State statute[s]" for purposes of the Three-Judge Court Act, serves, and does not expand, the purposes of § 2281. We therefore hold that a three-judge court was properly convened under that statute,[11] and that direct

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[10] See also H. Friendly, Federal Jurisdiction: A General View 93 (1973).

[11] *Fornaris* v. *Ridge Tool Co.,* 400 U. S. 41 (1970), does not militate against this holding. There, we held that a Puerto Rican statute was not a "State statute" within 28 U. S. C. § 1254 (2), which permits appeals from judgments of federal courts of appeals holding *state* statutes unconstitutional. We noted that 28 U. S. C. § 1258, requiring that we permit final judgments of the Supreme Court of the Commonwealth of Puerto Rico to be reviewed by appeal or by certiorari, directly corresponded to the provisions of 28 U. S. C. § 1257 providing for review of final judgments of "state" courts. Since no parallel provision was added to § 1254 (2) to permit appeals from the courts of appeals holding Puerto Rican statutes unconstitutional, we said:

"Whether the omission was by accident or by design, our practice of strict construction of statutes authorizing appeals dictates that we not give an expansive interpretation to the word 'State.'" 400 U. S., at 42 n. 1.

This conclusion seems compelled by the history of the close relationship between 28 U. S. C. § 1254 (2) and 28 U. S. C. § 1257. In the Judiciary Act of 1789, 1 Stat. 73, 85–86, final decisions of state courts sustaining state statutes against challenges under the Federal Constitution were subjected to review by this Court on writ of error. See *King Mfg. Co.* v. *City Council of Augusta,* 277 U. S. 100 (1928). But prior to 1925, there was no appeal from "final" judgments of the federal circuit courts. See 36 Stat. 1157 (1911). When con-

appeal to this Court was proper under 28 U. S. C. § 1253. Accordingly, we now turn to the merits.

II

Appellants challenge the District Court's holding that the appellee was denied due process of law by the omis-

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sideration was being given to amendment of the Judiciary Act in 1924 and 1925

"[a]ttention was drawn to the disparity between the want of obligatory review over [decisions of the circuit courts involving the constitutionality of state statutes] and the existence of obligatory jurisdiction over a similar class of cases in the state courts. Senator Copeland rehearsed before the Senate correspondence he had had on this point with the Chief Justice, who had urged that if it was desirable to put the circuit courts of appeals on the same level with the state courts, it would be better to withdraw review as of right from the state courts and subject the decisions of both the state courts and the circuit courts solely to a discretionary review by the Supreme Court, rather than to allow obligatory review over all constitutional cases from both courts. The Chief Justice, however, justified the proposed discrimination on the ground that a circuit court of appeals in deciding a federal constitutional question 'would be more likely to preserve the Federal view of the issue than the State court, at least to an extent to justify making a review of its decision by our court conditional upon our approval.' However, an amendment prevailed which met this discrimination by allowing writ of error to the circuit courts of appeals in cases sustaining a constitutional claim against a state statute. The argument advanced by the Chief Justice thus became the basis for a new development of the principle which since 1789 had been the basis of Supreme Court review of the highest courts of the states. Due to the belief that the state courts would be more jealous of local rights than of federal claims, review had lain as of right where the constitutional claim was advanced and denied. Now, due to the belief . . . that the federal court would sustain constitutional claims as opposed to the local right, review was provided from the circuit courts of appeals where the constitutional claim was advanced and allowed. Thereby, the Senate 'intended to put the two on a perfect parity, allowing a writ of error from the circuit court of appeals under

sion from § 2512 (b), as it incorporates § 1722, of provisions for preseizure notice and hearing. They argue that seizure for purposes of forfeiture is one of those " 'extraordinary situations' that justify postponing notice and opportunity for a hearing." *Fuentes* v. *Shevin,* 407 U. S., at 90; see *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 339 (1969); *Boddie* v. *Connecticut,* 401 U. S. 371, 378–379 (1971). We agree.[12]

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conditions exactly the same, except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious.' " F. Frankfurter & J. Landis, The Business of the Supreme Court 277–278 (1928) (footnotes omitted).

Thus, against that background, when Congress made § 1258 only a counterpart of § 1257, there could be no basis for an expansive reading of the word "State" in § 1254 (2), in the absence of its congressional amendment.

We have no occasion to address the question whether Puerto Rico is a "State" for purposes of 28 U. S. C. § 1343, a jurisdictional basis of appellee's complaint. Since the complaint and lease agreement, as incorporated, fairly read, leave little doubt that the matter in controversy exceeds $10,000 and arises under the Constitution of the United States, there is jurisdiction under 28 U. S. C. § 1331.

[12] Appellants also argue that the seizure did not result in any injury to appellee that constituted failure of preseizure notice and hearing a denial of due process. This is so, they contend, because the lease gave the lessees exclusive right to possession at the time of the seizure, and therefore appellee's nonpossessory interest was adequately protected by the statutory provisions for a post-seizure hearing. But the lease provides that lessees' failure, *inter alia,* within 15 days after notice from appellee to pay arrears of rent or use the yacht solely for legal purposes would establish a default entitling appellee to possession. Whether a default had in fact occurred between May 6, 1972, when a lessee was first accused of a narcotics violation, and the date of seizure, July 11, 1972, is not clear from the record, although it is clear that appellee did not attempt to repossess the yacht until October 19, 1972.

Since, however, our holding is that preseizure notice and hearing are not required by due process in the context of this forfeiture,

In holding that lack of preseizure notice and hearing denied due process, the District Court relied primarily upon our decision in *Fuentes* v. *Shevin, supra*. *Fuentes* involved the validity of Florida and Pennsylvania replevin statutes permitting creditors to seize goods allegedly wrongfully detained. A writ of replevin could be obtained under the Florida statute upon the creditor's bare assertion to a court clerk that he was entitled to the property, and under the Pennsylvania statute, upon filing an affidavit fixing the value of the property, without alleging legal entitlement to the property. *Fuentes* held that the statutory procedures deprived debtors of their property without due process by failing to provide for hearings " 'at a meaningful time.' " 407 U. S., at 80.

Fuentes reaffirmed, however, that, in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible. Such circumstances are those in which

> "the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Id.*, at 91.

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we have no occasion to remand for a determination (1) whether the company had an immediate, but as yet unexercised, right to possession on the date of seizure or merely a right to collect rents, together with a reversionary interest, and (2) whether either or both of these property interests would be of sufficient significance to require that the company be given an advance opportunity to contest the seizure. Cf. *Fuentes* v. *Shevin*, 407 U. S. 67, 86–87 (1972).

Thus, for example, due process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food, *North American Storage Co.* v. *Chicago,* 211 U. S. 306 (1908); from a bank failure, *Coffin Bros. & Co.* v. *Bennett,* 277 U. S. 29 (1928); or from misbranded drugs, *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950); or to aid the collection of taxes, *Phillips* v. *Commissioner,* 283 U. S. 589 (1931); or the war effort, *United States* v. *Pfitsch,* 256 U. S. 547 (1921).

The considerations that justified postponement of notice and hearing in those cases are present here. First, seizure under the Puerto Rican statutes serves significant governmental purposes: Seizure permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings,[13] thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given. And finally, unlike the situation in *Fuentes,* seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes.[14] In these circumstances, we hold that this case

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[13] Cf. *Ownbey* v. *Morgan,* 256 U. S. 94 (1921), cited with approval in *Fuentes* v. *Shevin, supra,* at 91 n. 23.

[14] *Fuentes* expressly distinguished seizure under a search warrant from seizure under a writ of replevin:

"First, a search warrant is generally issued to serve a highly important governmental need—*e. g.,* the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is

presents an "extraordinary" situation in which postponement of notice and hearing until after seizure did not deny due process.[15]

III

Appellants next argue that the District Court erred in holding that the forfeiture statutes unconstitutionally authorized the taking for government use of innocent parties' property without just compensation. They urge that a long line of prior decisions of this Court establish the principle that statutory forfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocents, and further that *United States* v. *United States Coin & Currency,* 401 U. S. 715 (1971), did not—contrary to the opinion of the District Court—overrule those prior precedents *sub silentio.* We agree. The historical background of forfeiture statutes in this country and this Court's prior decisions sustaining their constitutionality lead to that conclusion.

At common law the value of an inanimate object directly or indirectly causing the accidental death of a

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generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause." 407 U. S., at 93–94, n. 30.

We have no occasion to address the question whether the Fourth Amendment warrant or probable-cause requirements are applicable to seizures under the Puerto Rican statutes.

[15] No challenge is made to the District Court's determination that the form of postseizure notice satisfied due process requirements. See n. 3, *supra.* Notice, of course, was required to be " 'reasonably calculated' to apprise [the company] of the pendency of the forfeiture proceedings." *Robinson* v. *Hanrahan,* 409 U. S. 38, 40 (1972).

King's subject was forfeited to the Crown as a deodand.[16] The origins of the deodand are traceable to Biblical[17] and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required. See O. Holmes, The Common Law, c. 1 (1881). The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses. 1 W. Blackstone, Commentaries *300.[18] When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness.[19]

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[16] Deodand derives from the Latin *Deo dandum,* "to be given to God."

[17] See Exodus 21:28 ("[i]f an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten").

[18] See 1 M. Hale, Pleas of the Crown 419, 423–424 (1st Am. ed. 1847); 2 F. Pollock & F. Maitland, History of English Law 473 (2d ed. 1909); Law of Deodands, 34 Law Mag. 188, 189 (1845); Finkelstein, The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 Temp. L. Q. 169, 182 (1973).

[19] See Hale, n. 18, *supra,* at 424. Indeed, the abolition of the deodand institution in England in 1846, 9 & 10 Vict. c. 62, went hand in hand with the passage of Lord Campbell's Act creating a cause of action for wrongful death, 9 & 10 Vict. c. 93 (1846). Passage of the two bills was linked, because Lord Campbell was unwilling to eliminate the deodand institution, with its tendency to deter carelessness, particularly by railroads, unless a right of action was granted to the dead man's survivors. See 77 Hansard's Parliamentary Debates, Third Series 1031 (1845). See generally Finkelstein, n. 18, *supra,* at 170–171.

The adaptation of the deodand institution to serve the more contemporary function of deterrence is an example of a phenomenon discussed by Mr. Justice Holmes:

"The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or

Forfeiture also resulted at common law from conviction for felonies and treason. The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown. See 3 W. Holdsworth, History of English Law 68–71 (3d ed. 1927); 1 F. Pollock & F. Maitland, History of English Law 351 (2d ed. 1909). The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property. See 1 W. Blackstone, Commentaries *299.[20]

In addition, English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws—likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer. Statutory forfeitures were most often enforced under the *in rem* procedure utilized in the Court of Exchequer to forfeit the property of felons. See 3 W. Blackstone, Commentaries *261–262; *C. J. Hendry Co.* v. *Moore,* 318 U. S. 133, 137–138 (1943).

Deodands did not become part of the common-law tradition of this country. See *Parker-Harris Co.* v. *Tate,* 135 Tenn. 509, 188 S. W. 54 (1916). Nor has forfeiture

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necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received." The Common Law 5 (1881).

[20] In 1870, England eliminated most forfeitures of those convicted of felonies or treason. 33 & 34 Vict. c. 23.

of estates as a consequence of federal criminal conviction been permitted, see 18 U. S. C. § 3563; Rev. Stat. § 5326 (1874); 1 Stat. 117 (1790). Forfeiture of estates resulting from a conviction for treason has been constitutionally proscribed by Art. III, § 3, though forfeitures of estates for the lifetime of a traitor have been sanctioned, see *Wallach* v. *Van Riswick,* 92 U. S. 202 (1876). But "[l]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes," *C. J. Hendry Co.* v. *Moore, supra,* at 139, which provided for the forfeiture of commodities and vessels used in violations of customs and revenue laws. See *id.,* at 145–148; *Boyd* v. *United States,* 116 U. S. 616, 623 (1886). And almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law,[21] as were vessels used to deliver slaves to foreign countries,[22] and somewhat later those used to deliver slaves to this country.[23] The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.

Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense. Thus, Mr. Justice Story observed in *The Palmyra,* 12 Wheat. 1 (1827), that a conviction for piracy was not a prerequi-

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[21] Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47; see also Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, 1 Stat. 157, 161, 163, 176.

[22] Act of Mar. 22, 1794, 1 Stat. 347.

[23] Act of Mar. 2, 1807, 2 Stat. 426.

site to a proceeding to forfeit a ship allegedly engaged in piratical aggression in violation of a federal statute:

> "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. . . . [T]he [Crown's right to the goods and chattels] attached only by the conviction of the offender. . . . But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem,* cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum,* or *malum in se* . . . . [T]he practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam.*" *Id.,* at 14–15.

This rationale was relied upon to sustain the statutory forfeiture of a vessel found to have been engaged in piratical conduct where the innocence of the owner was "fully established." *United States* v. *Brig Malek Adhel,* 2 How. 210, 238 (1844). The vessel was "treated as the offender," without regard to the owner's conduct, "as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *Id.,* at 233.[24]

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[24] Thirty years earlier, the Court upheld a forfeiture of a quantity of coffee which had been transferred to bona fide purchasers after violation of the Non-Intercourse Act of 1809, upon reasoning that "[i]n the eternal struggle that exists between the avarice, enterprize and combinations of individuals on the one hand, and

Dobbins's Distillery v. *United States,* 96 U. S. 395 (1878), is an illustration of how severely this principle has been applied. That case involved a lessee's violations of the revenue laws which led to the seizure of real and personal property used in connection with a distillery. The lessor's assertions of innocence were rejected as a defense to a federal statutory forfeiture of his entire property, for the offense "attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery." *Id.,* at 401; see *United States* v. *Stowell,* 133 U. S. 1, 13–14 (1890).

Decisions reaching the same conclusion have continued into this century. In *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505 (1921), it was held that the federal tax-fraud forfeiture statute did not deprive an innocent owner of his property in violation of the Fifth Amendment. There, the claimant was a conditional vendor of a taxicab that had been used in the removal and concealment of distilled spirits upon which the federal tax was unpaid. Although recognizing that arguments against the application of the statute to cover an innocent owner were not without force, the Court rejected them, saying:

> "In breaches of revenue provisions some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility

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the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measure of policy adopted by the legislature." *United States* v. *1960 Bags of Coffee,* 8 Cranch 398, 405 (1814).

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> of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of *deodand* by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited. To the superstitious reason to which the rule was ascribed, Blackstone adds 'that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture.' . . .
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> "But whether the reason for [the forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *Id.*, at 510–511.

See also *United States* v. *One Ford Coupe Automobile*, 272 U. S. 321 (1926) (Brandeis, J.); *General Motors Acceptance Corp.* v. *United States*, 286 U. S. 49 (1932) (Cardozo, J.). In *Van Oster* v. *Kansas*, 272 U. S. 465 (1926), the Court upheld, against a Fourteenth Amendment attack, a forfeiture under state law of an innocent owner's interest in an automobile that he had entrusted to an alleged wrongdoer. Judicial inquiry into the guilt or innocence of the owner could be dispensed with, the Court held, because state lawmakers, in the exercise of the police power, were free to determine that certain uses of property were undesirable and then establish "a secondary defense against a forbidden use . . . ." *Id.*, at 467.

Plainly, the Puerto Rican forfeiture statutes further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents.[25] Forfeiture of conveyances that have been

[25] But for unimportant differences, P. R. Laws Ann., Tit. 24,

used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. See, *e. g.*, H. R. Rep. No. 1054, 76th Cong., 1st Sess. (1939); S. Rep. No. 926, 76th Cong., 1st Sess. (1939); H. R. Rep. No. 2751, 81st Cong., 2d Sess. (1950); S. Rep. No. 1755, 81st Cong., 2d Sess. (1950).[26] To the extent that

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§ 2512 (a) (Supp. 1973) is modeled after 21 U. S. C. § 881 (a). The latter section provides:

"(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . . . . .

"(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

"(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

"(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State. . . ."

See n. 1, *supra*. The exceptions contained in subparagraphs (A) and (B) of the federal statute, although having no specific counterpart in § 2512 (a)(4), have been judicially recognized by the Supreme Court of Puerto Rico. See *General Motors Acceptance Corp.* v. *Brañuela*, 61 P. R. R. 701 (1943); *Metro Taxicabs, Inc.* v. *Treasurer of Puerto Rico*, 73 P. R. R. 164 (1952); *Commonwealth* v. *Superior Court*, 94 P. R. R. 687 (1967).

[26] Seizure and forfeiture statutes also help compensate the Government for its enforcement efforts and provide methods for obtaining

such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property. Cf. *United States* v. *One Ford Coach,* 307 U. S. 219, 238–241 (1939) (DOUGLAS, J., dissenting).

Against the legitimate governmental interests served by the Puerto Rican statute and the long line of this Court's decisions which squarely collide with appellee's assertion of a constitutional violation, the District Court opposed our decision in *United States* v. *United States Coin & Currency,* 401 U. S. 715 (1971). This reliance was misplaced. In *Coin & Currency,* the Government claimed that the privilege against self-incrimination could not be asserted in a forfeiture proceeding under 26 U. S. C. § 7302 by one in possession of money seized from him when used in an illegal bookmaking operation. In the Government's view, the proceeding was not "criminal" because the forfeiture was authorized without regard to the guilt or innocence of the owner of the money. The Court's answer was that § 7302, read in conjunction with 19 U. S. C. § 1618, manifested a clear intention "to impose a penalty only upon those who [were] significantly involved in a criminal enterprise," 401 U. S., at 721–722, and in that circumstance the privilege could be asserted in the forfeiture proceeding by the person from whom the money was taken. Thus, *Coin & Currency* did not overrule prior decisions that sustained application to innocents of forfeiture statutes, like the Puerto Rican statutes, not limited in application to persons "significantly involved in a criminal enterprise."

This is not to say, however, that the "broad sweep"

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security for subsequently imposed penalties and fines. See, *e. g., One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232, 237 (1972).

of forfeiture statutes remarked in *Coin & Currency* could not, in other circumstances, give rise to serious constitutional questions. Mr. Chief Justice Marshall intimated as much over a century and a half ago in observing that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." *Peisch* v. *Ware,* 4 Cranch 347, 363 (1808). It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. See, *id.,* at 364; *Goldsmith-Grant Co.* v. *United States,* 254 U. S., at 512; *United States* v. *One Ford Coupe Automobile,* 272 U. S., at 333; *Van Oster* v. *Kansas,* 272 U. S., at 467. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; [27] for, in that circumstance, it

[27] The common law sought to mitigate the harshness of felony and deodand forfeitures. The writ of restitution was available to an individual whose goods were stolen by a thief and forfeited to the crown as a consequence of the thief's conviction. See 2 F. Pollock & F. Maitland, *supra,* n. 18, at 165–166; 3 W. Holdsworth, History of English Law 280 and n. 3 (3d ed. 1927). Mitigation with respect to deodands was less formalized:

"It seems also clear from the ancient authorities, that jurors always determined the amount of deodand to be imposed with great moderation, and with a due regard to the rights of property and the moral innocence of the party incurring the penalty. Our ancestors seem fully to have perceived the hardship of inflicting such penalty on one who had been guilty of no moral or indeed legal offence; and in all cases, therefore, where death was purely the result of accident, and not of negligence or carelessness, imposed a nominal fine, or found that only to be the deodand which by its immediate contact occasioned death." Law of Deodands, *supra,* n. 18, at 190.

Since 1790 the Federal Government has applied the ameliorative policy—first adopted in England, see *United States* v. *Morris,*

would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive. Cf. *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

But in this case appellee voluntarily entrusted the lessees with possession of the yacht, and no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use. Cf. *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 596 (1962). The judgment of the District Court is

Reversed.

MR. JUSTICE STEWART joins Parts I and II of the Court's opinion, but, for the reasons stated in the dis-

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10 Wheat. 246, 293–295 (1825)—of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred "without willful negligence" or an intent to commit the offense. See 1 Stat. 122, c. 12 (1790); 1 Stat. 506 (1797); Rev. Stat. §§ 5292–5293 (1874); 19 U. S. C. § 1618; *The Laura*, 114 U. S. 411, 414–415 (1885); *United States* v. *United States Coin & Currency*, 401 U. S. 715, 721 (1971). Indeed, forfeitures incurred under 21 U. S. C. § 881 (a), which served as the model for enactment of the disputed Puerto Rican statute, see n. 25, *supra*, are subject to the remission and mitigation procedures of 19 U. S. C. § 1618. See 21 U. S. C. § 881 (d). Regulations implementing § 1618 provide that, if the seized property was in the possession of another who was responsible for the act which resulted in the seizure, the petitioner must produce evidence explaining the manner in which the other person acquired possession and showing that, prior to parting with the property, he did not know or have reasonable cause to believe that the property would be used in violation of the law or that the violator had a criminal record or a reputation for commercial crime. 19 CFR § 171.13 (a). These provisions are also extended to those individuals holding chattel mortgages or conditional sales contracts. 19 CFR § 171.13 (b). See also 18 U. S. C. § 3617 (b), establishing standards for judicial remission and mitigation of forfeitures resulting from violations of the internal revenue laws relating to liquor.

senting opinion of MR. JUSTICE DOUGLAS, he would hold that the forfeiture of property belonging to an innocent and nonnegligent owner violates the Fifth and Fourteenth Amendments.

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

I join the Court's opinion, and agree that there was no constitutional necessity under *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), or any other case in this Court to accord the owner-lessor of the yacht a hearing in the circumstances of this case. I add, however, that the presence of important public interests which permits dispensing with a preseizure hearing in the instant case, is only one of the situations in which no prior hearing is required. See *Mitchell* v. *W. T. Grant Co., ante,* p. 600; *Arnett* v. *Kennedy, ante,* p. 134 (WHITE, J., concurring).

MR. JUSTICE DOUGLAS, dissenting in part.

While I agree that Puerto Rico is a State for purposes of the three-judge court jurisdiction, I dissent on the merits.

The discovery of marihuana on the yacht took place May 6, 1972. The seizure of the yacht took place on July 11, 1972—over two months later. In view of the long delay in making the seizure where is that "special need for very prompt action" which we emphasized in *Fuentes* v. *Shevin,* 407 U. S. 67, 91? The Court cites instances of exigent circumstances—seized poisoned food, dangerous drugs, failure of a bank, and the like. But they are inapt.

Fuentes v. *Shevin,* involved a contest between debtor and creditor and a resolution of private property rights not implicated in an important governmental purpose. Here important governmental purposes are involved. As

to that type of case we said in *Fuentes:* "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food." *Id.,* at 91–92.

Postponement of notice and hearing until after seizure of the vessel apparently was not needed here, as the District Court held. Yet after that two-month delay, forfeiture of the vessel is ordered without notice to the owner and without just compensation for the taking. On those premises this is the classic case of lack of procedural due process.

The owner on the record before us was wholly innocent of knowing that the lessee was using the vessel illegally. To analogize this case to the old cases of forfeiture of property of felons is peculiarly inappropriate. Nor is this a case where owner and lessee are "in cahoots" in a smuggling venture or negligent in any way. The law does provide for forfeitures of property even of the innocent. But as Mr. Chief Justice Marshall said in *Peisch* v. *Ware,* 4 Cranch 347, 365: "[T]he law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control."

The lessee of the vessel was, of course, no stranger.

Here unlike *United States* v. *One Ford Coach,* 307 U. S. 219, 238–239 (DOUGLAS, J., dissenting), there is no suggestion that the lessee was a mere strawman for runners of drugs. Even where such ambiguous circumstances were present the Court refused to impose forfeiture of an auto running illegal whiskey and belonging to those who acted "in good faith and without negligence." *Id.,* at 236.

The present case is one of extreme hardship. The District Court found that the owner "did not know that its property was being used for an illegal purpose and was completely innocent of the lessee's criminal act. After the seizure and within the time allowed by law, the Superintendent [of the Police] notified lessee. Plaintiff was never notified and, since lessee did not post bond, the yacht was forfeited to the Commonwealth of Puerto Rico. It was not until plaintiff attempted to recover possession of the yacht after lessee had defaulted in the rental payments that plaintiff learned of its forfeiture." 363 F. Supp. 1337, 1340. Moreover, the owner had included in the lease a prohibition against use of the yacht for an unlawful project.

If the yacht had been notoriously used in smuggling drugs, those who claim forfeiture might have equity on their side. But no such showing was made; and so far as we know only one marihuana cigarette was found on the yacht. We deal here with trivia where harsh judge-made law should be tempered with justice. I realize that the ancient law is founded on the fiction that the inanimate object itself is guilty of wrongdoing. *United States* v. *United States Coin & Currency,* 401 U. S. 715, 719–720. But that traditional forfeiture doctrine cannot at times be reconciled with the requirements of the Fifth Amendment. *Id.,* at 721. Such a case is the present one.

Some forfeiture statutes are mandatory, title vesting in the State when the forfeiting act occurs. *United States* v. *Stowell,* 133 U. S. 1, 19. Others are conditional, forfeiture occurring only if and when the State follows prescribed procedures. *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 699. Some forfeiture statutes exclude from their scope, property used in violation of the law as to which the owner is not "a consenting party or privy." See 19 U. S. C. § 1594. Some provide for discretionary administrative or judicial relief from forfeiture if the forfeiture was incurred without willful negligence or without any intention on the part of the owner to violate the law, 19 U. S. C. § 1618, or if the owner had at no time any knowledge or reason to believe that the property was used in violation of specified laws, 18 U. S. C. § 3617 (b); *United States* v. *One Ford Coach,* 307 U. S. 219.

Puerto Rico, however, has no provision for mitigation in case the owner of the seized property is wholly innocent of any wrongdoing. And, as the Court says, these absolute, mandatory forfeiture procedures have been supported at least by much dicta in the cases.

But in my view, there was a taking of private property "for public use" under the Fifth Amendment, applied to the States by the Fourteenth, and compensation must be paid an innocent owner. Where the owner is in no way implicated in the illegal project, I see no way to avoid paying just compensation for property taken. I, therefore, would remand the case to the three-judge court for findings as to the innocence of the lessor of the yacht—whether the illegal use was of such magnitude or notoriety that the owner cannot be found faultless in remaining ignorant of its occurrence.

The law of deodands* was at one time as severe as the rule applied this day by the Court. See Law of Deodands, 34 Law Mag. 188–191 (1845). Its severity was tempered by juries who were sustained by the King's Bench, *id.*, at 191. The "great moderation" of the jurors in light of "the moral innocence of the party incurring the penalty," *id.*, at 190, is an example we should follow here. While the law of deodands does not obtain here (cf. *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505, 510–511; *United States* v. *One Ford Coupe,* 272 U. S. 321, 333), the quality of mercy is no stranger to our equity jurisdiction, *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329–330; *United States* v. *Wiltberger,* 5 Wheat. 76, 95.

*The law of deodands starting with Exodus 21:28 is related by O. Holmes, The Common Law 7 *et seq.* (1881). Deodand derives from *Deo dandum* (to be given to God). "It was to be given to God, that is to say to the church, for the king, to be expended for the good of his soul." *Id.*, at 24.

BRADLEY ET AL. *v.* SCHOOL BOARD OF THE CITY OF RICHMOND ET AL.

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

No. 72–1322. Argued December 5, 1973—Decided May 15, 1974

The District Court on May 26, 1971, awarded to the successful plaintiff-petitioners, Negro parents and guardians, in this protracted litigation involving the desegregation of the Richmond, Virginia, public schools, expenses and attorneys' fees for services rendered from March 10, 1970, to January 29, 1971. On March 10, 1970, petitioners had moved in the District Court for additional relief under *Green* v. *County School Board of New Kent County,* 391 U. S. 430, in which this Court held that a freedom-of-choice plan (like the one previously approved for the Richmond schools) was not acceptable where methods promising speedier and more effective conversion to a unitary school system were reasonably available. Respondent School Board then conceded that the plan under which it had been operating was not constitutional. After considering a series of alternative and interim plans, the District Court on April 5, 1971, approved the Board's third proposed plan, and the order allowing fees followed shortly thereafter. Noting the absence of any explicit statutory authorization for such an award in this type of case, the court predicated its ruling on the grounds (1) that actions taken and defenses made by the School Board during the relevant period resulted in an unreasonable delay in desegregation of the schools, causing petitioners to incur substantial expenditures to secure their constitutional rights, and (2) that plaintiffs in actions of this kind were acting as "private attorneys general," *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U. S. 400, 402, in leading the School Board into compliance with the law, thus effectuating the constitutional guarantees of nondiscrimination. The Court of Appeals reversed, stressing that "if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." Following initial submission of the case to the Court of Appeals but before its decision, Congress enacted § 718 of the Education Amendments of 1972, which granted a federal court authority to award the prevailing party a

reasonable attorney's fee when appropriate upon entry of a final order in a school desegregation case, the applicability of which to this and other litigation the court then considered. In the other cases, the court held that § 718 did not apply to services rendered prior to July 1, 1972, the effective date of § 718, and in this case reasoned that there were no orders pending or appealable on either May 26, 1971, when the District Court made its fee award, or on July 1, 1972, and that therefore § 718 could not be used to sustain the award. *Held:* Section 718 can be applied to attorneys' services that were rendered before that provision was enacted, in a situation like the one here involved where the propriety of the fee award was pending resolution on appeal when the statute became law. Pp. 710–724.

(a) An appellate court must apply the law in effect at the time it renders its decision, *Thorpe* v. *Housing Authority of the City of Durham,* 393 U. S. 268, 281, unless such application would work a manifest injustice or there is statutory direction or legislative history to the contrary. Pp. 711–716.

(b) Such injustice could result "in mere private cases between individuals," *United States* v. *Schooner Peggy,* 1 Cranch 103, 110, the determinative factors being the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in law upon those rights. Upon consideration of those aspects here (see *infra,* (c)–(e)), it cannot be said that the application of the statute would cause injustice. Pp. 716–721.

(c) There was a disparity in the respective abilities of the parties to protect themselves, and the litigation did not involve merely private interests. Petitioners rendered substantial service to the community and to the Board itself by bringing it into compliance with its constitutional mandate and thus acting as a "private attorney general" in vindicating public policy. Pp. 718–719.

(d) Application of § 718 does not affect any matured or unconditional rights, the School Board having no unconditional right to the funds allocated to it by the taxpayers. P. 720.

(e) No increased burden was imposed since the statute did not alter the Board's constitutional responsibility for providing pupils with a nondiscriminatory education, and there is no change in the substantive obligation of the parties. Pp. 720–721.

(f) The Court of Appeals erred in concluding that § 718 was inapplicable to the petitioners' request for fees because there was no final order pending unresolved on appeal, since the language of § 718 is not to be read to mean that a fee award must be made

simultaneously with the entry of a desegregation order, and a district court must have discretion in a school desegregation case to award fees and costs incident to the final disposition of interim matters. Pp. 721–723.

(g) Since the District Court made an allowance for services to January 29, 1971, when petitioners were not yet the "prevailing party" within the meaning of § 718, the fee award should be recomputed to April 5, 1971, or thereafter. Pp. 723–724.

472 F. 2d 318, vacated and remanded.

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

William T. Coleman, Jr., argued the cause for petitioners. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Norman J. Chachkin, Charles Stephen Ralston, Eric Schnapper,* and *Louis R. Lucas.*

George B. Little argued the cause for respondents. With him on the brief were *James K. Cluverius* and *Conard B. Mattox, Jr.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this protracted school desegregation litigation, the District Court awarded the plaintiff-petitioners expenses and attorneys' fees for services rendered from March 10, 1970, to January 29, 1971. 53 F. R. D. 28 (ED Va. 1971). The United States Court of Appeals for the Fourth Circuit, one judge dissenting, reversed. 472 F. 2d 318 (1972). We granted certiorari, 412 U. S. 937 (1973), to determine whether the allowance of attorneys' fees

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Bork, Assistant Attorney General Pottinger, Deputy Solicitor General Wallace,* and *Gerald P. Norton* for the United States, and by *David S. Tatel* and *Armand Derfner* for the Lawyers' Committee for Civil Rights Under Law.

was proper. Pertinent to the resolution of the issue is the enactment in 1972 of § 718 of Title VII, the Emergency School Aid Act, 20 U. S. C. § 1617 (1970 ed., Supp. II), as part of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 235, 369.

I

The suit was instituted in 1961 by 11 Negro parents and guardians against the School Board of the city of Richmond, Virginia, as a class action under the Civil Rights Act of 1871, 42 U. S. C. § 1983, to desegregate the public schools. On March 16, 1964, after extended consideration,[1] the District Court approved a "freedom of choice" plan by which every pupil was permitted to attend the school of the pupil's or the parents' choice, limited only by a time requirement for the transfer application and by lack of capacity at the school to which transfer was sought. On appeal, the Fourth Circuit, sit-

[1] See 317 F. 2d 429 (CA4 1963). Before trial, one pupil-plaintiff was admitted to the school of his choice, and the court ordered admission of the remaining 10. The District Court found that, in general, during the 1961–1962 school year, pupil assignments in Richmond were being made on the basis of dual attendance zones; that promotions were controlled by a "feeder" system whereby pupils initially assigned to Negro schools were promoted routinely only to Negro schools; and that, in the handling of some transfer requests from Negro pupils, the students were required to meet criteria to which white students of the same scholastic aptitude were not subject. The court declined, however, to grant general injunctive relief and ordered only the admission of the 10 pupils.

The Court of Appeals reversed in part. It held that not only were the individual minor plaintiffs entitled to relief, but that they were entitled to an injunction, on behalf of others of the class they represented and who were similarly situated, against the continuation of the discriminatory system and practices that were found to exist. *Id.*, at 438.

ting en banc, affirmed, with two judges dissenting in part, and held that the plan satisfied the Board's constitutional obligations. 345 F. 2d 310 (1965). The court saw no error in the trial court's refusal to allow the plaintiffs' attorneys more than a nominal fee ($75). *Id.*, at 321. The dissenters referred to the fee as "egregiously inadequate." *Id.*, at 324. On petition for a writ of certiorari, this Court, *per curiam*, 382 U. S. 103 (1965), summarily held that the petitioners improperly had been denied a full evidentiary hearing on their claim that a racially based faculty allocation system rendered the plan constitutionally inadequate under *Brown* v. *Board of Education*, 347 U. S. 483 (1954). In vacating the judgment of the Court of Appeals and in remanding the case, we expressly declined to pass on the merits of the desegregation plan and noted that further judicial review following the hearing was not precluded. 382 U. S., at 105.

After the required hearing, the District Court, on March 30, 1966, approved a revised "freedom of choice" plan [2] submitted by the Board and agreed to by the peti-

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[2] Under the approved plan, the Board undertook steps "to eliminate a dual school system in the assignment of pupils" and to assure that opportunities were provided "for white children and Negro children to associate on equal terms in the public schools." App. 21a–22a. Generally, the plan permitted any child to attend any school in the city at his proper grade. The specific steps to be taken included (a) action to correct inequality in enrollment in relationship to capacity where schools in close proximity to each other had significant enrollment differences, (b) efforts to acquaint pupils in all schools with opportunities in other schools, and (c) the planning and creation of citywide centers, including workshops, institutes, and seminars, serving pupils from all areas of the city. *Id.*, at 22a–23a. In addition, the Board undertook to insure that the "pattern of assignment of teachers and other professional staff among the various schools of the system will not be such that schools are identifiable as intended for students of a particular race, color

tioners. App. 17a. It provided that if the steps taken by the Board "do not produce significant results during the 1966–67 school year, it is recognized that the freedom of choice plan will have to be modified." *Id.*, at 23a. This plan was in operation about four years. While it was in effect, *Green* v. *County School Board of New Kent County*, 391 U. S. 430 (1968), was decided. The Court there held that where methods promising speedier and more effective conversion to a unitary system were reasonably available, a freedom-of-choice plan was not acceptable. *Id.*, at 439–441.

Thereafter, on March 10, 1970, petitioners filed with the District Court a motion for further relief in the light of the opinions of this Court in *Green, supra,* in *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969), and in *Carter* v. *West Feliciana Parish School Board,* 396 U. S. 290 (1970). Specifically, petitioners asked that the court "require the defendant school board forthwith to put into effect" a plan that would "promptly and realistically convert the public schools of the City of Richmond into a unitary non-racial system," and that the court "award a reasonable fee to [petitioners'] counsel." App. 25a. The court then ordered the Board to advise the court whether the public schools were being operated "in accordance with the constitutional requirements . . . enunciated by the United States Supreme Court." *Id.*, at 27a. The Board, by a statement promptly filed with the District Court, averred that it had operated the school system to the best of its knowledge and belief in accordance with the decree

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or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority, of the students are of that race." *Id.*, at 20a. Finally, the Board undertook to insure that the program for construction of new schools or additions to existing schools would "not be designed to perpetuate, maintain, or support racial segregation." *Id.*, at 23a.

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of March 30, 1966, but that it has "been advised" that the city schools were "not being operated as unitary schools in accordance with the most recent enunciations of the Supreme Court." *Id.*, at 28a. It was also asserted that the Board had requested the Department of Health, Education, and Welfare to make a study and recommendation; that the Department had agreed to undertake to do this by May 1; and that the Board would submit a plan for the operation of the public school system not later than May 11. *Ibid.* Following a hearing, however, the District Court, on April 1, 1970, entered a formal order vacating its order of March 30, 1966, and enjoining the defendants "to disestablish the existing dual system" and to replace it "with a unitary system." See 317 F. Supp. 555, 558 (ED Va. 1970). Thereafter, the Board and several intervenors filed desegregation plans.

The initial plan offered by the Board and HEW was held unacceptable by the District Court on June 26, 1970. *Id.*, at 572. The court was concerned (a) with the fact that the Board had taken no voluntary action to change its freedom-of-choice plan after this Court's decision in *Green* two years before, *id.*, at 560, (b) with the plan's failure to consider patterns of residential segregation in fixing school zone lines or to use transportation as a desegregation tool, despite the decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 431 F. 2d 138 (CA4 1970), aff'd as modified, 402 U. S. 1 (1971), and (c) with its failure to consider racial factors in zoning, despite the approval thereof in *Warner* v. *County School Board of Arlington County,* 357 F. 2d 452 (CA4 1966). 317 F. Supp., at 577–578. The District Court also rejected desegregation plans offered by intervenors and by the petitioners.[3]

[3] The court rejected the petitioners' plan for utilizing contiguous zoning and pairing, satellite zoning, and noncontiguous pairing,

A second plan submitted by the Board was also deemed to be unsatisfactory in certain respects. Nonetheless, on August 17 the court found its adoption on an interim basis for 1970–1971 to be necessary, since the school year was to begin in two weeks.[4] *Id.*, at 578. The court directed the defendants to file within 90 days a report setting out the steps taken "to create a unitary system . . . and . . . the earliest practical and reasonable date that any such system could be put into effect." *Ibid.*

The Board then submitted three other desegregation plans. Hearings were held on these and on still another plan submitted by the petitioners.[5] On April 5, 1971,

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together with the use of school and public transportation, because it felt that the lack of immediately available transportation facilities would preclude the plan's operation for the opening of the 1970–1971 school year. It noted that it otherwise found the plan to be reasonable and, if adopted, that it would result in a unitary system. 317 F. Supp. 555, 572 and 576 (ED Va. 1970). The court suggested that Richmond could not be desegregated without employment of techniques suggested by the petitioners and observed, "It would seem to the Court highly reasonable to require that the defendant school board take reasonably immediate steps toward this end." *Id.*, at 575.

[4] The interim plan included contiguous and satellite zoning, pairing, and some public transportation, principally of those pupils who were indigent. The problems that continued to concern the court were, most importantly, the fact that under the plan a large number of the district's elementary students would continue to attend schools that would be 90% or more Negro, while at the same time four elementary schools would remain all white; in addition, two high schools and certain secondary schools would continue to be racially identifiable. *Id.*, at 572–576.

[5] Under Plan I only proximal geographic zoning was to be used in making pupil assignments. This meant simply that a pupil would be assigned to the school nearest his home without regard to the resulting racial composition of that school. Although recognizing the desirability of neighborhood schools, the court rejected this plan

the court adopted the Board's third plan, which involved pupil reassignments and extensive transportation within the city. 325 F. Supp. 828 (ED Va. 1971).[6]

Meanwhile, the Board had moved for leave to make the school boards and governing bodies of adjoining Chester-

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in view of the existence of Richmond housing patterns previously determined to have been fostered by governmental action. At the elementary and middle levels, this would have resulted in over half the students being assigned to schools that were racially identifiable; at the high school level almost 39% of the district's white pupils would have been isolated in one 97% white school. 325 F. Supp. 828, 833 (ED Va. 1971).

Plan II, which the Board most actively supported, was held unacceptable in that it embraced a continuation of the 1970–1971 interim plan and did little to integrate the elementary schools. The plan involved the use of zoning, as did Plan I, and contiguous pairing whereby schools in adjoining zones would have been consolidated. *Id.*, at 834.

Plan III, which the court ordered into effect, called for extensive busing of students, proximal geographic zoning, clusters, satellites, and faculty racial balance. In addition, the elementary, middle and high schools were to have a minority-majority student ratio under which each group's projected enrollment in a particular school was to be at least half of the group's projected citywide ratio. *Id.*, at 834–844.

The court also rejected the petitioners' plan, finding that Plan III resulted in "a narrower spread" of minority-majority student ratios in the various schools. *Id.*, at 844–846.

[6] Meanwhile, the District Court (a) on January 8, 1971, denied a motion made by some of the defendants that the judge disqualify himself because of personal bias, 324 F. Supp. 439 (ED Va. 1971); (b) on January 29 denied the petitioners' motion to order implementation of their proposed plan and also the Board's motion to modify the existing injunction restraining it from undertaking any new construction planning, 324 F. Supp. 456 (ED Va. 1971); and (c) on February 10 denied a motion for summary judgment as to certain defendants with respect to costs, fees, and damages, 324 F. Supp. 401 (ED Va. 1971). See also 315 F. Supp. 325 (ED Va. 1970); 51 F. R. D. 139 (ED Va. 1970).

field and Henrico Counties, as well as the Virginia State Board of Education, parties to the litigation, and to serve upon these entities a third-party complaint to compel them to take all necessary action to bring about the consolidation of the systems and the merger of the boards. The court denied the defense motion for the convening of a three-judge court. 324 F. Supp. 396 (ED Va. 1971).

On January 10, 1972, the court ordered into effect a plan for the integration of the Richmond schools with those of Henrico and Chesterfield Counties. 338 F. Supp. 67 (ED Va. 1972). On appeal, the Fourth Circuit, sitting en banc, reversed, with one judge dissenting, holding that state-imposed segregation had been "completely removed" in the Richmond school district and that the consolidation was not justified in the absence of a showing of some constitutional violation in the establishment and maintenance of these adjoining and separate school districts. 462 F. 2d 1058, 1069 (1972). We granted cross-petitions for writs of certiorari. 409 U. S. 1124 (1973). After argument, the Court of Appeals' judgment was affirmed by an equally divided Court. *Richmond School Board* v. *Board of Education,* 412 U. S. 92 (1973).

II

The petitioners' request for a significant award of attorneys' fees was included, as has been noted, in their pivotal motion of March 10, 1970. App. 25a. That application was renewed on July 2. *Id.,* at 66a. The District Court first suggested, by letter to the parties, that they attempt to reach agreement as to fees. When agreement was not reached, the court called for supporting material and briefs.[7] In due course the court awarded counsel fees in the amount of $43,355 for services ren-

[7] Petitioners initially suggested $46,820 in fees and $13,327.56 in expenses, a total of $60,147.56. App. 94a–95a.

dered from March 10, 1970, to January 29, 1971, and expenses of $13,064.65. 53 F. R. D. 28, 43–44 (ED Va. 1971).

Noting the absence at that time of any explicit statutory authorization for an award of fees in school desegregation actions, *id.*, at 34, the court based the award on two alternative grounds rooted in its general equity power.[8] First, the court observed that prior desegregation decisions demonstrated the propriety of awarding counsel fees when the evidence revealed obstinate noncompliance with the law or the use of the judicial process for purposes of harassment or delay in affording rights clearly owed.[9] Applying the test enunciated by the Fourth Cir-

[8] The court discussed, 53 F. R. D. 28, 34–36 (ED Va. 1971), but did not rely on, the "common fund" theory under which an individual litigant's success confers a substantial benefit on an ascertainable class and the exercise of the court's equitable discretion to allow a fee results in spreading the cost the litigant has incurred among those who have benefited by his efforts. See *Trustees* v. *Greenough*, 105 U. S. 527 (1882); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939).

The court felt, however, that there were other grounds on which an award of counsel fees could be based. It referred to *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), where this Court, recognizing the rule that attorneys' fees are not ordinarily recoverable as costs, nonetheless noted that exceptions to this rule existed "for situations in which overriding considerations indicate the need for such a recovery." *Id.*, at 391–392. There the Court approved an award of fees to successful shareholder plaintiffs in a suit to set aside a corporate merger accomplished through the use of a misleading proxy statement, in violation of § 14 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n (a). It was said: "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale." 396 U. S., at 392. See also *Hall* v. *Cole*, 412 U. S. 1 (1973).

[9] See *Brewer* v. *School Board of the City of Norfolk*, 456 F. 2d 943, 951–952 (CA4), cert. denied, 406 U. S. 933 (1972); *Nesbit* v. *Statesville City Board of Education*, 418 F. 2d 1040, 1043

cuit in 345 F. 2d, at 321, the court sought to determine whether "the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy." Examining the history of the litigation, the court found that at least since 1968 the Board clearly had been in default in its constitutional duty as enunciated in *Green*. While reluctant to characterize the litigation engendered by that default as unnecessary in view of the ongoing development of relevant legal standards, the court observed that the actions taken and the defenses asserted by the Board had caused an unreasonable delay in the desegregation of the schools and, as a result, had caused the plaintiffs to incur substantial expenditures of time and money to secure their constitutional rights.[10]

(CA4 1969); *Williams* v. *Kimbrough*, 415 F. 2d 874, 875 (CA5 1969), cert. denied, 396 U. S. 1061 (1970); *Rolfe* v. *County Board of Education of Lincoln County*, 391 F. 2d 77, 81 (CA6 1968); *Clark* v. *Board of Education of Little Rock School District*, 369 F. 2d 661, 670–671 (CA8 1966); *Griffin* v. *County School Board of Prince Edward County*, 363 F. 2d 206 (CA4), cert. denied, 385 U. S. 960 (1966); *Bell* v. *School Board of Powhatan County*, 321 F. 2d 494, 500 (CA4 1963).

[10] The District Court stated:

"At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order.

. . . . . .

"It is no argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense." 53 F. R. D., at 39.

As an alternative basis for the award, the District Court observed that the circumstances that persuaded Congress to authorize by statute the payment of counsel fees under certain sections of the Civil Rights Act of 1964 [11] were present in even greater degree in school desegregation litigation. In 1970–1971, cases of this kind were characterized by complex issues pressed on behalf of large classes and thus involved substantial expenditures of lawyers' time with little likelihood of compensation or award of monetary damages. If forced to bear the burden of attorneys' fees, few aggrieved persons would be in a position to secure their and the public's interests in a nondiscriminatory public school system. Reasoning from this Court's *per curiam* decision in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968), the District Judge held that plaintiffs in actions of this kind were acting as private attorneys general in leading school boards into compliance with the law, thereby effectuating the constitutional guarantee of nondiscrimination and rendering appropriate the award of counsel fees. 53 F. R. D., at 41–42.

The Court of Appeals, in reversing, emphasized that the Board was not operating "in an area where the practical methods to be used were plainly illuminated or where prior decisions had not left a 'lingering doubt' as to the proper procedure to be followed," particularly in the light of uncertainties existing prior to this Court's then impending decision in *Swann* v. *Charlotte-Mecklenburg*

[11] Title 42 U. S. C. § 2000a–3 (b) authorizes an allowance of a reasonable attorney's fee to a prevailing party, other than the United States, in an action under the public accommodation subchapter of the Civil Rights Act of 1964. Similarly, 42 U. S. C. § 2000e–5 (k) authorizes an allowance of a reasonable attorney's fee to a prevailing party, other than the Equal Employment Opportunity Commission or the United States, in an action under the equal employment opportunity subchapter of that Act.

Board of Education, 402 U. S. 1 (1971). 472 F. 2d, at 327. It felt that by the failure of Congress to provide specifically for counsel fees "in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully," and that "if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." *Id.,* at 330–331.

After initial submission of the case to the Court of Appeals, but prior to its decision, the Education Amendments of 1972, of which § 718 of Title VII of the Emergency School Aid Act is a part, became law. Section 718, 20 U. S. C. § 1617 (1970 ed., Supp. II), grants authority to a federal court to award a reasonable attorney's fee when appropriate in a school desegregation case.[12] The Court of Appeals, sitting en banc, then heard argument as to the applicability of § 718 to this and other litigation.[13] In the other cases it held that only legal services rendered after July 1, 1972, the effective date of § 718, see Pub. L. 92–318, § 2 (c)(1), 86 Stat. 236, were compensable under that statute. *Thompson* v. *School Board*

[12] "§ 1617. Attorney fees.

"Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[13] The fee issue had been argued in the Court of Appeals on March 7, 1972. The Education Amendments of 1972 were approved by the President on June 23. The argument before the en banc court took place on October 2.

of the City of Newport News, 472 F. 2d 177 (CA4 1972). In the instant case the court held that, because there were no orders pending or appealable on either May 26, 1971, when the District Court made its fee award, or on July 1, 1972, when the statute became effective, § 718 did not sustain the allowance of counsel fees.

III

In *Northcross* v. *Board of Education of the Memphis City Schools,* 412 U. S. 427, 428 (1973), we held that under § 718 "the successful plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " We decide today a question left open in *Northcross,* namely, "whether § 718 authorizes an award of attorneys' fees insofar as those expenses were incurred prior to the date that that section came into effect." *Id.,* at 429 n. 2.

The District Court in this case awarded counsel fees for services rendered from March 10, 1970, when petitioners filed their motion for further relief, to January 29, 1971, when the court declined to implement the plan proposed by the petitioners. It made its award on May 26, 1971, after it had ordered into effect the non-interim desegregation plan which it had approved. The Board appealed from that award, and its appeal was pending when Congress enacted § 718. The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of § 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law.

This Court in the past has recognized a distinction between the application of a change in the law that takes place while a case is on direct review, on the one hand,

and its effect on a final judgment [14] under collateral attack,[15] on the other hand. *Linkletter* v. *Walker,* 381 U. S. 618, 627 (1965). We are concerned here only with direct review.

A

We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

The origin and the justification for this rule are found in the words of Mr. Chief Justice Marshall in *United States* v. *Schooner Peggy,* 1 Cranch 103 (1801):

> "It is in the general true that the province of an appellate court is only to enquire whether a judg-

[14] By final judgment we mean one where "the availability of appeal" has been exhausted or has lapsed, and the time to petition for certiorari has passed. *Linkletter* v. *Walker,* 381 U. S. 618, 622 n. 5 (1965).

[15] In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 374 (1940), the Court noted that the effect of a subsequent ruling of invalidity on a prior final judgment under collateral attack is subject to no fixed "principle of absolute retroactive invalidity" but depends upon consideration of "particular relations . . . and particular conduct." Questions "of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." *Ibid.* And in *Linkletter* it was observed: "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U. S., at 629.

See Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907 (1962); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201 (1965).

> ment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id.*, at 110.[16]

In the wake of *Schooner Peggy*, however, it remained unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, as was true of the convention under consideration in *Schooner Peggy*, or, conversely, whether such a change

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[16] *Schooner Peggy* concerned a condemnation following the seizure of a French vessel by an American ship. The trial court found that the vessel was within French territorial waters at the time of seizure and, hence, was not a lawful prize. On appeal, the Circuit Court reversed, holding that the vessel in fact was on the high seas. A decree was entered accordingly. While the case was pending on appeal to this Court, a convention with France was entered into providing in part: "Property captured, and not yet *definitively* condemned, or which may be captured before the exchange of ratifications . . . shall be mutually restored." 1 Cranch, at 107. This Court reversed, holding that it must apply the terms of the convention despite the propriety of the Circuit Court's decision when it was rendered, and that the vessel was to be restored since, by virtue of the pending appeal, it had not been "*definitively* condemned," *id.*, at 108.

in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases. For a very long time the Court's decisions did little to clarify this issue.[17]

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[17] In *United States* v. *Chambers,* 291 U. S. 217 (1934), the Court held that pending prosecutions, including those on appeal, brought pursuant to the National Prohibition Act were to be dismissed in view of the interim ratification of the Twenty-first Amendment, absent inclusion of a saving clause. In *Carpenter* v. *Wabash R. Co.,* 309 U. S. 23 (1940), the Court, in reliance on *Schooner Peggy,* held that an amendment to the Bankruptcy Act, effected while the case was pending on petition for writ of certiorari, was to be given effect. The amendment, however, provided explicitly that it was applicable to railroad receiverships then pending in any United States court. In *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538 (1941), again in reliance on *Schooner Peggy,* it was held that a federal appellate court, in diversity jurisdiction, must follow a state supreme court decision changing the applicable state law subsequent to the decision in the federal trial court. In *Ziffrin, Inc.* v. *United States,* 318 U. S. 73 (1943), the Court held that an amendment to the Interstate Commerce Act, made after the hearing upon an application for a permit to continue contract carrier operations, was to be given effect. "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law." *Id.,* at 78. In *United States* v. *Alabama,* 362 U. S. 602 (1960), the District Court had dismissed an action under the Civil Rights Act of 1957, 42 U. S. C. § 1971 (c), brought by the United States against the State of Alabama and others, and did so with respect to Alabama on the ground that the Act did not authorize the action against the State. While the case was pending after a grant of certiorari, the Civil Rights Act of 1960, 74 Stat. 86, was passed, expressly authorizing an action of that kind against a State. The Court applied the new statute without discussion of the legislative history and remanded the case with instructions to reinstate the action.

See also *Freeborn* v. *Smith,* 2 Wall. 160 (1865); *Moores* v. *National Bank,* 104 U. S. 625 (1882), where a state statute of limitations was construed by the State Supreme Court in a way contrary to the construction given theretofore by the lower federal court, and this Court followed the later construction; *Stephens* v.

Ultimately, in *Thorpe* v. *Housing Authority of the City of Durham,* 393 U. S. 268 (1969), the broader reading of *Schooner Peggy* was adopted, and this Court ruled that "an appellate court must apply the law in effect at the time it renders its decision." *Id.,* at 281. In that case, after the plaintiff Housing Authority had secured a state court eviction order, and it had been affirmed by the Supreme Court of North Carolina, *Housing Authority of the City of Durham* v. *Thorpe,* 267 N. C. 431, 148 S. E. 2d 290 (1966), and this Court had granted certiorari, 385 U. S. 967 (1966), the Department of Housing and Urban Development ordered a new procedural prerequisite for an eviction. Following remand by this Court for such further proceedings as might be appropriate in the light of the new directive, 386 U. S. 670 (1967), the state court adhered to its decision. 271 N. C. 468, 157 S. E. 2d 147 (1967).[18] This Court again granted certiorari. 390 U. S. 942 (1968). Upon review, we held that, although the circular effecting the change did not indicate whether it

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Cherokee Nation, 174 U. S. 445 (1899), where the Court upheld a federal statute, containing retrospectivity language and conferring jurisdiction upon this Court over cases on review of actions of the Dawes Commission, enacted after rulings below that decrees of the courts in the Indian territories were final; *Dinsmore* v. *Southern Express Co.,* 183 U. S. 115 (1901), where the Court, relying upon *Schooner Peggy,* applied a statute, enacted while the case was pending on certiorari, to affirm the judgment of the lower court; *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9 (1918); *Dorchy* v. *Kansas,* 264 U. S. 286, 289 (1924); *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n,* 273 U. S. 126 (1927); *Sioux County* v. *National Surety Co.,* 276 U. S. 238, 240 (1928); *Patterson* v. *Alabama,* 294 U. S. 600, 607 (1935).

[18] The Supreme Court of North Carolina held that since all "critical events" had occurred prior to the date of the circular, "[t]he rights of the parties had matured and had been determined before the directive was issued." 271 N. C., at 470, 157 S. E. 2d, at 149

was to be applied to pending cases or to events that had transpired prior to its issuance,[19] it was, nonetheless, to be applied to anyone residing in the housing project on the date of its promulgation. The Court recited the language in *Schooner Peggy,* quoted above, and noted that that reasoning "has been applied where the change was constitutional, statutory, or judicial," 393 U. S., at 282 (footnotes omitted), and that it must apply "with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." *Ibid. Thorpe* thus stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.

Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature.[20] While neither our decision in *Thorpe* nor our decision today purports to hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary,[21] we

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[19] In our first *Thorpe* opinion, however, we did note: "While the directive provides that certain records shall be kept commencing with the date of its issuance, there is no suggestion that the basic procedure it prescribes is not to be followed in all eviction proceedings that have not become final." *Thorpe* v. *Housing Authority of the City of Durham,* 386 U. S. 670, 673 (1967).

[20] The Fourth Circuit has declined to apply § 718 to services rendered prior to its enactment on the ground that "legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute applied in that manner." *Thompson* v. *School Board of the City of Newport News,* 472 F. 2d 177, 178 (1972). The Fifth Circuit has done the same. *Johnson* v. *Combs,* 471 F. 2d 84, 86 (1972); *Henry* v. *Clarksdale Municipal Separate School Dist.,* 480 F. 2d 583, 585 (1973).

[21] Where Congress has expressly provided, or the legislative history had indicated, that legislation was to be given only prospective

do note that insofar as the legislative history of § 718 is supportive of either position,[22] it would seem to provide at least implicit support for the application of the statute to pending cases.[23]

B

The Court in *Thorpe,* however, observed that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision "had been made to prevent manifest injustice," citing *Greene* v. *United*

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effect, the courts, in the absence of any attendant constitutional problem, generally have followed that lead. See, for example, *Goldstein* v. *California,* 412 U. S. 546, 551–552 (1973); *United States* v. *Thompson,* 356 F. 2d 216, 227 n. 12 (CA2 1965), cert. denied, 384 U. S. 964 (1966).

[22] In *Johnson* v. *Combs,* the Fifth Circuit characterized the legislative history of § 718 as "inconclusive," 471 F. 2d, at 87. In *Thompson* v. *School Board of the City of Newport News,* the Fourth Circuit rejected the view that the legislative history could be read to support the applicability of § 718 to services rendered prior to its effective date, but did not find any explicitly stated legislative intent to the contrary. 472 F. 2d, at 178.

[23] The legislation that ultimately resulted in the passage of § 718 grew out of a bill that would have provided for the establishment of a $15 million federal fund from which successful litigants in school discrimination cases would be paid a reasonable fee "for services rendered, and costs incurred, *after the date of enactment of this Act.*" S. 683, § 11 (a), 92d Cong., 1st Sess. (1971) (emphasis supplied). The bill was reported out of the Senate Committee on Labor and Public Welfare as S. 1557, with the relevant clause intact in § 11. See S. Rep. No. 92–61, pp. 55–56 (1971). The section, however, was stricken in the Senate, 117 Cong. Rec. 11338–11345 (1971), and the present language of § 718 took its place. *Id.,* at 11521–11529 and 11724–11726. The House, among other amendments, deleted all mention of counsel fees. In conference, the fee provision was restored. S. Rep. No. 92–798, p. 143 (1972).

Thus, while there is no explicit statement that § 718 may be applied to services rendered prior to enactment, we are reluctant specifically to read into the statute the very fee limitation that Congress eliminated.

States, 376 U. S. 149 (1964).[24] Although the precise category of cases to which this exception applies has not been clearly delineated, the Court in *Schooner Peggy* suggested that such injustice could result "in mere private cases between individuals," and implored the courts to "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." 1 Cranch, at 110. We perceive no such threat of manifest injustice present in this case. We decline, accordingly, to categorize it as an exception to *Thorpe*'s general rule.

The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.

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[24] In *Greene,* the Court held that a claimant's right to recover lost earnings had become final as a result of the prior decision that the claimant had been wrongfully discharged, *Greene* v. *McElroy,* 360 U. S. 474 (1959), and of the District Court's order on remand. Accordingly, the Court ruled that his rights had matured under an earlier Department of Defense regulation, and declined to give retroactive effect to a new regulation that took effect while the claim was being processed. The inequity of a contrary holding was stressed by the Court:

"In a case such as the present, where the Government has acted without authority in causing the discharge of an employee without providing adequate procedural safeguards, we should be reluctant to conclude that a regulation, not explicitly so requiring, conditions restitution on a retrospective determination of the validity of the substantive reasons for the Government action—reasons which the employee was not afforded an adequate opportunity to meet or rebut at the time of his discharge." 376 U. S., at 162.

As noted, the Court, in *Thorpe* v. *Housing Authority of the City of Durham,* 393 U. S. 268 (1969), characterized *Greene* as an exception to the general rule of *Schooner Peggy,* "made to prevent manifest injustice." *Id.,* at 282, and n. 43.

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In this case the parties consist, on the one hand, of the School Board, a publicly funded governmental entity, and, on the other, a class of children whose constitutional right to a nondiscriminatory education has been advanced by this litigation. The District Court rather vividly described what it regarded as the disparity in the respective abilities of the parties adequately to present and protect their interests.[25] Moreover, school desegregation litigation is of a kind different from "mere private cases between individuals." With the Board responsible for the education of the very students who brought suit against it to require that such education comport with constitutional standards, it is not appropriate to view the parties as engaged in a routine private lawsuit. In this litigation the plaintiffs may be recognized as having rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system.[26] *Brown* v. *Board of Education,* 347 U. S., at 494.

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[25] "[F]rom the beginning the resources of opposing parties have been disproportionate. Ranged against the plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work. . . . Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand. . . .

"Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. . . . To secure counsel willing to undertake the job of trial . . . necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes." 53 F. R. D., at 40.

[26] See Dept. of Health, Education, and Welfare, J. Coleman et al., Equality of Educational Opportunity (1966); United States Commission on Civil Rights, Racial Isolation in the Public Schools (1967). See also *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U. S. 205 (1972).

In *Northcross* we construed, as *in pari passu,* § 718 and § 204 (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–3 (b), providing for an award of counsel fees to a successful plaintiff under the public accommodation subchapter of that Act. Our discussion of the latter provision in *Piggie Park* is particularly apt in the context of school desegregation litigation:

> "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." 390 U. S., at 401–402 (footnotes omitted).

Application of § 718 to such litigation would thus appear to have been anticipated by Mr. Chief Justice Marshall in *Schooner Peggy* when he noted that in "great national concerns . . . the court must decide according to existing laws." 1 Cranch, at 110. Indeed, the circumstances surrounding the passage of § 718, and the numerous expressions of congressional concern and intent with respect to the enactment of that statute, all proclaim its status as having to do with a "great national concern." [27]

[27] It is particularly in the area of desegregation that this Court in *Newman* and in *Northcross* recognized that, by their suit, plain-

The second aspect of the Court's concern that injustice may arise from retrospective application of a change in law relates to the nature of the rights effected by the change. The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional. See *Greene* v. *United States,* 376 U. S., at 160; *Claridge Apartments Co.* v. *Commissioner,* 323 U. S. 141, 164 (1944); *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U. S. 190, 199 (1913). We find here no such matured or unconditional right affected by the application of § 718. It cannot be claimed that the publicly elected School Board had such a right in the funds allocated to it by the taxpayers. These funds were essentially held in trust for the public, and at all times the Board was subject to such conditions or instructions on the use of the funds as the public wished to make through its duly elected representatives.

The third concern has to do with the nature of the impact of the change in law upon existing rights, or, to state it another way, stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard. In *Thorpe,* we were careful to note that by the circular the "respective obligations of both HUD and the Authority under the annual contributions contract remain unchanged. . . . Likewise, the lease agreement between

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tiffs vindicated a national policy of high priority. Other courts have given explicit and implicit recognition to the priority placed on desegregation litigation by the Congress. See *Knight* v. *Auciello,* 453 F. 2d 852, 853 (CA1 1972) and *Lee* v. *Southern Home Sites Corp.,* 444 F. 2d 143, 145 (CA5 1971) (housing); *Johnson* v. *Combs,* 471 F. 2d, at 86 (schools); *Miller* v. *Amusement Enterprises, Inc.,* 426 F. 2d 534, 537–538 (CA5 1970) (public accommodation); *Cooper* v. *Allen,* 467 F. 2d 836, 841 (CA5 1972) (employment).

the Authority and petitioner remains inviolate." 393 U. S., at 279. Here no increased burden was imposed since § 718 did not alter the Board's constitutional responsibility for providing pupils with a nondiscriminatory education. Also, there was no change in the substantive obligation of the parties. From the outset, upon the filing of the original complaint in 1961, the Board engaged in a conscious course of conduct with the knowledge that, under different theories, discussed by the District Court and the Court of Appeals, the Board could have been required to pay attorneys' fees. Even assuming a degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under § 718, if known, rather than simply the common-law availability of an award, would have caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs.

The availability of § 718 to sustain the award of fees against the Board therefore merely serves to create an additional basis or source for the Board's potential obligation to pay attorneys' fees. It does not impose an additional or unforeseeable obligation upon it.

Accordingly, upon considering the parties, the nature of the rights, and the impact of § 718 upon those rights, it cannot be said that the application of the statute to an award of fees for services rendered prior to its effective date, in an action pending on that date, would cause "manifest injustice," as that term is used in *Thorpe,* so as to compel an exception of the case from the rule of *Schooner Peggy.*

C

Finally, we disagree with the Court of Appeals' conclusion that § 718 by its very terms is inapplicable to the petitioners' request for fees "because there was no

'final order' pending unresolved on appeal," 472 F. 2d, at 331, when § 718 became effective, or on May 26, 1971, when the District Court made its award.

It is true that when the District Court entered its order, it was at least arguable that the petitioners had not yet become "the prevailing party," within the meaning of § 718. The application for fees had been included in their March 10, 1970, motion for further relief in the light of developments indicated by the decision two years before in *Green*. The Board's first plan was disapproved by the District Court on June 26. Its second plan was also disapproved but was ordered into effect on an interim basis on August 17 for the year about to begin. The third plan was ultimately approved on April 5, 1971, and the order allowing fees followed shortly thereafter.

Surely, the language of § 718 is not to be read to the effect that a fee award must be made simultaneously with the entry of a desegregation order. The statute, instead, expectedly makes the existence of a final order a prerequisite to the award. The unmanageability of a requirement of simultaneity is apparent when one considers the typical course of litigation in a school desegregation action. The history of this litigation from 1970 to 1972 is illustrative. The order of June 20, 1970, suspending school construction, the order of August 17 of that year placing an interim plan in operation, and the order of April 5, 1971, ordering the third plan into effect, all had become final when the fee award was made on May 26, 1971.[28] Since most school cases can be expected

[28] Since the finality of these orders is not contested, we are not called upon to construe the finality language as it appears in § 718. The only court that has dealt with the issue under this statute has held that the most suitable test for determining finality is appealability under 28 U. S. C. § 1291. See *Johnson* v. *Combs*, 471 F. 2d, at 87.

This Court has been inclined to follow a "pragmatic approach" to

to involve relief of an injunctive nature that must prove its efficacy only over a period of time and often with frequent modifications, many final orders may issue in the course of the litigation. To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary evidenced by the passage of § 718. A district court must have discretion to award fees and costs incident to the final disposition of interim matters. See 6 J. Moore, Federal Practice ¶ 54.70 (5) (1974 ed.). Further, the resolution of the fee issue may be a matter of some complexity and require, as here, the taking of evidence and briefing. It would therefore be undesirable to delay the implementation of a desegregation plan in order to resolve the question of fees simultaneously. The District Court properly chose not to address itself to the question of the award until after it had approved the noninterim plan for achievement of the unitary school system in Richmond on April 5, 1971.

We are in agreement, however, with the dissenting judge of the Court of Appeals when he observed, 472 F. 2d, at 337, that the award made by the District Court for services from March 10, 1970, to January 29, 1971,

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the question of finality. *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 306 (1962). And we have said that a final decision, within the meaning of § 1291, "does not necessarily mean the last order possible to be made in a case." *Gillespie* v. *United States Steel Corp.,* 379 U. S. 148, 152 (1964); see *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 545 (1949).

Without wishing affirmatively to construe the statute in detail in the absence of consideration of the issue by the lower courts, we venture to say only that the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees in school desegregation cases. See C. Wright, Federal Courts § 101 (2d ed. 1970).

did not precisely fit § 718's requirement that the beneficiary of the fee order be "the prevailing party." In January 1971 the petitioners had not yet "prevailed" and realistically did not do so until April 5. Consequently, any fee award was not appropriately to be made until April 5. Thereafter, it may include services at least through that date. This, of course, will be attended to on remand.

Accordingly, we hold that § 718 is applicable to the present situation, and that in this case the District Court in its discretion may allow the petitioners reasonable attorneys' fees for services rendered from March 10, 1970, to or beyond April 5, 1971. The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Syllabus

BOB JONES UNIVERSITY *v.* SIMON, SECRETARY OF THE TREASURY, ET AL.

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

No. 72–1470. Argued January 7, 1974—Decided May 15, 1974

Petitioner, a private university, was notified by the Internal Revenue Service (IRS), pursuant to a newly announced policy of denying tax-exempt status for private schools with racially discriminatory admissions policies, that it was going to revoke a ruling letter declaring that petitioner qualified for tax-exempt status under § 501 (c) (3) of the Internal Revenue Code of 1954 (Code). Petitioner sued for injunctive relief to prevent revocation, alleging irreparable injury in the form of income tax liability and loss of contributions and claiming that the revocation would violate petitioner's rights to free exercise of religion, to free association, and to due process and equal protection of the laws. The District Court granted relief despite § 7421 (a) of the Code, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The Court of Appeals reversed, holding that § 7421 (a), as construed in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1, foreclosed relief. Under that decision a pre-enforcement injunction against tax assessment or collection may be granted only if (1) "it is clear that under no circumstances could the Government ultimately prevail . . ." and (2) "if equity jurisdiction otherwise exists." *Held:*

1. The suit is one "for the purpose of restraining the assessment or collection of any tax" within the meaning of § 7421 (a). Pp. 738–742.

(a) Petitioner's allegation that revocation of the ruling letter would subject it to "substantial" income tax liability demonstrates that a primary purpose of the suit is to prevent the IRS from assessing and collecting income taxes; but even if no income tax liability resulted, the suit would still be one to restrain the assessment and collection of federal social security and unemployment taxes, as well as to restrain the collection of taxes from petitioner's donors. Pp. 738–739.

(b) Petitioner has not shown that the contemplated revocation of its ruling letter is not based on the IRS' good-faith effort to enforce the technical requirements of the Code. Pp. 739–741.

2. Petitioner's contention that § 7421 (a) is subject to judicially created exceptions other than the *Williams Packing* test is without merit. That decision constitutes an all-encompassing reading of § 7421 (a), and it rejected the contention, relied upon by petitioner, that irreparable injury alone is sufficient to lift the statutory bar. Pp. 742–746.

3. Denying injunctive relief to petitioner under the standards of *Williams Packing, supra,* will not, because of alleged irreparable injury pending resort to alternative remedies, deny petitioner due process of law, since this is not a case where an aggrieved party has no access at all to judicial review. The review procedures that are available are constitutionally adequate, even though involving serious delay. Pp. 746–748.

4. Petitioner has not met the standards of *Williams Packing, supra,* since its contentions are sufficiently debatable to foreclose any notion that "under no circumstances could the Government ultimately prevail." Pp. 748–750.

472 F. 2d 903 and 476 F. 2d 259, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post,* p. 750. DOUGLAS, J., took no part in the decision of the case.

J. D. Todd, Jr., argued the cause for petitioner. With him on the briefs were *Wesley M. Walker* and *Oscar Jackson Taylor, Jr.*

Assistant Attorney General Crampton argued the cause for respondents. With him on the brief were *Solicitor General Bork, Stuart A. Smith, Grant W. Wiprud,* and *Leonard J. Henzke, Jr.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case and *Commissioner* v. *"Americans United" Inc., post,* p. 752, involve the application of the Anti-

Injunction Act, § 7421 (a) of the Internal Revenue Code of 1954 (the Code), 26 U. S. C. § 7421 (a), to the ruling-letter program of the Internal Revenue Service (the Service) for organizations claiming tax-exempt status under Code § 501 (c)(3), 26 U. S. C. § 501 (c)(3). The question presented is whether, prior to the assessment and collection of any tax, a court may enjoin the Service from revoking a ruling letter declaring that petitioner qualifies for tax-exempt status and from withdrawing advance assurance to donors that contributions to petitioner will constitute charitable deductions under Code § 170 (c)(2), 26 U. S. C. § 170 (c)(2). We hold that it may not.

I

Section 501 (a) of the Code exempts from federal income taxes organizations described in § 501 (c)(3). The latter provision encompasses:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Section 501 (c)(3) organizations are also exempt from federal social security (FICA) taxes by virtue of Code § 3121 (b)(8)(B), 26 U. S. C. § 3121 (b)(8)(B), and from federal unemployment (FUTA) taxes by virtue of § 3306 (c)(8), 26 U. S. C. § 3306 (c)(8). Dona-

tions to § 501 (c)(3) organizations are tax deductible under § 170 (c)(2).[1]

As a practical matter, an organization hoping to solicit tax-deductible contributions may not rely solely on technical compliance with the language of §§ 501 (c)(3) and 170 (c)(2). The organization must also obtain a ruling letter from the Service, pursuant to Rev. Procs. 72–3 and 72–4, 1972–1 Cum. Bull. 698, 706, declaring that it qualifies under § 501 (c)(3). Receipt of such a ruling letter leads, in the ordinary case, to inclusion in

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[1] Section 170 (a) of the Code provides that "[t]here shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. . . ." Section 170 (c)(2) declares:

"Charitable contribution defined.—For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of—

. . . . . .

"(2) A corporation, trust, or community chest, fund, or foundation—

"(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

The organizations set forth in § 170 (c)(2) are, but for a few unimportant exceptions, the same as those described in § 501 (c)(3). Analogous deductions for contributions to § 501 (c)(3) organizations are provided for federal estate and gift tax purposes. See Code §§ 2055 (a)(2) and 2522 (a)(2), 26 U. S. C. §§ 2055 (a)(2) and 2522 (a)(2).

the Service's periodically updated Publication No. 78, "Cumulative List of Organizations described in Section 170 (c) of the Internal Revenue Code of 1954" (the Cumulative List). In essence, the Cumulative List is the Service's official roster of tax-exempt organizations: "The listing of an organization in [the Cumulative List] signifies it has received a ruling or determination letter . . . stating that contributions by donors to the organization are deductible as provided in section 170 of the Code." Rev. Proc. 72–39, 1972–2 Cum. Bull. 818. An organization's inclusion in the Cumulative List assures potential donors in advance that contributions to the organization will qualify as charitable deductions under § 170 (c)(2). The Service has announced that, with narrowly limited exceptions, a donor may rely on the Cumulative List for so long as the beneficiaries of his largesse maintain their listing, regardless of their actual tax status.[2] For this reason, appearance on the Cumulative List is a prerequisite to successful fund raising

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[2] Section 3.01 of Rev. Proc. 72–39, 1972–2 Cum. Bull. 818, provides:

"Where an organization listed in [the Cumulative List] ceases to qualify as an organization contributions to which are deductible under section 170 of the Code and the Service subsequently revokes a ruling or a determination letter previously issued to it, contributions made to the organization by persons unaware of the changes in the status of the organization generally will be considered allowable if made on or before the date of publication of the Internal Revenue Bulletin announcing that contributions are no longer deductible. However, the Service is not precluded from disallowing a deduction for any contribution made after an organization ceases to qualify under section 170, where the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for, or was aware of, the activities or deficiencies on the part of the organization that gave rise to the loss of qualification."

for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List.[3]

Because of the importance of inclusion in the Cumulative List, revocation of a § 501 (c)(3) ruling letter and consequent removal from the Cumulative List is likely to result in serious damage to a charitable organization.[4] Revocation not only threatens the flow of contributions, it also subjects the affected organization to FICA and FUTA taxes and, assuming that the organization has taxable income and does not qualify as tax exempt under another subsection of § 501, to federal income taxes.[5] Upon the assessment and attempted collection of income taxes, the organization may litigate the legality of the Service's action by petitioning the Tax Court to review a notice of deficiency. See Code §§ 6212 and 6213, 26 U. S. C. §§ 6212 and 6213. Or, following the collection of any federal tax and the denial of a refund by the Service, the organization may bring a

[3] This is particularly so with respect to tax-exempt private foundations, because they are subject to tax liability if they contribute funds to an organization that does not qualify under § 170 (c)(2). See Code § 4945 (d)(5), 26 U. S. C. § 4945 (d)(5).

[4] In recognition of the significance of such a change in status, the Service provides several stages of internal administrative review. If the Service indicates, pursuant to prescribed procedures, that cause for revocation exists, the affected organization is entitled to submit written protests and to have conferences at both the District Director and National Office level. § 11, Rev. Proc. 72–4, 1972–1 Cum. Bull., at 708; § 4, Rev. Proc. 72–39, 1972–2 Cum. Bull., at 818–819.

[5] An organization may lose its § 501 (c)(3) status but still be exempt from federal income taxes if it qualifies, for example, as a § 501 (c)(4) social welfare organization. But the loss of § 501 (c)(3) status inevitably means that the exemptions from FICA and FUTA taxes no longer apply, since those exemptions are keyed to § 501 (c)(3). See Code §§ 3121 (b)(8)(B) and 3306 (c)(8).

refund suit in a federal district court or in the Court of Claims. See Code § 7422, 26 U. S. C. § 7422; 28 U. S. C. §§ 1346 (a)(1) and 1491. Finally, a donor to the organization may bring a refund suit to challenge the denial of a charitable deduction under § 170 (c)(2). Presumably such a "friendly donor" would be able to attack the legality of the Service's revocation of an organization's § 501 (c)(3) status. But these post-revocation avenues of review take substantial time, during which the organization is certain to lose contributions from those donors whose gifts are contingent on entitlement to charitable deductions under § 170 (c)(2). Accordingly, any organization threatened with revocation of a § 501 (c)(3) ruling letter has a powerful incentive to bring a pre-enforcement suit to prevent the Service from taking action in the first instance.

The pressures operating on organizations facing revocation of § 501 (c)(3) status to seek injunctive relief against the Service pending judicial review of the proposed action conflict directly with a congressional prohibition of such pre-enforcement tax suits. In force continuously since its enactment in 1867, the Anti-Injunction Act, now Code § 7421 (a), provides in pertinent part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . ."[6] Because an injunction

[6] See Act of Mar. 2, 1867, § 10, 14 Stat. 475; Rev. Stat. § 3224 (1874); Int. Rev. Code of 1939, § 3653. Section 7421 (a) of the Code states:

"Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), *no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court* by any person, whether or not such person is the person against whom such tax was assessed." (Emphasis added.)

The italicized portion of § 7421 (a) is identical to language in § 10 of the Act of Mar. 2, 1867, but for the first "any," which the revisers

preventing the Service from withdrawing a § 501 (c)(3) ruling letter would necessarily preclude the collection of FICA, FUTA, and possibly income taxes from the affected organization, as well as the denial of § 170 (c)(2) charitable deductions to donors to the organization, a suit seeking such relief falls squarely within the literal scope of the Act.[7]

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added to the Revised Statutes version. See *Snyder* v. *Marks,* 109 U. S. 189, 192 (1883). None of the exceptions in § 7421 (a) is relevant to this case. The phrase commencing with "by any person . . ." was added by § 110 (c) of the Federal Tax Lien Act of 1966, Pub. L. 89–719, 80 Stat. 1144. The main purpose of the addition of this language was to deal with cases where third parties who are not themselves subject to tax liability hold property liens that compete with federal tax liens. Due to the literal meaning of the Anti-Injunction Act, such persons were, prior to 1966, often unable to protect their legitimate property interests when the Service foreclosed on property on which it held a tax lien. See H. R. Rep. No. 1884, 89th Cong., 2d Sess., 27–28 (1966). Such persons are now given a right of action under Code § 7426, 26 U. S. C. § 7426, and the language of § 7421 (a), as amended, renders that action exclusive. The "by any person" phrase is, however, also a reaffirmation of the plain meaning of the emphasized portion of § 7421 (a). In this respect, it is declaratory, not innovative. Cf. Bittker & Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L. J. 51, 57, n. 22 (1972). We are aware of the contrary reading of the "by any person" phrase in *McGlotten* v. *Connally,* 338 F. Supp. 448, 453 n. 25 (DC 1972) (three-judge court), but we are of a different view.

[7] The congressional antipathy for premature interference with the assessment or collection of any federal tax also extends to declaratory judgments. In 1935, one year after the enactment of the Declaratory Judgment Act, 48 Stat. 955, now 28 U. S. C. §§ 2201–2202, Congress amended that Act to exclude suits "with respect to Federal taxes . . . ," § 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1027, thus reaffirming the restrictions set out in the Anti-Injunction Act. The Declaratory Judgment Act now reads:

"§ 2201. Creation of Remedy.

"In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes,* any court of the United States, upon

The clash between the language of the Anti-Injunction Act and the desire of § 501 (c)(3) organizations to block the Service from withdrawing a ruling letter has been resolved against the organizations in most cases. *E. g.*,

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the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis added.)

"§ 2202. Further relief.

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Some have noted that the federal tax exception to the Declaratory Judgment Act may be more sweeping than the Anti-Injunction Act. *E. g.*, E. Borchard, Declaratory Judgments 855 (2d ed. 1941); Bittker & Kaufman, *supra,* n. 6, at 58. See S. Rep. No. 1240, 74th Cong., 1st Sess., 11 (1935). The Service takes that position in this case, arguing that any suit for an injunction is also an action for a declaratory judgment and thus is barred by the literal terms of the Declaratory Judgment Act, without regard to the independent force of § 7421 (a). A number of courts, on the other hand, have held that the federal tax exception to the Declaratory Judgment Act and the Anti-Injunction Act have coterminous application. *E. g., "Americans United" Inc.* v. *Walters,* 155 U. S. App. D. C. 284, 291, 477 F. 2d 1169, 1176 (1973), rev'd *sub nom. Commissioner* v. *"Americans United" Inc., post,* p. 752; *Tomlinson* v. *Smith,* 128 F. 2d 808 (CA7 1942); *McGlotten* v. *Connally, supra; Jules Hairstylists of Maryland, Inc.* v. *United States,* 268 F. Supp. 511 (Md. 1967), aff'd, 389 F. 2d 389 (CA4), cert. denied, 391 U. S. 934 (1968). Petitioner cites these cases in response to the Service's reliance on the Declaratory Judgment Act. There is no dispute, however, that the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act. Because we hold that the instant case is barred by the latter provision, there is no occasion to resolve whether the former is even more preclusive. Nor need we decide whether any action for an injunction is of necessity a request for a declaration of rights that triggers the terms of the Declaratory Judgment Act.

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Crenshaw County Private School Foundation v. *Connally,* 474 F. 2d 1185 (CA5 1973), pet. for cert. pending in No. 73–170; *National Council on the Facts of Overpopulation* v. *Caplin,* 224 F. Supp. 313 (DC 1963); *Israelite House of David* v. *Holden,* 14 F. 2d 701 (WD Mich. 1926).[8] But see *McGlotten* v. *Connally,* 338 F. Supp. 448 (DC 1972) (three-judge court). Cf. *Green* v. *Connally,* 330 F. Supp. 1150 (DC), aff'd *per curiam sub nom. Coit* v. *Green,* 404 U. S. 997 (1971).

In the present case, the Court of Appeals for the Fourth Circuit followed the majority view. *Bob Jones University* v. *Connally,* 472 F. 2d 903, petition for rehearing denied, 476 F. 2d 259 (1973). In light of the contrary result reached by the Court of Appeals for the District of Columbia Circuit in *"Americans United" Inc.* v. *Walters,* 155 U. S. App. D. C. 284, 477 F. 2d 1169 (1973), rev'd *sub nom. Commissioner* v. *"Americans United" Inc., post,* p. 752, we granted Bob Jones University's petition for certiorari. 414 U. S. 817 (1973).

II

Petitioner refers to itself as "the world's most unusual university." Founded in 1927 and now located in Greenville, South Carolina, the University is devoted to the teaching and propagation of its fundamentalist religious beliefs. All classes commence and close with prayer,

[8] Several courts have reached the same result under the federal tax exception to the Declaratory Judgment Act, set forth in n. 7, *supra.* *E. g., Liberty Amendment Committee of the U. S. A.* v. *United States,* Civil Action No. 70–721 (CD Cal. June 19, 1970) (unpublished), aff'd *per curiam,* No. 26507 (CA9 July 7, 1972) (unpublished), cert. denied, 409 U. S. 1076 (1972); *Mitchell* v. *Riddell,* 402 F. 2d 842 (CA9 1968), appeal dismissed and cert. denied, 394 U. S. 456 (1969); *Jolles Foundation, Inc.* v. *Moysey,* 250 F. 2d 166 (CA2 1957); *Kyron Foundation* v. *Dunlap,* 110 F. Supp. 428 (DC 1952).

and courses in religion are compulsory. Students and faculty are screened for adherence to certain religious precepts and may be expelled or dismissed for lack of allegiance to them. One of these beliefs is that God intended segregation of the races and that the Scriptures forbid interracial marriage. Accordingly, petitioner refuses to admit Negroes as students. On pain of expulsion students are prohibited from interracial dating, and petitioner believes that it would be impossible to enforce this prohibition absent the exclusion of Negroes.

In 1942, the Service issued petitioner a ruling letter under § 101 (6) of the Internal Revenue Code of 1939, the predecessor of § 501 (c)(3). In 1970, however, the Service announced that it would no longer allow § 501 (c)(3) status for private schools maintaining racially discriminatory admissions policies and that it would no longer treat contributions to such schools as tax deductible. See Rev. Rul. 71–447, 1971–2 Cum. Bull. 230. The Service requested proof of a nondiscriminatory admissions policy from all such schools and warned that tax-exempt ruling letters would be reviewed in light of the information provided. At the end of 1970, petitioner advised the Service that it did not admit Negroes, and in September 1971, further stated that it had no intention of altering this policy. The Commissioner of Internal Revenue therefore instructed the District Director to commence administrative procedures leading to the revocation of petitioner's § 501 (c)(3) ruling letter.

Petitioner brought these administrative proceedings to a halt by filing suit in the United States District Court for the District of South Carolina for preliminary and permanent injunctive relief preventing the Service from revoking or threatening to revoke petitioner's tax-exempt status. Petitioner alleged irreparable injury in the form of substantial federal income tax liability and the loss of

contributions. Petitioner asserted that the Service's threatened action was outside its lawful authority and would violate petitioner's rights to the free exercise of religion, to free association, and to due process and equal protection of the laws.

The District Court rejected a motion to dismiss for lack of jurisdiction, and it preliminarily enjoined the Service from revoking or threatening to revoke petitioner's tax-exempt status and from withdrawing advance assurance of the deductibility of contributions made to petitioner. *Bob Jones University* v. *Connally,* 341 F. Supp. 277 (1971). The Court of Appeals for the Fourth Circuit reversed, with one judge dissenting. 472 F. 2d 903, reh. den., 476 F. 2d 259 (1973). That court held that petitioner's suit was barred by the Anti-Injunction Act as interpreted by this Court in *Enochs* v. *Williams Packing & Navigation Co.,* 370 U. S. 1. (1962).

III

The Anti-Injunction Act apparently has no recorded legislative history,[9] but its language could scarcely be more explicit—"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . ." The Court has interpreted the principal purpose of this language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, "and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs* v. *Williams Packing & Navi-*

[9] See Note, Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition, 49 Harv. L. Rev. 109 n. 9 (1935); Gorovitz, Federal Tax Injunctions and the Standard Nut Cases, 10 Taxes 446 n. 6 (1932).

gation Co., supra, at 7. See also, *e. g., State Railroad Tax Cases,* 92 U. S. 575, 613–614 (1876). Cf. *Cheatham* v. *United States,* 92 U. S. 85, 88–89 (1876). The Court has also identified "a collateral objective of the Act—protection of the collector from litigation pending a suit for refund." *Williams Packing, supra,* at 7–8.

In furtherance of these goals, the Court in its most recent reading gave the Act almost literal effect. In *Williams Packing,* an employer sought to enjoin the collection of FICA and FUTA taxes that the employer alleged were not owed and would destroy its business. The Court held unanimously that the suit was barred by the Act. Only upon proof of the presence of two factors could the literal terms of § 7421 (a) be avoided: first, irreparable injury, the essential prerequisite for injunctive relief in any case; and second, certainty of success on the merits. *Id.,* at 6–7. An injunction could issue only "if it is clear that under no circumstances could the Government ultimately prevail . . . ." *Id.,* at 7. And this determination would be made on the basis of the information available to the Government at the time of the suit. "Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Ibid.*

Perhaps in recognition of the stringent nature of the *Williams Packing* standard and its implications for this case, petitioner makes little effort to argue that it can meet that test. Rather, it asserts that the Anti-Injunction Act, properly construed, is not applicable, that *Williams Packing* is not the controlling reading of the Act, and that rejection of both these contentions would work a denial of due process of law. We find these arguments unpersuasive.

A

First, petitioner contends that the Act is inapplicable because this is not a suit "for the purpose of restraining the assessment or collection of any tax . . . ." Under petitioner's theory, its suit is intended solely to compel the Service to refrain from withdrawing petitioner's § 501 (c)(3) ruling letter and from depriving petitioner's donors of advance assurance of deductibility. Petitioner describes its goal as the maintenance of the flow of contributions, not the obstruction of revenue.

Petitioner's complaint and supporting documents filed in the District Court belie any notion that this is not a suit to enjoin the assessment or collection of federal taxes from petitioner. In support of its claim of irreparable injury, petitioner alleged in part that it would be subject to "substantial" federal income tax liability if the Service were allowed to carry out its threatened action. App. 6. Petitioner buttressed this contention with sworn affidavits alleging federal income tax liability of three-quarters of a million dollars for one year and in excess of half a million dollars for another and stressing the detrimental effect such tax liability would have on petitioner's capacity to operate its institution, to support its personnel, and to continue with its expansion plans. *Id.*, at 10–11, 43–44. These allegations leave little doubt that a primary purpose of this lawsuit is to prevent the Service from assessing and collecting income taxes from petitioner.

We recognize that petitioner's assertions that it will owe federal income taxes should its § 501 (c)(3) status be revoked are open to debate, because they are based in part on a failure to take into account possible deductions for depreciation of plant and equipment. Even if it could be shown, however, that petitioner would owe no federal income taxes if its § 501 (c)(3) status were

revoked, this would still be a suit to restrain the assessment or collection of taxes because petitioner would also be liable for FICA and FUTA taxes. Section 7421 (a) speaks of "any tax"; it does not differentiate between federal income taxes or FICA or FUTA taxes. See, *e. g., Williams Packing, supra.* Moreover, petitioner seeks to restrain the collection of taxes from its donors—to force the Service to continue to provide advance assurance to those donors that contributions to petitioner will be recognized as tax deductible, thereby reducing their tax liability. Although in this regard petitioner seeks to lower the taxes of those other than itself, the Act is nonetheless controlling.[10] Thus in any of its implications, this case falls within the literal scope and the purposes of the Act.

Petitioner further contends that the Service's actions do not represent an effort to protect the revenues but an attempt to regulate the admissions policies of private universities. Under this line of argument, the Anti-

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[10] See n. 6, *supra.* Petitioner argues that the revenues will be unaffected by the loss of its § 501 (c)(3) status, since if petitioner loses its ruling letter, donors will simply redirect their gifts to organizations whose tax-exempt status is secure, thus obtaining the same § 170 (c)(2) charitable deductions they presently enjoy when they make contributions to petitioner. It follows, according to petitioner, that the Act's principal purpose of protecting the revenues is not threatened by an injunction preserving petitioner's § 501 (c)(3) status. Thus, the Act should be found inapplicable.

The argument is too speculative to be persuasive. It presumes that all donors who take § 170 (c)(2) deductions will desert petitioner if the ruling letter is withdrawn and that all such donors will make gifts in equivalent amounts to other tax-exempt organizations. We deem it unlikely that either premise is wholly true. To the extent that either premise is inaccurate, an injunction preserving petitioner's § 501 (c)(3) ruling letter will interrupt the assessment and collection of taxes.

Injunction Act is said to be inapplicable because the case does not truly involve taxes. We disagree.

The Service bases its present position with regard to the tax status of segregative private schools on its interpretation of the Code.[11] There is no evidence that that position does not represent a good-faith effort to enforce the technical requirements of the tax laws, and, without indicating a view as to whether the Service's interpretation is correct, we cannot say that its position has no legal basis or is unrelated to the protection of the revenues. The Act is therefore applicable. Petitioner's attribution of non-tax-related motives to the Service ignores the fact that petitioner has not shown that the Service's action is without an independent basis in the requirements of the Code. Moreover, petitioner's argument fails to give appropriate weight to *Bailey* v. *George,* 259 U. S. 16 (1922). In that case, the Court held that the Act blocked a pre-enforcement suit to enjoin collection of the federal Child Labor Tax, although the tax was challenged as a regulatory measure beyond the taxing power of Congress. Significantly, the Court announced *Bailey* v. *George* on the same day that it issued *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20

[11] See Rev. Rul. 71–447, 1971–2 Cum. Bull. 230. The question of whether a segregative private school qualifies under § 501 (c) (3) has not received plenary review in this Court, and we do not reach that question today. Such schools have been held not to qualify under § 501 (c) (3) in *Green* v. *Connally,* 330 F. Supp. 1150 (DC) (three-judge court), aff'd *per curiam sub nom. Coit* v. *Green,* 404 U. S. 997 (1971). As a defendant in *Green,* the Service initially took the position that segregative private schools were entitled to tax-exempt status under § 501 (c) (3), but it reversed its position while the case was on appeal to this Court. Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy.

(1922), a tax-refund case in which the Court struck down the Child Labor Tax Law as unconstitutional on the grounds that the taxpayer attempted to raise prematurely in *Bailey* v. *George*.[12]

Petitioner also argues that § 7421 (a) is not controlling because when the Act was passed in 1867 Congress could not possibly have foreseen something as sophisticated as the comparatively recent ruling-letter program [13] and the special importance of that program for § 501 (c)(3) organizations. This argument proves too much, however, since the same Congress also could not have foreseen, for example, FICA or FUTA taxes, to which the prohibitory command of § 7421 (a) indisputably applies. See, *e. g., Williams Packing, supra.* Moreover, through the years Congress has repeatedly re-enacted the Anti-Injunction Act [14] at times when it was obviously aware of

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[12] In support of its argument that this case does not involve a "tax" within the meaning of § 7421 (a), petitioner cites such cases as *Hill* v. *Wallace,* 259 U. S. 44 (1922) (tax on unregulated sales of commodities futures), and *Lipke* v. *Lederer,* 259 U. S. 557 (1922) (tax on unlawful sales of liquor). It is true that the Court in those cases drew what it saw at the time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions. *E. g., Sonzinsky* v. *United States,* 300 U. S. 506, 513 (1937). Even if such distinctions have merit, it would not assist petitioner, since its challenge is aimed at the imposition of federal income, FICA, and FUTA taxes which clearly are intended to raise revenue.

[13] The currently prevailing ruling-letter program of the Service commenced in 1940, see Caplin, Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles, NYU 20th Inst. on Fed. Tax 1, 2, 4–5 (1962), although its formal announcement did not take place until 1953. Rev. Rul. 10, 1953–1 Cum. Bull. 488.

[14] The most recent re-enactment, in the Internal Revenue Code of 1954, postdates both the actual and the formal commencement of the Service's ruling-letter program for § 501 (c)(3) organizations. See n. 13, *supra.*

the continuously increasing complexity of the federal tax system.[15]

B

Petitioner next argues that *Enochs* v. *Williams Packing & Navigation Co., supra,* does not constitute an all-encompassing reading of the Act. Petitioner contends, on the basis of prior precedents, that § 7421 (a) is subject to judicially created exceptions other than the "under no circumstances" test announced in *Williams Packing.* But the Court's unanimous opinion in *Williams Packing* indicates that the case was meant to be the capstone to judicial construction of the Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose.

During the first half century of the Act's existence, the Court gave it literal force, without regard to the character of the tax, the nature of the pre-enforcement challenge to it, or the status of the plaintiff. See *State Railroad Tax Cases,* 92 U. S., at 613–614; *Snyder* v. *Marks,* 109 U. S. 189 (1883); *Pacific Steam Whaling Co.* v. *United States,* 187 U. S. 447 (1903); *Dodge* v. *Osborn,* 240 U. S. 118 (1916); *Bailey* v. *George,* 259 U. S. 16 (1922).[16] Occasionally, however, the Court noted in

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[15] In addition to repeatedly re-enacting the Anti-Injunction Act, Congress reaffirmed the Act's purpose by adding the federal tax exception to the Declaratory Judgment Act. See n. 7, *supra.*

[16] The Anti-Injunction Act was written against the background of general equitable principles disfavoring the issuance of federal injunctions against taxes, absent clear proof that available remedies at law were inadequate. *E. g., Dows* v. *City of Chicago,* 11 Wall. 108, 109–110 (1871); *Shelton* v. *Platt,* 139 U. S. 591 (1891); *Pittsburgh & C. R. Co.* v. *Board of Pub. Works,* 172 U. S. 32 (1898). See

dictum that unspecified extraordinary and exceptional circumstances might justify an injunction despite the Act. *E. g., Dodge* v. *Osborn, supra,* at 122; *Bailey* v. *George, supra,* at 20. In 1922, the Court seized upon these dicta and permitted pre-enforcement injunctive suits against tax statutes that were viewed as penalties or as adjuncts to the criminal law. *Hill* v. *Wallace,* 259 U. S. 44 (1922); *Lipke* v. *Lederer,* 259 U. S. 557 (1922); *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386 (1922). Shortly thereafter, however, the Court made clear that *Hill, Lipke,* and *Regal Drug* were of narrow scope and had no application to pre-enforcement challenges to truly revenue-raising tax statutes. *Graham* v. *Du Pont,* 262 U. S. 234 (1923).[17] Thus, the Court's first departure from a literal reading of the Act produced a prompt correction in course.

California v. *Latimer,* 305 U. S. 255, 261–262 (1938) (Brandeis, J., for a unanimous Court):

"[The delay inherent in pursuing remedies at law], it is urged, is a special circumstance which justifies resort to a suit for an injunction in order that the question of liability may be promptly determined. If the delay incident to such proceedings justified refusal to pay a tax, the federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal, could have little application. For possible delay of that character is the common incident of practically every contest over the validity of a federal tax." (Footnote omitted.)

Since equitable principles militating against the issuance of federal injunctions in tax cases existed independently of the Anti-Injunction Act, it is most unlikely that Congress would have chosen the stringent language of the Act if its purpose was merely to restate existing law and not to compel litigants to make use solely of the avenues of review opened by Congress. For this reason, it is not surprising that the early cases interpreting the Act read it at face value.

[17] As noted earlier, the Court has also abandoned the view that bright-line distinctions exist between regulatory and revenue-raising taxes. See n. 12, *supra.*

In the 1930's the Court decided *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932), and *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439 (1938), the cases relied on most heavily by petitioner. *Standard Nut* set forth a new definition of the extraordinary and exceptional circumstances test, which was followed in *Regents*. In *Standard Nut* the Court stated that the Act is merely "declaratory of the principle" of cases prior to its passage that equity usually, but not always, disavows interference with tax collection; thus, the Act was to be construed "as near as may be in harmony with [equity doctrine] and the reasons upon which it rests." 284 U. S., at 509. Through this interpretation, the concept of extraordinary and exceptional circumstances was reduced to the traditional equitable requirements for issuance of an injunction.

Standard Nut was such a significant deviation from precedent that it was referred to by a commentator at the time as "a tribute to the tenacity of the American taxpayer" and "little short of phenomenal." [18] Read literally, the Court's opinion effectively repealed the Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded before the Act's passage. The incongruity of this position has not escaped notice.[19] It undoubtedly led directly to the Court's re-

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[18] Gorovitz, Federal Tax Injunctions and the Standard Nut Cases, 10 Taxes 446 (1932). Mr. Justice Stone, joined in dissent by Mr. Justice Brandeis, underlined the tension between *Standard Nut* and prior precedent: "Enacted in 1867, [the Anti-Injunction Act], for more than sixty years, has been consistently applied as precluding relief, whatever the equities alleged." 284 U. S., at 511.

[19] *E. g.*, Lenoir, Congressional Control Over Suits to Restrain the Assessment or Collection of Federal Taxes, 3 Ariz. L. Rev. 177, 195 (1961).

"In effect [*Standard Nut*] says that if special circumstances exist which bring the case within some acknowledged head of equity juris-

examination of the requirements of the Act in *Williams Packing,* the second time the Court has undertaken to rehabilitate the Act following debilitating departures from its explicit language. See *Graham* v. *Du Pont, supra.*

Williams Packing switched the focus of the extraordinary and exceptional circumstances test from a showing of the degree of harm to the plaintiff absent an injunction to the requirement that it be established that the Service's action is plainly without a legal basis. The Court in essence read *Standard Nut* not as an instance of irreparable injury but as a case where the Service had no chance of success on the merits. 370 U. S., at 7. And the Court explicitly held that the Act may not be evaded "merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise." *Id.,* at 6. Yet petitioner's argument that we should find *Williams Packing* inapplicable turns, in the last analysis, on its claim that to do otherwise would subject it to great harm. The Court rejected that consideration in *Williams Packing* itself, and we reject it as a reason for finding that case not controlling. Under the language of the Act, the degree of harm is not a factor, and as a matter of judicial construction, it does not provide a meaningful stopping point between *Standard Nut* and *Williams Packing.* Acceptance of petitioner's irreparable injury argument would simply

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diction, [the Anti-Injunction Act] does not apply, and the Court may issue an injunction. But in the absence of such circumstances the Court will lack equity jurisdiction because there will be no basis for such jurisdiction. To say that [the Act] applies only in such cases seems a little absurd. It is tantamount to saying that [the Act] forbids the courts to issue injunctions only when they would not have the authority to issue them anyway! It denies any force whatever to [the Act] except as declaratory of an equitable rule previously followed by the courts."

revive the evisceration of the Act inherent in *Standard Nut.*

C

Assuming, *arguendo,* the applicability of § 7421 (a) and *Williams Packing,* petitioner contends that forcing it to meet the standards of those authorities will deny it due process of law in light of the irreparable injury it will suffer pending resort to alternative procedures for review and of the alleged inadequacies of those remedies at law. The Court dismissed out of hand similar contentions nearly 60 years ago,[20] and we find such arguments no more compelling now than then.

This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different. If, as alleged in its complaint, petitioner will have taxable income upon the withdrawal of its § 501 (c)(3) status, it may in accordance with prescribed procedures petition the Tax Court to review the assessment of income taxes. Alternatively, petitioner may pay income taxes, or, in their absence, an installment of FICA or FUTA taxes, exhaust the Service's internal refund procedures, and then bring suit for a refund. These review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax-exempt status and withdrawal of advance assurance of deductibility. See, *e. g., Christian Echoes National Ministry, Inc.* v. *United States,*

[20] See *Dodge* v. *Osborn,* 240 U. S. 118, 122 (1916):

"There is a contention that the provisions requiring an appeal to the Commissioner of Internal Revenue after payment of the taxes and giving a right to sue in case of his refusal to refund are wanting in due process and therefore there is jurisdiction [to issue injunctive relief prior to the assessment or collection of any tax]. But we think it suffices to state that contention to demonstrate its entire want of merit."

470 F. 2d 849 (CA10 1972), cert. denied, 414 U. S. 864 (1973); *Center on Corporate Responsibility, Inc.* v. *Shultz,* 368 F. Supp. 863 (DC 1973).[21]

We do not say that these avenues of review are the best that can be devised. They present serious problems of delay, during which the flow of donations to an organization will be impaired and in some cases perhaps even terminated. But, as the Service notes, some delay may be an inevitable consequence of the fact that disputes between the Service and a party challenging the Service's actions are not susceptible of instant resolution through litigation. And although the congressional restriction to postenforcement review may place an organization claiming tax-exempt status in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference, *e. g., Cheatham* v. *United States,* 92 U. S., at 88–89; *State*

[21] Because of the availability of FICA and FUTA refund actions, we need not address the adequacy of another possible means of seeking postenforcement judicial review—the "friendly donor" refund suit. Under this approach, there must be a donor willing to file a refund action claiming a § 170 (c) (2) charitable deduction for a contribution to an organization after the Service has revoked the organization's ruling letter and withdrawn advance assurance of deductibility. To utilize this approach, the organization must first be able to find a donor willing to subject himself to the rigors of litigation against the Service and then must rely on the donor to present the relevant arguments on the organization's behalf. These and other possible differences between a donor refund suit and an action brought directly by an organization leave open the question whether a donor's refund suit constitutes an adequate legal remedy for correcting illegal actions on the part of the Service. We reserve this question for a case that turns upon its resolution.

Railroad Tax Cases, 92 U. S., at 613–614, and of the opportunities for review that are available.[22]

IV

Since we hold that *Williams Packing, supra,* governs this case, the remaining issue is whether petitioner has met the standards of that case. Without deciding the

[22] Petitioner did not bring this case as a refund action. Accordingly, we have no occasion to decide whether the Service is correct in asserting that a district court may not issue an injunction in such a suit, but is restricted in any tax case to the issuance of money judgments against the United States. Brief for Respondents 37 n. 35. We note, however, that the Service's position with regard to the range of relief available in a refund suit raises several considerations not presented by a pre-enforcement suit for an injunction. For example, it may be possible to conclude that a suit for a refund is not "for the purpose of restraining the assessment or collection of any tax . . . ," and thus that neither the literal terms nor the principal purpose of § 7421 (a) is applicable. Moreover, such a suit obviously does not clash with what the Court referred to in *Williams Packing, supra,* as a "collateral objective of the Act—protection of the collector from litigation pending a suit for refund." 370 U. S., at 7–8. And there would be serious question about the reasonableness of a system that forced a § 501 (c) (3) organization to bring a series of backward-looking refund suits in order to establish repeatedly the legality of its claim to tax-exempt status and that precluded such an organization from obtaining prospective relief even though it utilized an avenue of review mandated by Congress.

The Service indicates that "its normal practice is to issue a favorable ruling upon the application of an organization which has prevailed in a court suit." Brief for Respondents 35 n. 31, When the Service adheres to that position following a refund suit decided in favor of the plaintiff, there is of course little likelihood that injunctive relief would be necessary or appropriate. But our decision today that § 7421 (a) bars pre-enforcement injunctive suits by organizations claiming § 501 (c) (3) status unless the standards of *Williams Packing* are met should not be interpreted as deciding whether injunctive relief is possible in a refund suit in a district court.

merits, we think that petitioner's First Amendment, due process, and equal protection contentions are sufficiently debatable to foreclose any notion that "under no circumstances could the Government ultimately prevail . . . ." 370 U. S., at 7. See, *e. g., Green* v. *Connally,* 330 F. Supp. 1150 (DC), aff'd *per curiam sub nom. Coit* v. *Green,* 404 U. S. 997 (1971). Accordingly, the Court of Appeals did not err in holding that § 7421 (a) deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought.

In holding that § 7421 (a) blocks the present suit, we are not unaware that Congress has imposed an especially harsh regime on § 501 (c)(3) organizations threatened with loss of tax-exempt status and with withdrawal of advance assurance of deductibility of contributions. A former Commissioner of the Internal Revenue Service has sharply criticized the system applicable to such organizations.[23] The degree of bureaucratic control

[23] See Thrower, IRS Is Considering Far Reaching Changes in Ruling on Exempt Organizations, 34 J. Taxation 168 (1971):

"There is no practical possibility of quick judicial appeal at the present. If we deny tax exemption or the benefit to the organization of its donors having the assurance of deductibility of contributions, the organization must either create net taxable income or other tax liability for itself as a litigable issue, or find a donor who as a guinea pig is willing to make a contribution, have it disallowed, and litigate the disallowance. Assuming the readiness of the organization or donor to litigate, the issue under the best of circumstances could hardly come before a court until at least a year after the tax year in which the issue arises. Ordinarily, it would take much longer for the case of the organization's status to be tried. . . . While all of this time is passing, the organization is dormant for lack of contributions and those otherwise interested in its program lose their interest and move on to other organizations blessed with the Internal Revenue Service imprimatur; and the right to judicial review is not pursued.

"This is an extremely unfortunate situation for several reasons. First, it offends my sense of justice for undue delay to be imposed

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that, practically speaking, has been placed in the Service over those in petitioner's position is susceptible of abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities. Specific treatment of not-for-profit organizations to allow them to seek pre-enforcement review may well merit consideration. But this matter is for Congress, which is the appropriate body to weigh the relevant, policy-laden considerations, such as the harshness of the present law, the consequences of an unjustified revocation of § 501 (c)(3) status, the number of organizations in any year threatened with such revocation, the comparability of those organizations to others which rely on the Service's ruling-letter program, and the litigation burden on the Service and the effect on the assessment and collection of federal taxes if the law were to be changed.

The judgment is affirmed.

It is so ordered.

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

MR. JUSTICE BLACKMUN, concurring in the result.

I concur in the Court's judgment and agree with much of the reasoning in its opinion for this case. As the Court notes, *ante,* at 738, the University's obtaining an injunction would directly prevent the collection of what it says are $750,000 in income taxes for 1971 and of over $500,000 for 1972. On the basis of this fact alone, the "purpose" of the suit is indeed to restrain "the

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on one who needs a prompt decision. Second, in practical effect it gives a greater finality to IRS decisions than we would want or Congress intended. Third, it inhibits the growth of a body of case law interpretative of the exempt organization provisions that could guide the IRS in its further deliberations."

assessment or collection of [a] tax," and brings 26 U. S. C. § 7421 (a) into play.

Since the anti-injunction statute is applicable, we must consider whether the University comes within the statute's exception recognized in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1 (1962). As to this, I join Part IV of the Court's opinion to the effect that it has not been shown that "under no circumstances could the Government ultimately prevail." *Id.*, at 7.

ALEXANDER, COMMISSIONER OF INTERNAL REVENUE *v.* "AMERICANS UNITED" INC.

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

No. 72–1371. Argued January 7, 1974—Decided May 15, 1974

Respondent, a nonprofit corporation, had a ruling letter assuring it of tax-exempt status under § 501 (c) (3) of the Internal Revenue Code of 1954 (Code). The Internal Revenue Service (IRS) revoked the ruling letter on the ground that respondent had violated the lobbying proscriptions of §§ 501 (c) (3) and 170 of the Code, the effect of which was to render it liable for federal unemployment taxes and to terminate its eligibility for tax-deductible contributions. Respondent and two of its benefactors brought this action seeking a declaratory judgment that the IRS' administration of the lobbying provisions of §§ 501 (c) (3) and 170 was erroneous or unconstitutional and injunctive relief requiring reinstatement of its § 501 (c) (3) tax-exempt status. The District Court dismissed the complaint on the ground, *inter alia*, that the action was barred by the prohibition in § 7421 (a) of the Code against suits "for the purpose of restraining the assessment or collection of any tax." The Court of Appeals agreed that the action could not be maintained by the benefactors but held that respondent's suit was not barred on the grounds that respondent raised constitutional allegations; that the primary design of the suit was not to enjoin the assessment or collection of respondent's own taxes; that restraining the assessment or collection of the taxes of respondent's contributors was only a "collateral effect" of this suit; and that in the absence of injunctive relief respondent would sustain irreparable injury for which there was no adequate legal remedy. The court consequently affirmed the dismissal as to the benefactors but reversed as to respondent. *Held:* The action is barred by § 7421 (a). *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1; *Bob Jones University* v. *Simon*, *ante*, p. 725. Pp. 758–763.

(a) The constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under § 7421 (a). Pp. 759–760.

(b) That respondent was not seeking to enjoin the assessment or collection of its own taxes is irrelevant, for § 7421 (a) bars a suit to enjoin the assessment or collection of anyone's taxes. P. 760.

(c) Under any reasonable construction of the statutory term "purpose," the objective of this action was to restrain the assessment and collection of taxes from respondent's contributors, the purpose being to restore advance assurance that donations to respondent would qualify as charitable deductions for respondent's donors. Pp. 760–761.

(d) An action for refund of unemployment taxes, even if successful, will not lead to the recovery of contributions lost in the interim between withdrawal of a § 501 (c)(3) ruling letter and the final adjudication of entitlement to § 501 (c)(3) status. This is, however, merely a form of irreparable injury, which in itself is insufficient to avoid the bar of § 7421 (a). Pp. 761–762.

(e) An action for refund of unemployment taxes will afford respondent a full opportunity to litigate the legality of the IRS' withdrawal of its § 501 (c)(3) ruling letter, since respondent's liability for such taxes hinges on precisely the same legal issue as does its eligibility for tax-deductible contributions under § 170, *i. e.*, its entitlement to § 501 (c)(3) status. P. 762.

155 U. S. App. D. C. 284, 477 F. 2d 1169, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 763. DOUGLAS, J., took no part in the decision of the case.

Assistant Attorney General Crampton argued the cause for petitioner. With him on the briefs were *Solicitor General Bork, Richard B. Stone, Stuart A. Smith, Ernest J. Brown, Grant W. Wiprud,* and *Leonard J. Henzke, Jr.*

Alan B. Morrison and *Franklin C. Salisbury* argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging affirmance were filed by *H. David Rosenbloom, Harry J. Rubin, John Holt Myers, Samuel Rabinove,* and *Mortimer M. Caplin* for the Council on Foundations, Inc., and by *Thomas F. Field* for Tax Analysts and Advocates.

MR. JUSTICE POWELL delivered the opinion of the Court.

Respondent is a nonprofit, educational corporation organized under the laws of the District of Columbia as "Protestants and Other Americans United for Separation of Church and State." Its purpose is to defend and maintain religious liberty in the United States by the dissemination of knowledge concerning the constitutional principle of the separation of church and State. In 1950, the Internal Revenue Service issued a ruling letter that respondent qualified as a tax-exempt organization under the predecessor provision to § 501 (c)(3) of the Internal Revenue Code of 1954 (the Code), 26 U. S. C. § 501 (c)(3).[1] As a result, the Service treated contributions to respondent as charitable deductions under the predecessor provision of § 170 (c)(2) of the Code, 26 U. S. C. § 170 (c)(2).[2] This situation continued unchanged until

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[1] The predecessor provision of Code § 501 (c)(3) was § 101 (6) of the Internal Revenue Code of 1939. Section 501 (c)(3) describes the following as organizations exempt from federal income taxes by virtue of § 501 (a):

"Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

[2] The predecessor provision of § 170 (c)(2) of the Code was § 23 (o)(2) of the Internal Revenue Code of 1939. Section 170 (c)(2) defines a "charitable contribution" for purposes of § 170 (a), the charitable deduction provision, to mean a contribution or gift to or for the use of:

"A corporation, trust, or community chest, fund, or foundation—

April 25, 1969, when the Service issued a ruling letter revoking the 1950 ruling on the ground that respondent had violated §§ 501 (c)(3) and 170 (c)(2)(D) by devoting a substantial part of its activities to attempts to influence legislation. Shortly thereafter, the Service issued another ruling letter exempting respondent from income taxation as a "social welfare" organization under Code § 501 (c)(4), 26 U. S. C. § 501 (c)(4).[3] The effect of this change in status was to render respondent liable for unemployment (FUTA) taxes under Code § 3301, 26 U. S. C. § 3301,[4] and to destroy its eligibility for tax-deductible contributions under § 170.

"(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

"(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

"(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

"(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

The differences between the requirements of §§ 501 (c)(3) and 170 (c)(2) are minor and are not involved in this litigation.

[3] Section 501 (c)(4) lists the following organizations as qualifying under the § 501 (a) exemption from federal income taxes:

"Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

[4] See Code § 3306 (c)(8), 26 U. S. C. § 3306 (c)(8). Respondent began paying FUTA taxes in February 1970 and has stated its willingness to continue to do so in light of its relatively insubstantial

Because the 1969 ruling letter caused a substantial decrease in its contributions, respondent and two of its benefactors initiated the instant action in the United States District Court for the District of Columbia on July 30, 1970.[5] They sought a declaratory judgment that the Service's administration of the lobbying proscriptions of §§ 501 (c)(3) and 170 was erroneous or unconstitutional[6] and injunctive relief requiring rein-

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liability for such taxes. The Service reports that respondent paid $981.13 in FUTA taxes for the year 1969, $1,052.60 for 1970, $889.09 for 1971, and $1,131.36 for 1972. Brief for Petitioner 4 n. 2.

Ordinarily, respondent's shift from § 501 (c)(3) status to § 501 (c)(4) status would also have meant that it would become subject to federal social security (FICA) taxes, since § 501 (c)(3) organizations are exempt from such taxes but § 501 (c)(4) organizations are not. Code § 3121 (b)(8)(B), 26 U. S. C. § 3121 (b)(8)(B). This distinction is not involved here, however, because respondent in prior years voluntarily elected to pay FICA taxes although it held § 501 (c)(3) status. This election had been in effect for more than eight years, which rendered respondent incapable of terminating its election to pay FICA taxes even if it had retained its § 501 (c)(3) status. Code § 3121 (k)(1)(D), 26 U. S. C. § 3121 (k)(1)(D).

[5] Federal jurisdiction was founded on 28 U. S. C. §§ 1331 and 1340 and on § 10 of the Administrative Procedure Act, now 5 U. S. C. §§ 701–706.

[6] The amended complaint identified five claims: (1) that the lobbying proscriptions of §§ 501 (c)(3) and 170 (c)(2)(D) and the Service's administration of them were unconstitutional due to the restrictions imposed on the exercise of First Amendment rights of political advocacy by respondent and its contributors; (2) that the "substantial part" test of these provisions denied equal protection of the laws in conflict with the Due Process Clause of the Fifth Amendment, by allowing large tax-exempt organizations to engage in a greater quantum of lobbying activity than is allowed to smaller organizations; (3) that this disparity in the absolute amounts of lobbying activity allowed large and small § 501 (c)(3) organizations enabled certain large churches to engage in more lobbying in favor of government aid to church schools than respondent could bring to

statement of respondent's § 501 (c)(3) ruling letter. Because their objections to the Service's action included a facial challenge to the constitutionality of federal statutes,[7] they also requested the convening of a three-judge district court pursuant to 28 U. S. C. § 2282.

The Service moved to dismiss the action, principally on the ground that the exception in the Declaratory Judgment Act for cases "with respect to Federal taxes," [8] and the prohibition in the Anti-Injunction Act against suits "for the purpose of restraining the assessment or collection of any tax," [9] ousted the court of subject-

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bear in opposition, thereby violating the plaintiffs' rights under the Establishment and Free Exercise Clauses of the First Amendment; (4) that the statutory standards of "substantial part" and "propaganda" were so lacking in specificity that they constituted an invalid delegation of legislative power to the Service; and (5) that the Service acted arbitrarily and capriciously in revoking respondent's § 501 (c)(3) exemption. The last two contentions apparently were not advanced in the Court of Appeals. There the argument centered on the "discriminatory" aspects of the "substantial part" test identified above as claim (2).

[7] Specifically, respondent and its coplaintiffs sought to have the exemption clauses of § 501 (c)(3) severed from the remainder of that section and declared unconstitutional.

[8] The federal tax exception to the Declaratory Judgment Act appears in 28 U. S. C. § 2201:

"In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes,* any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis added.)

[9] The Anti-Injunction Act (Income Tax Assessment) is set forth in Code § 7421 (a), 26 U. S. C. § 7421 (a):

"Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court

matter jurisdiction. The District Court accepted this argument, refused to convene a three-judge court, and dismissed the complaint in an unpublished order filed March 9, 1971. The United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal insofar as it pertained to the individual plaintiffs, but it reversed as to respondent and remanded the case to the District Court with instructions to convene a three-judge court. *"Americans United" Inc.* v. *Walters,* 155 U. S. App. D. C. 284, 477 F. 2d 1169 (1973). The Service petitioned for review, and we granted certiorari. 412 U. S. 927 (1973). We reverse.

In our opinion in *Bob Jones University* v. *Simon, ante,* p. 725, we examined the meaning of the Anti-Injunction Act and its interpretation in prior opinions of this Court, and we reaffirmed our adherence to the two-part test announced in *Enochs* v. *Williams Packing & Navigation Co.,* 370 U. S. 1 (1962). To reiterate, the Court in *Williams Packing* unanimously held that a pre-enforcement injunction against the assessment or collection of taxes may be granted only (i) "if it is clear that under no circumstances could the Government ultimately prevail . . . ," *id.,* at 7, and (ii) "if equity jurisdiction otherwise exists." *Ibid.* Unless both conditions are met, a suit for preventive injunctive relief must be dismissed.

In the instant case the Court of Appeals recognized *Williams Packing* as controlling precedent for respondent's individual coplaintiffs and affirmed the dismissal of the suit as to them. 155 U. S. App. D. C., at 292, 477 F. 2d, at 1177. The court held that the relief requested by the individual plaintiffs "relate[d] directly to the assessment and collection of taxes" and that the allegations of

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by any person, whether or not such person is the person against whom such tax was assessed."

None of the exceptions is relevant to this case.

infringements of constitutional rights were "to no avail" in overcoming the barrier of § 7421 (a). *Id.*, at 291, 477 F. 2d, at 1176. The court also recognized that respondent could not satisfy the *Williams Packing* criteria, *id.*, at 298, 477 F. 2d, at 1183, but concluded that respondent's suit was without the scope of the Anti-Injunction Act and therefore not subject to the *Williams Packing* test.[10]

The court's conclusion with regard to respondent rested on the confluence of several factors. One was the constitutional nature of respondent's claims. As the court noted, the thrust of respondent's argument is not that it qualifies for a § 501 (c)(3) exemption under existing law but rather that that provision's "substantial part" test and proscription against efforts to influence legislation are unconstitutional. *Id.*, at 293, 477 F. 2d, at 1178. Obviously, this observation could not have been dispositive to the Court of Appeals, for this factor does not differentiate respondent, which was allowed to sue, from the individual coplaintiffs, who likewise pressed constitutional claims but who were dismissed from the action. Furthermore, decisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act. *E. g.*,

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[10] The Court of Appeals also held that the scope of the "except with respect to Federal taxes" clause of the Declaratory Judgment Act, see n. 8, *supra*, is coterminous with the Anti-Injunction Act ban against suits "for the purpose of restraining the assessment or collection of any tax" despite the broader phrasing of the former provision. 155 U. S. App. D. C. 284, 291, 477 F. 2d 1169, 1176. While we take no position on this issue, it is in any event clear that the federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the Anti-Injunction Act. Because we hold that the latter Act bars the instant suit, there is no occasion to deal separately with the former. See *Bob Jones University* v. *Simon*, *ante*, at 732–733, n. 7.

Bailey v. *George*, 259 U. S. 16 (1922); *Dodge* v. *Osborn*, 240 U. S. 118 (1916).

The other three factors identified by the Court of Appeals are equally unpersuasive. First, the court noted that respondent "does not seek in this lawsuit to enjoin the assessment or collection of its own taxes." 155 U. S. App. D. C., at 292, 477 F. 2d, at 1177. Because respondent volunteered to pay FUTA taxes even if it obtained an injunction restoring its § 501 (c)(3) status, this observation, we may assume, is correct. It is also irrelevant. Section 7421 (a) does not bar merely a taxpayer's attempt to enjoin the collection of his own taxes. Rather, it declares in sweeping terms that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." [11] Thus a suit to enjoin the assessment or collection of anyone's taxes triggers the literal terms of § 7421 (a).

Perhaps the real point of the court's observation about respondent's taxes was to set the stage for its more pertinent conclusion that restraining the assessment or collection of taxes was "at best a collateral effect" of respondent's action and that this suit arose "in a posture removed from a restraint on assessment or collection." 155 U. S. App. D. C., at 294, 477 F. 2d, at 1179. We disagree. Under any reasonable construction of the statutory term "purpose," the objective of this suit was to restrain the assessment and collection of taxes from respondent's contributors. The obvious

[11] The portion of § 7421 (a) beginning with "by any person" was added to the Act in 1966. See *Bob Jones University* v. *Simon*, *ante*, at 731–732, n. 6. As we noted there, however, the "by any person" phrase reaffirms the plain meaning of the original language of the Act.

purpose of respondent's action was to restore advance assurance that donations to it would qualify as charitable deductions under § 170 that would reduce the level of taxes of its donors.[12] Indeed, respondent would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors. Thus we think it circular to conclude, as did the Court of Appeals, that respondent's "primary design" was not "to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation." *Ibid.* The latter goal is merely a restatement of the former and can be accomplished only by restraining the assessment and collection of a tax in contravention of § 7421 (a).

Finally, the Court of Appeals emphasized that respondent had no "alternate legal remedy in the form of adequate refund litigation . . . ." *Id.*, at 295, 477 F. 2d, at 1180. The court recognized, of course, that respondent does have an opportunity to litigate its claims in an action for refund of FUTA taxes but dismissed this alternative with the statement that "it is subject to certain conditions and, we feel, is so far removed from the mainstream of the action and relief sought as to hardly be considered adequate." *Id.*, at 294 n. 13, 477 F. 2d, at 1179 n. 13. The import of these comments is unclear. If they are taken to mean that a refund action is, as a practical matter, inadequate to avoid the decrease in respondent's contributions for the interim between the withdrawal of § 501 (c)(3) status and the final adjudication of its en-

[12] Alternatively, this suit was intended to reassure private foundations that they could make contributions to respondent without risk of tax liability under Code § 4945 (d)(5), 26 U. S. C. § 4945 (d)(5). In this respect, the purpose of this action was to restrain the assessment of taxes against such foundations.

titlement to that exemption, they are certainly accurate. This, however, is only a statement of irreparable injury, which is the essential prerequisite for injunctive relief under traditional equitable standards and only one part of the *Williams Packing* test. As noted in *Bob Jones, ante,* at 745–746, allowing injunctive relief on the basis of this showing alone would render § 7421 (a) quite meaningless.

If, on the other hand, the court's comments about the inadequacy of a refund action for FUTA taxes are interpreted to mean that respondent lacks an opportunity to have its claims finally adjudicated by a court of law, we think they are inaccurate. Respondent's liability for FUTA taxes hinges on precisely the same legal issue as does its eligibility for tax-deductible contributions under § 170, namely its entitlement to § 501 (c)(3) status. And respondent will have a full opportunity to litigate the legality of the Service's withdrawal of respondent's § 501 (c)(3) ruling letter in a refund suit following the payment of FUTA taxes. *E. g., Christian Echoes National Ministry, Inc.* v. *United States,* 470 F. 2d 849 (CA10 1972), cert. denied, 414 U. S. 864 (1973).[13]

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[13] That respondent has voluntarily paid FUTA taxes rather than challenging their imposition via a refund suit does not alter this conclusion. A taxpayer cannot render an available review procedure an inadequate remedy at law by voluntarily forgoing it. See *Graham* v. *Du Pont,* 262 U. S. 234 (1923).

It should also be noted that this case cannot be distinguished from *Bob Jones, ante,* p. 725, on the ground that petitioner in that case in theory will be subject to federal income taxes upon termination of its § 501 (c)(3) status, whereas respondent in this case will not, given that it has established § 501 (c)(4) status. Refund suits for federal income taxes and for FUTA (or FICA) taxes are fungible in the present context. So long as the imposition of a federal tax, without regard to its nature, follows from the Service's withdrawal of § 501 (c)(3) status, a refund suit following

We therefore conclude that there are no valid reasons to distinguish this case from *Williams Packing* for purposes of § 7421 (a) or to exempt respondent's suit from the dual requirements enunciated in that case.[14] The judgment is reversed.

It is so ordered.

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

MR. JUSTICE BLACKMUN, dissenting.

Finding myself in solitary dissent in this "tax" case, I am somewhat diffident about expressing views contrary to those the Court apparently has reached so easily. I do so only because I am disturbingly aware of the overwhelming power of the Internal Revenue Service. This power is such that its mere exercise often freezes tax status so as to endanger the existence of philanthropic organizations and the public benefits they secure, merely because the path to judicial review is so discouragingly long and expensive. I write primarily, therefore, to express what I feel is a needed word of caution about governmental power where the means to challenge that power are unfavorable and unsatisfactory at best.

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the collection of that tax is an appropriate vehicle for litigating the legality of the Service's actions under § 501 (c)(3). As noted in *Bob Jones, ante,* at 748 n. 22, we need not decide now the range of remedies available in such a refund suit, which, unlike this suit, is brought pursuant to congressionally authorized procedures.

[14] We think our reading of § 7421 (a) is compelled by the language and apparent congressional purpose of this statute. The consequences of the present regime for § 501 (c)(3) organizations can be harsh indeed, as MR. JUSTICE BLACKMUN ably articulates in his dissenting opinion today. As we noted in *Bob Jones, ante,* at 749–750, this may well be a subject meriting congressional consideration.

I

"Americans United" Inc. (AU) is a District of Columbia nonprofit educational corporation organized in 1948. For almost 18 years AU was formally recognized by the Service as exempt from federal income tax under § 501 (c)(3) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c)(3),[1] and its predecessor, § 101 (6) of the Internal Revenue Code of 1939.

On April 25, 1968, however, the Commissioner of Internal Revenue revoked AU's letter-ruling exemption on the ground that the organization no longer met the requirements of § 501 (c)(3) and, instead, was an "action" organization, within the definition of Treasury Regulations §§ 1.501 (c)(3)–1 (c)(3)(i) and (iv), in that a substantial part of its activities was devoted to the pursuit of objectives to influence legislation App. 7–10. The loss of its § 501 (c)(3) status, however, did not result

[1] AU's exemption ruling, under § 101 (6) of the 1939 Code, was issued July 3, 1950. Section 501 reads in pertinent part as follows:

"§ 501. Exemption from tax on corporations, certain trusts, etc.

"(a) Exemption from taxation.

"An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

. . . . . .

"(c) List of exempt organizations.

"The following organizations are referred to in subsection (a):

. . . . . .

"(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

in AU's becoming subject to federal income tax. This was because AU qualified as a civic league or other organization to which § 501 (c)(4) has application.[2]

The result, nevertheless, was distinctly adverse to AU in two respects. A contribution to the organization no longer was deductible by the donor under §§ 170 (a)(1) and (c)(2)(D) of the 1954 Code, 26 U. S. C. §§ 170 (a)(1) and (c)(2)(D), the latter of which closely parallels but is not identical with § 501 (c)(3). As a matter of much less concern, AU also became subject to federal unemployment tax under § 3301 of the Code, 26 U. S. C. § 3301, for exemption therefrom for § 501 organizations is limited to those that qualify under § 501 (c)(3). § 3306 (c)(8) of the 1954 Code, 26 U. S. C. § 3306 (c)(8).[3] AU has paid federal unemployment taxes,[4] and has stipulated that it will continue to do so.

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[2] Section 501 (c)(4) relates to:

"(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

[3] Although, under § 3121 (b)(8)(B) of the 1954 Code, 26 U. S. C. § 3121 (b)(8)(B), AU was not required to pay tax imposed by the Federal Insurance Contributions Act so long as it was exempt under § 501 (c)(3), it had elected to do so, as was its privilege under § 3121 (k)(1)(A), 26 U. S. C. § 3121 (k)(1)(A). Termination of this accepted responsibility for tax requires two years' advance written notice and cannot be effected at all after an organization has been subjected to the tax eight years or more. § 3121 (k)(1)(D), 26 U. S. C. § 3121 (k)(1)(D). AU has been so taxed for more than eight years. Thus, it is unable to terminate its responsibility for tax under the FICA even if it were to continue as a § 501 (c)(3) organization.

[4] AU paid $981.13 in federal unemployment tax for 1969; $1,052.60 for 1970; $889.09 for 1971; and $1,131.36 for 1972. Brief for Petitioner 4 n. 2.

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As a result of the revocation of its § 501 (c)(3) status, contributions by donors to AU declined sharply so that for the first time the organization was not able to raise enough funds to cover its expenses. AU and two of its benefactors then sought relief by the present suit.[5] They have alleged that the substantiality test of §§ 501 (c)(3) and 170 (c)(2)(D) created an unconstitutional disparity between large and small organizations; that the Commissioner revoked AU's exemption ruling punitively; that

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[5] The amended complaint requested both declaratory and injunctive relief. The latter, however, would be fully adequate and a declaratory judgment, as such, would not be needed. Accordingly, I am concerned only with the applicability of the Anti-Injunction Act, § 7421 (a) of the Code, 26 U. S. C. § 7421 (a).

The Commissioner has asserted that the Declaratory Judgment Act, 28 U. S. C. §§ 2201–2202, also provides a jurisdictional barrier to the suit because its general applicability is limited by the phrase, "except with respect to Federal taxes." While not reaching the question, I would agree with the Court's observation in the companion case, *Bob Jones University* v. *Simon, ante,* at 732–733, n. 7, that questions exist as to the scope of § 2201 and as to whether it is coterminous with § 7421 (a).

The Commissioner also asserts that the doctrine of sovereign immunity bars the present action. I do not agree. The suit, as the Court of Appeals noted, 155 U. S. App. D. C. 284, 295, 477 F. 2d 1169, 1180, falls within the immunity doctrine's exceptions enunciated in *Dugan* v. *Rank,* 372 U. S. 609, 621–622 (1963): "(1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." Here, the claim is made that § 501 (c)(3) is unconstitutional and that the Commissioner administers the section in an unconstitutional manner.

In *Green* v. *Connally,* 330 F. Supp. 1150 (DC 1971), the court granted relief against Treasury officials comparable to that sought here. Inasmuch as the defense of sovereign immunity is jurisdictional, *United States* v. *Sherwood,* 312 U. S. 584, 586 (1941), this Court's summary affirmance of the *Green case sub nom. Coit* v. *Green,* 404 U. S. 997 (1971), affords pertinent precedent.

it was unconstitutional to penalize First Amendment activity in this manner; and that § 501 (c)(3)'s "substantial" and "propaganda" standards were unconstitutionally vague. AU sought reinstatement on the IRS Cumulative List of Organizations so that contributions to it would be deductible by donors under §§ 170 (a)(1) and (c)(2)(D).

II

The Anti-Injunction Act, § 7421 (a) of the Code, 26 U. S. C. § 7421 (a), reads in part:

> "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

In considering § 7421 (a), a two-step analysis is necessary: (1) When does the statute apply? (2) When it is applicable, under what circumstances is an exception permitted? It seems to me that the Court overlooks the first question in order to apply mechanically the criteria for an exception to the application of § 7421 (a).

The threshold question, obviously, is whether the present litigation is a "suit for the purpose of restraining" any tax. It is conceded that AU has no income tax liability and will have none regardless of the outcome of this litigation. AU has paid, and will continue to pay, federal unemployment taxes. Its assumption of FICA tax liability is frozen and cannot now be terminated.

It is in the context of this fixed and certain status as to all these federal taxes—income, unemployment, FICA—that "the purpose" of the present litigation, within the meaning of § 7421 (a), must be ascertained. AU asserts that the purpose is to determine its charitable status so far as benefactors are concerned. Indeed, one

surely must concede that, within the literal import of the statute's words, the suit is not one "for the purpose of restraining . . . any tax." It is, instead, a suit to assure the continuance of contributions utilized to sustain AU's operations.

I would not attribute to Congress, however, so simplistic a prohibition in § 7421 (a) as to enable an organization to circumvent the statutory barrier by a subjective protestation of the purpose for which an injunction is sought. In order to ascertain legislative intent, it is necessary to consider effect as well as purpose and thus to bring objective criteria into the analysis. See Recent Development, 73 Col. L. Rev. 1502, 1508–1510 (1973).

In *Bob Jones University* v. *Connally,* 472 F. 2d 903, 906 (1973), the Fourth Circuit concluded that when the withdrawal of an exemption "would ultimately result in potentially greater tax revenues," the obvious purpose of a suit to enjoin the withdrawal is to prevent the assessment of tax, and § 7421 (a) would be applicable. Thus, "purpose" was equated with ultimate tax effect. *Crenshaw County Private School Foundation* v. *Connally,* 474 F. 2d 1185, 1188 (CA5 1973), pet. for cert. pending No. 73–170, has a similar focus. In the present case the Court of Appeals took a different approach:

> "The restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation." 155 U. S. App. D. C. 284, 293–294, 477 F. 2d 1169, 1178–1179.

In this view, applicability of the statute depends on the direct effect the relief sought would have on the plaintiff and not on the system as a whole.

As has been noted, the result of the injunction sought here would not directly inhibit the collection of tax from AU. It is also highly speculative what collateral effect, if any at all, the suit could possibly have on the federal revenue. If the assertion that AU's contributions have dried up is to be accepted, as I suspect it must be, I would presume that its erstwhile contributors have found other objects for their bounty, that is, other organizations whose names remain on the Service's vitally important Cumulative List. When nothing more than possible collateral effect on the revenues is involved, the Court's wide-ranging test of applicability of § 7421 (a), announced today, is, for me, too attenuated and too removed to be encompassed within the intendment of the statute's phrase, "for the purpose of restraining the assessment or collection of any tax."

In *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1 (1962), this Court observed that the object of § 7421 (a) "is to withdraw jurisdiction from the . . . courts to entertain suits seeking injunctions prohibiting the collection of federal taxes," and "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Id.*, at 5 and 7. There undoubtedly is appropriate concern about the underlying danger that a multitude of spurious suits, or even of suits with possible merit, would so interrupt the free flow of revenues as to jeopardize the Nation's fiscal stability. See, *e. g.*, *State Railroad Tax Cases*, 92 U. S. 575, 613–614 (1876); *Cheatham* v. *United States*, 92 U. S. 85, 89 (1876). Certainly, precollection suits could threaten planning and budgeting. But I do not perceive how the injunction desired in this case interferes with the area of concern that is the subject of § 7421 (a). Any po-

tential increase in revenues because donors no longer may contribute to AU and thereby obtain a § 170 (a)(1) deduction is, at best, only minor and speculative and is neither significant nor controlling. I, therefore, would accept "direct effect on the plaintiff" as a component to be considered in the ascertainment of the true "purpose" of the suit, within the meaning and reach of § 7421 (a).

I do not wish to indicate disapproval of *Williams Packing*. There a taxpayer sought to enjoin the collection of taxes. As the basis for equitable jurisdiction, it asserted that it would be thrown into bankruptcy if it were required to pay the taxes it challenged. The Court carefully noted that there may well be situations where "the central purpose of the Act is inapplicable and . . . the attempted collection may be enjoined." 370 U. S., at 7. To be sure, the Court narrowly confined exceptions to § 7421 (a) to instances where the plaintiff would suffer irreparable injury and where it was "clear that under no circumstances could the Government ultimately prevail." *Ibid.* If, however, this test is met, then the "manifest purpose" of the statute—to permit the collection of taxes without judicial intervention—is "inapplicable." The Court thus made it clear that there was an element, in addition to the traditional equity considerations previously spelled out in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932), that must be present in order to avoid the proscription of the Anti-Injunction Act.

Williams Packing, of course, on its facts, is clearly distinguishable from this case. There the purpose of the suit was directly to restrain the collection of social security and unemployment taxes allegedly past due from that taxpayer. Here the avowed purpose is not to restrain tax collection but to assure AU's restoration to the Cumulative List. In *Williams Packing* it was the incidence of taxation that was challenged and the ir-

reparable injury of prospective payment of the tax was claimed as the equitable basis for the injunction. Nothing remotely resembling that is present here. To read *Williams Packing* as broadly as the Court does today is to make § 7421 (a) more restrictive than the Court in *Williams Packing* or Congress intended. The result is that § 7421 (a) becomes an absolute bar to any and all injunctions, irrespective of tax liability, of purpose or effect of the suit, or of the character of the Service's action.

There is a further consideration. Arguably, where the challenged governmental action is not one intended to produce revenue but, rather, is one to accomplish a broad-based policy objective through the medium of federal taxation, the application of § 7421 (a) is inappropriate.[6]

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[6] Some courts have endorsed this approach. In *McGlotten* v. *Connally,* 338 F. Supp. 448 (DC 1972), a suit to enjoin, among other things, the continuation of tax exempt status of organizations that excluded nonwhites from membership, Chief Judge Bazelon, in writing for a three-judge District Court, stated:

"Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. . . . In the present case, the central purpose [of the statute] is clearly inapplicable." *Id.,* at 453–454 (footnotes omitted).

See also *Green* v. *Connally,* 330 F. Supp. 1150 (DC), aff'd *per curiam sub nom. Coit* v. *Green,* 404 U. S. 997 (1971), where the three-judge court did not mention § 7421 (a) specifically but permitted the suit and granted relief; *Bob Jones University* v. *Connally,* 472 F. 2d 903, 907–908 (CA4 1973) (dissenting opinion). And see the opinion of the Court of Appeals in the present case. 155 U. S. App. D. C., at 293–294, 477 F. 2d, at 1178–1179.

The purpose of the IRS action of itself is not controlling. The Court has found that "taxes" in the nature of a penalty were not within the meaning of § 7421 (a), *Hill* v. *Wallace,* 259 U. S. 44 (1922); *Lipke* v. *Lederer,* 259 U. S. 557 (1922), and has rejected, as well, the contention that an injunction could issue against a

Obviously, § 501 (c)(3) is not designed to raise money.[7] Its purpose, rather, is to assure the existence of truly philanthropic organizations and the continuation of the important public benefits they bestow.[8]

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regulatory tax as opposed to a revenue measure. *Sonzinsky* v. *United States,* 300 U. S. 506 (1937). The Court relies on *Bailey* v. *George,* 259 U. S. 16 (1922), for the principle that even the collection of an unconstitutional tax cannot be enjoined. All these situations, however, have a factor in common with *Williams Packing* that is absent from the present suit: AU does not seek to restrain the Government's act of collecting any tax that it owes.

[7] Commissioner Alexander spoke to this effect in remarks to the American Society of Association Executives in New Orleans August 29, 1973:

"The IRS recognizes that the exempt organization provisions of the law must be interpreted and administered in light of their special purpose and their place in the tax law. Their purpose is *not* to raise revenue. Rather, they are designed to act as a guardian. They insure that exempt organization assets will be put to the approved uses contemplated in the law. Their application calls for an extraordinary degree of care and judgment." BNA Daily Tax Report, Aug. 30, 1973, p. J–1.

[8] The value of philanthropic organizations must be balanced against the revenue-raising objectives of the tax laws. Some of the factors to be weighed in this balance are reflected in the 1965 Treasury Department Report on Private Foundations:

"Private philanthropic organizations can possess important characteristics which modern government necessarily lacks. They may be many-centered, free of administrative superstructure, subject to the readily exercised control of individuals with widely diversified views and interests. Such characteristics give these organizations great opportunity to initiate thought and action, to experiment with new and untried ventures, to dissent from prevailing attitudes, and to act quickly and flexibly. Precisely because they can be initiated and controlled by a single person or a small group, they may evoke great intensity of interest and dedication of energy. These values, in themselves, justify the tax exemptions and deductions which the law provides for philanthropic activity.

"Private foundations play a significant part in the work of philanthropy. While the foundation is a relatively modern development,

Another very important factor deserving consideration in this context is the hazard of vesting in the Commissioner virtual plenipotentiary power over philanthropic organizations. Although there can be little question that the Commissioner, under § 7805 (a) of the Code, 26 U. S. C. § 7805 (a), is properly vested with broad powers to "prescribe all needful rules and regulations for the enforcement" of the tax laws, there is nothing in the Code that suggests that he must be fully insulated from challenge when effectuating social policy.

AU has charged unconstitutional treatment pursuant to an unconstitutional provision. These are claims peculiarly within the province of courts and not of the Executive's administrative officers. The Court's opinion makes clear that a claim of this kind is now precluded from judicial determination until such time as the Court concludes that the Government could not ultimately prevail on the merits. Unless and until that conclusion is reached, the philanthropic organization is at the mercy of the Commissioner for the period of time—usually a

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its predecessor, the trust, has ancient vintage. Like its antecedent, the foundation permits a donor to commit to special uses the funds which he gives to charity. . . . In these ways, foundations have enriched and strengthened the pluralism of our social order.

"Private foundations have also preserved fluidity and provided impetus for change within the structure of American philanthropy. Operating charitable organizations tend to establish and work within defined patterns. . . . The assets of private foundations, on the other hand, are frequently free of commitment to specific operating programs or projects; and that freedom permits foundations relative ease in the shift of their focus of interest and their financial support from one charitable area to another. New ventures can be assisted, new areas explored, new concepts developed, new causes advanced. Because of its unique flexibility, then, the private foundation can constitute a powerful instrument for evolution, growth, and improvement in the shape and direction of charity." Senate Committee on Finance, 89th Cong., 1st Sess., 12–13 (Comm. Print 1965).

substantial one—it takes for a claim to be filed and to work its way through the adjudicative process in the guise of a refund suit with its myriad pitfalls. And even this route is possible only if the organization has a tax that has been paid.[9] See Part III, *infra.*

The Court in *Bob Jones University, ante,* at 729–730, acknowledges that "appearance on the Cumulative List is a prerequisite to successful fund raising for most charitable organizations." The program of exemption by letter ruling, therefore, is tantamount to a licensing procedure. If the Commissioner's authority were limited by a clear statutory definition of § 501 (c)(3)'s requirement of "no substantial part," or by an objective definition of what is "charitable," there would be less concern about possible administrative abuse.[10] But where the philanthropic organization is concerned, there appears to be little to circumscribe the almost unfettered power of the Commissioner.[11] This may be very well so long

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[9] The Commissioner states that the majority of organizations exempt under § 501 (c)(3) operate at a loss so that no income tax liability would result if their exemptions were revoked. *Bob Jones University* v. *Simon,* Brief for Petitioner 23 n. 22.

[10] As has been noted, one of AU's claims is that "substantial" and "propaganda," as these words are employed in § 501 (c)(3), are unconstitutionally vague. There are no clear objective criteria by which the Commissioner draws his conclusions with respect to these terms. Moreover, the § 501 (c)(3) revocation is arrived at by the Commissioner not solely by construing the language of § 501 (c)(3), but by his assertion that that section and §§ 170 (a)(1) and (c)(2)(D) are *in pari materia.* Thus, the idiosyncrasies of the word "charitable" in § 170 (a)(1) are engrafted upon, and entwined with, the "organized and operated exclusively for religious, charitable . . . or educational purposes" standard of § 501 (c)(3). This is nowhere compelled by statute, but is the product of the Commissioner's discretionary application and interpretation.

[11] In *Bob Jones University, ante,* at 740, the Court suggests that so long as an action of the Service reflects "a good-faith effort to

as one subscribes to the particular brand of social policy the Commissioner happens to be advocating at the time (a social policy the merits of which I make no attempt to evaluate), but application of our tax laws should not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative concern. To the extent these determinations are reposed in the authority of the Internal Revenue Service, they should have the system of checks and balances provided by judicial review *before* an organization that for years has been favored with an exemption ruling is imperiled by an allegedly unconstitutional change of direction on the part of the Service.

When an organization which has appeared on the Cumulative List seeks to enjoin what it claims is its illegal removal from that List and has no direct income tax liability or a *de minimis* collateral liability, the injunction, in my view, should not be within the prohibition of § 7421 (a).

III

Concluding, as I have, that § 7421 (a) is not a bar to an injunction by AU, the traditional equitable considera-

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enforce the technical requirements of the tax laws," the presence of a collateral motive does not render the Anti-Injunction Act inapplicable. I do not perceive just where the good-faith inquiry is made. It certainly is not made at the determination whether a suit is for the purpose of restraining taxes. It is doubtful that it is made in determining whether there are any circumstances under which the Government may ultimately prevail on the merits. Moreover, for me, there is a distinct question as to the meaning of the Court's phrase, "a good-faith effort to enforce the technical requirements of the tax laws." Is innovation in effectuating social policy a good-faith effort to enforce technical requirements? Is a threat to revoke a university's exemption ruling made in good faith when it rests on the proposition that the institution does not comply with government-approved admission standards?

tions of irreparable injury and adequate alternative remedy must determine whether injunctive relief is appropriate. This is an inquiry independent of the question whether the Anti-Injunction Act applies, and is no different from the inquiry as to when injunctive relief is appropriate outside the tax field. See, for example, *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 240–241 (1952); *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 506–507 (1959). AU makes a vigorous and pressing claim that it is and will be irreparably injured by the loss of contributions since donors no longer receive an income tax deduction, and that this loss is completely unrecoverable even were AU ultimately to prevail on the merits. The Court in its opinion, *ante*, at 761–762, seems to accept the fact of irreparable injury here, just as the Court of Appeals recognized its presence as virtually inevitable. 155 U. S. App. D. C., at 292, 477 F. 2d, at 1177. Even where it has been found that § 7421 (a) bars a suit, it has been recognized that revocation of exempt status is an irreparable injury that otherwise satisfies the condition for the granting of injunctive relief. See, for example, *Bob Jones University* v. *Connally*, 472 F. 2d, at 906.

In addition to irreparable injury, the plaintiff must show that he has no adequate remedy at law. *Wilson* v. *Shaw*, 204 U. S. 24, 31 (1907). The Commissioner suggests that a plaintiff organization usually has three alternative remedies, any one of which is adequate: an income tax refund suit, a federal unemployment tax or FICA tax refund suit, and an accommodation suit by a selected donor in the form of testing his claim to a charitable deduction under §§ 170 (a)(1) and (c)(2)(D).

In AU's case the Commissioner, of course, cannot and does not contend that the income tax refund suit alternative is available. AU received § 501 (c)(4) status upon

revocation of its § 501 (c)(3) exemption, and it is not subject to federal income tax so long as it retains § 501 (c)(4) status. Whenever that alternative is available, as in *Bob Jones University, ante,* p. 725, such availability not only indicates the existence of a remedy at law but that the direct effect of an injunction would be to restrain the collection of taxes.

An FICA tax refund suit is not available as an alternative to AU, since AU has made its election under § 3121 (k)(1)(A) and that election is now irrevocable. See n. 3, *supra.* Although AU conceivably might bring a refund suit for federal unemployment taxes,[12] the real question, and a substantial one, is whether that remedy is adequate for AU and is an effective route for the determination of the issues involved.

A suit for refund of federal unemployment tax, authorized under § 7422 of the Code, 26 U. S. C. § 7422, and with a period of limitations imposed by § 6532 (a), is directly geared to a determination of the technical

[12] The Court assumes the ready availability of an FUTA refund suit. *Ante,* at 762–763, n. 13. It is curious, however, that the Commissioner did not assert this possibility in the earlier stages of the litigation. It was suggested, apparently, only after the main briefing in the Court of Appeals. Tr. of Oral Arg. 36–37. It is also noteworthy that in discussing the problem former Commissioner Thrower has stated:

"There is no practical possibility of quick judicial appeal at the present. If we deny tax exemption or the benefit to the organization of its donors having the assurance of deductibility of contributions, the organization must either create net taxable income or other tax liability for itself as a litigable issue, or find a donor who as a guinea pig is willing to make a contribution, have it disallowed, and litigate the disallowance." Thrower, IRS Is Considering Far Reaching Changes in Ruling on Exempt Organizations, 34 J. of Taxation 168 (1971).

Whether procedurally feasible or not, there is some indication that such suits are not common practice.

aspects of FUTA liability and not to the larger constitutional issues. At most, the refund suit is an artificial vehicle to adjudicate questions other than entitlement to refund; its focus is on liability and not on eligibility under §§ 170 (a)(1) and (c)(2)(D). It is most doubtful, also, that potential contributors would regard a favorable outcome in such a suit as possessing the reliability of a favorable letter ruling. Assuming that AU could litigate its constitutional claims in an FUTA refund suit, see *Christian Echoes National Ministry, Inc.* v. *United States,* 470 F. 2d 849 (CA10 1972), cert. denied, 414 U. S. 864 (1973),[13] there are other obstacles in its path.

The suit for refund may not be maintained until a claim for refund has been filed. § 7422. The federal unemployment tax is imposed on an annual basis; thus, no refund can be claimed until the expiration of the year for which the tax is paid. Section 6532 (a)(1), as usual, precludes the suit until the claim is denied or six months have passed from the date of filing. Once suit is instituted, the Government has at least 60 days to answer the complaint. Under optimum conditions and with cooperation, the minimum period of time required to achieve the objective through the refund suit is one to two years from the time of revocation.[14] This is the delay if the

[13] In *Christian Echoes* a nonprofit religious corporation sued for refund of FICA taxes in an aggregate amount exceeding $103,000 paid over seven taxable years. The purpose of the suit, of course, was to recover the taxes paid, but constitutional challenges to § 501 (c)(3) were the basic legal arguments. There is no suggestion in the court's opinion that Christian Echoes' primary concern was with the loss of contributions; this, however, must have been of relative importance.

[14] Former Commissioner Thrower, in the article cited above, stated that "the issue under the best of circumstances could hardly come before a court until at least a year after the tax year in which the is-

organization wins and no Government appeal is taken. If an appeal follows, the delay in ultimate resolution drags on. *E. g., Christian Echoes, supra,* where the ruling was revoked in 1966 and final judicial review was concluded only in 1973. While this is perhaps to be expected, and must be endured, in an ordinary tax refund suit, a delay of this magnitude defeats the adequacy of remedy when a philanthropic organization's very existence is at stake.

There are still other hazards. When small sums are at issue, as with AU's FUTA liability, the Government inadvertently or intentionally may concede the refund. This is not unlikely, for sound administration may not warrant the time and expense necessary to contest a claim of small amount when vital issues and conceivably profound precedents are at stake. *Church of Scientology* v. *United States,* 485 F. 2d 313 (CA9 1973), illustrates the Government's effort to win dismissal of a case when a refund had been made. See also *Mitchell* v. *Riddell,* 402 F. 2d 842 (CA9 1968), appeal dismissed and cert. denied, 394 U. S. 456 (1969). There is little doubt that the Commissioner possesses the authority to make the refund and moot the suit if he chooses not to litigate the underlying issues. Although I agree with the Commissioner

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sue arises. Ordinarily, it would take much longer for the case of the organization's status to be tried." 34 J. of Taxation 168.

The former Commissioner also made significant remarks with respect to the need for judicial determination of issues involved in this case that will be precluded by the Court's interpretation of § 7421:

"This is an extremely unfortunate situation for several reasons. First, it offends my sense of justice for undue delay to be imposed on one who needs a prompt decision. Second, in practical effect it gives a greater finality to IRS decisions than we would want or Congress intended. Third, it inhibits the growth of a body of case law interpretive of the exempt organization provisions that could guide the IRS in its further deliberations." *Ibid.*

that to do so in a situation like that in the instant case would amount to bad faith, Brief for Petitioner 35 n. 25, it would be almost impossible for an organization to prove bad faith where, as here, the sum at issue is minimal and inadvertence or sound administration could be a valid reason for the refund.

Additionally, there is a substantial question whether an organization's eventual victory in a refund suit would accomplish its goal. The Commissioner has asserted that "normal practice is to issue a favorable ruling upon the application of an organization which has prevailed in a court suit," Reply Brief for Petitioner 34–35, n. 31. Still, the IRS Exempt Organizations Handbook states:

> "An organization which obtains a Tax Court or Federal court decision holding it to be exempt must file an exemption application and establish its right to exemption before the Service will recognize its exemption for years subsequent to those involved in the court decision." Department of Treasury, Internal Revenue Manual, Part XI, c. (11) 671, ¶ 270.

Whatever the internal practice may be, the published procedures cast serious doubt on the adequacy of the refund suit to resolve the organization's urgent problem. The revenue ruling has prospective application, whereas a court determination operates retrospectively to the extent the pleadings and proof and the applicable statute of limitations permit.[15] Thus, the scope of relief available in a refund suit is also uncertain. The orga-

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[15] See Note, Procedural Due Process Limitations on the Suspension of Advanced Assurance of Deductibility, 47 S. Cal. L. Rev. 427 (1974), for a detailed discussion of constitutional considerations of IRS letter-ruling revocation without a hearing.

nization is then faced with the dilemma of choosing between a so-called pre-assessment suit, which the Court says it cannot bring, and a refund suit that decides little more than the correctness of a particular year's tax liability (which in this case has been paid and is of little or no concern).

The staged suit by a "friendly" donor is the Commissioner's other suggestion. The donor's suit suffers the same time problems. The organization is off the Cumulative List at least until the donor establishes his entitlement to a §§ 170 (a)(1) and (c)(2)(D) deduction. This suit also may be mooted. Moreover, litigation by the accommodating donor does not permit the organization to assert its rights and interests. Could the donor make the First Amendment and equal protection claims that AU seeks to have determined? Not only must AU rely on a contributor to raise issues for it, but it must find a donor who is willing both to contribute and to undertake the task of litigation. This strains largesse to the extreme, particularly since the suit will subject the donor to routine full audit of his own return.

I conclude that neither course is an adequate remedy for an irreparably harmed organization to vindicate its claims.[16] Thus, equitable relief in the form of an injunction is not inappropriate.

[16] The contention that the remedies suggested by the Commissioner are inadequate is supported by most of the commentators who have addressed the issue since these cases were decided in the Courts of Appeals. See Note, Constitutional Implications of Withdrawal of Federal Tax Benefits From Private Segregated Schools, 33 Md. L. Rev. 51, 53 (1973); Note, The Loss of Privileged Tax Status and Suits to Restrain Assessments, 30 Wash. & Lee L. Rev. 573, 590 (1973); Comment, Avoiding the Anti-Injunction Statute in Suits to Enjoin Termination of Tax-Exempt Status, 14 Wm. & Mary L. Rev. 1014, 1025 (1973); Recent Development, 73 Col. L. Rev. 1502, 1513–1514 (1973); Notes, 46 Temp. L. Q. 596, 601 (1973).

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IV

The last issue is whether the amended complaint presented a substantial constitutional question on the merits justifying the convening of a three-judge court under 28 U. S. C. § 2282. The test was enunciated in *Ex parte Poresky,* 290 U. S. 30, 32 (1933), and restated in *Goosby* v. *Osser,* 409 U. S. 512, 518 (1973), and in *Hagans* v. *Lavine,* 415 U. S. 528, 542–543 (1974). The Court of Appeals in the present case said that "the possibility of success is not so certain as to merit the *Enochs* exception with respect to § 7421 (a), yet not so frivolous or foreclosed as to merit denial of the § 2282 motion." 155 U. S. App. D. C., at 298, 477 F. 2d, at 1183. I do not differ with that determination.

I, of course, imply no opinion on the merits of the underlying controversy.

Since I cannot join the Court's reversal of the Court of Appeals' judgment, I respectfully dissent.

DILLARD ET AL. *v.* INDUSTRIAL COMMISSION OF VIRGINIA ET AL.

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

No. 73–5412. Argued March 26, 1974—Decided May 15, 1974

In this action (brought initially by appellant Dillard and in which appellant Williams was allowed to intervene) Williams claimed that the Due Process Clause of the Fourteenth Amendment prevented Virginia from permitting suspension of workmen's compensation benefits as a result of a claimed change in condition without notice to the claimant and a prior adversary hearing. The District Court rejected the constitutional claim on the merits. *Held:* If, as indicated in the briefs and oral arguments in this Court, state law permits a claimant whose benefits have been suspended to have them reinstated by the state trial courts, which act in a purely ministerial capacity, pending a full administrative hearing before the State Industrial Commission on the merits of his claim, it was probably unnecessary to address the federal constitutional question. Accordingly, the case must be remanded to the District Court for reconsideration. Pp. 784–798.

347 F. Supp. 71, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 799.

John M. Levy argued the cause for appellants. With him on the briefs was *George S. Newman.*

Stuart H. Dunn, Assistant Attorney General of Virginia, argued the cause for appellees Industrial Commission of Virginia and individual Commissioners. With him on the brief were *Andrew P. Miller,* Attorney General, and *William E. O'Neill, Jr. J. Robert Brame III* argued the cause for appellee Aetna Casualty & Surety

Co. With him on the brief were *William H. King* and *Willard I. Walker.**

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellants seek to establish that, under the Due Process Clause of the Fourteenth Amendment, Virginia may not permit the suspension of workmen's compensation benefits without a prior adversary hearing. A three-judge United States District Court, over one dissent, rejected appellants' constitutional arguments. 347 F. Supp. 71 (ED Va. 1972). We noted probable jurisdiction. 414 U. S. 1110 (1973). Although the parties have focused primarily on the due process issue, the briefs and oral arguments have indicated that under state law a claimant whose workmen's compensation benefits have been suspended may have them reinstated by a state trial court pending a full administrative hearing on the merits of his claim. If this is an accurate reading of state law, it is in all probability unnecessary to address any questions of federal constitutional law in this case. Accordingly, the case must be remanded to the District Court for reconsideration.

I

This litigation has centered on the role of the Industrial Commission of Virginia (Commission) in overseeing relationships between workmen's compensation claimants and employers or the employers' insurance companies.

**J. Albert Woll, Bernard Kleiman, Stephen P. Berzon,* and *Stefan M. Rosenzweig* filed a brief for American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging reversal.

James F. Fitzpatrick and *David Bonderman* filed a brief for the American Insurance Assn. et al. as *amici curiae* urging affirmance.

Although the Virginia system for workmen's compensation is controlled in all significant respects by an extensive statutory scheme referred to as the Act, Va. Code Ann. § 65.1–1 *et seq.* (1973 and Supp. 1973),[1] it operates in a largely voluntary manner through memoranda of agreement between disabled workmen and employers or insurance companies. Compensation is paid out of private funds, in some cases through self-insurance by employers but for the most part through coverage by private insurance companies. All agreements between employees and employers or insurance companies must be approved by the Commission, which may extend its imprimatur "only when the Commission, or any member thereof, is clearly of the opinion that the best interests of the employee or his dependents will be served thereby . . . ." § 65.1–93.

In most instances the parties agree voluntarily on entitlement to benefits.[2] When this does not occur, the Commission will grant a hearing to resolve the disagreement, § 65.1–94, and will make an award if found to be due. § 65.1–96. The Commission's awards are subject to review by appeal to the Virginia Supreme Court and, if unchallenged, are conclusive until changed by the

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[1] The Act defines the relevant employment relationships, §§ 65.1–3 to 65.1–5, types of compensable disabilities, §§ 65.1–7 and 65.1–46, levels of compensation, §§ 65.1–54 to 65.1–57, 65.1–65 to 65.1–65.1, and 65.1–70 to 65.1–71, and the like. Participation in the Virginia system is mandatory for all employees and employers covered by the Act. § 65.1–23, as amended. The Act has been in force since 1918. Its history and general structure are described in the District Court's opinion. See 347 F. Supp. 71, 72–73 (ED Va. 1972).

[2] An *amicus* brief indicates that in the years 1967 to 1971 approximately 95% of all claims for workmen's compensation were resolved by voluntary agreement. Brief for American Insurance Association et al. 10.

Commission. § 65.1–98.[3] The Commission has no enforcement power *per se*. Rather, the Act provides:

> "Any party in interest may file in the circuit or corporation court of the county or city in which the injury occurred, or if it be in the city of Richmond then in the circuit or law and equity court of such city, a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from, or of an award of the Commission affirmed upon appeal, whereupon the court, or the judge thereof in vacation, shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though such judgment had been rendered in a suit duly heard and determined by the court. . . ." § 65.1–100.

The state courts have construed their enforcement duty under § 65.1–100 as purely ministerial. They do not inquire into whether a claimant's condition continues to justify compensation. Rather, they simply enforce agreements and awards that have been approved and not formally rescinded by the Commission.[4] Thus,

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[3] The Virginia Supreme Court accords substantial weight to the Commission's findings of fact, *e. g., LeWhite Constr. Co.* v. *Dunn,* 211 Va. 279, 176 S. E. 2d 809 (1970), and restricts its review primarily to questions of law. Cf. *Brown* v. *Fox,* 189 Va. 509, 54 S. E. 2d 109 (1949).

[4] See *Richmond Cedar Works* v. *Harper,* 129 Va. 481, 492–493, 106 S. E. 516, 520 (1921):

"Section 62 [the predecessor to § 65.1–100 of the Act] was clearly enacted for the purpose of providing a means not only of enforcing an award which had been affirmed on . . . appeal, but also all other final awards of the commission from which there had been no

a workmen's compensation claimant in Virginia has at his disposal a ready mechanism in the state trial courts to enforce any facially valid award or agreement. Since judicial enforcement is a ministerial act, this relief appears to be available with a minimum of delay or procedural difficulty.

Termination of benefits due to a change in a claimant's condition, like the commencement of benefits in the first instance, is a product of voluntary agreement in most cases. But when a dispute arises over a claimant's condition and his continued entitlement to benefits, the only avenue open to an employer for extinguishing a claimant's enforcement rights under § 65.1–100 of the Act appears in § 65.1–99. See *Bristol Door Co.* v. *Hinkle,* 157 Va. 474, 161 S. E. 902 (1932). This section provides, in relevant part:

> "Upon its own motion or upon the application of any party in interest, on the ground of a change in

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appeal, as well as all agreements between the parties approved by the commission. When this section is invoked, however, the rights of the claimants have already been established. The proceeding then resembles a motion under our statute for execution upon a forthcoming or delivery bond. . . . [A]ll of the rights of the parties having been previously litigated and determined, the court is required to render judgment in accordance either with (a) the agreement of the parties, which has been approved by the commission, (b) an award of the commission which has not been appealed from, or (c) an award of the commission which has been previously affirmed upon appeal. At this stage of the proceeding, the court is vested with no discretion; the statute is mandatory, and the refusal to render such judgment as that section requires could be compelled by mandamus. . . . The order of the court under section 62 in rendering judgment so that execution may be had, is the exercise of a ministerial function, and the mere method provided by the legislature for enforcing the collection by legal process of the amount already legally ascertained to be due . . . ."

Accord, *Parrigen* v. *Long,* 145 Va. 637, 134 S. E. 562 (1926).

> condition, the Industrial Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded . . . . No such review shall affect such award as regards any moneys paid . . . ." Va. Code Ann. § 65.1–99 (1973).[5]

Although it may be indisputable that a claimant is no longer entitled to benefits due to a change in his condition, if the claimant refuses to terminate voluntarily an award or agreement, an employer or insurer appears to have no defense against a state court enforcement action until there is a formal determination by the Commission under this section. *E. g., Manchester Bd. & Paper Co.* v. *Parker,* 201 Va. 328, 111 S. E. 2d 453 (1959).[6] If an employer or insurance company meets the requirements established by the Commission for invoking its review under this section, the Commission in due course will

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[5] Although § 65.1–99 refers specifically to awards, it has been interpreted as applying also to voluntary agreements that have been approved by the Commission. See *Manchester Bd. & Paper Co.* v. *Parker,* 201 Va. 328, 111 S. E. 2d 453 (1959).

[6] In the *Manchester* case, a claimant and an insurance company entered into an agreement to pay benefits, which the Commission approved. The employee then returned to work, rendering himself technically ineligible for benefits. The insurance company suspended payments and commenced proceedings leading to a determination under what is now § 65.1–99 of the Act, but it failed to adhere precisely to the requirements of the Commission under that section. One year after the employee returned to work, the Commission refused to rescind the agreement, concluding that the insurance company had failed to comply with § 65.1–99 as implemented by the Commission. On appeal, the Virginia Supreme Court affirmed. It held that § 65.1–99 was the exclusive statutory means for rescinding an agreement approved by the Commission and that employers and insurance companies failed to follow that section at their own risk, without regard to the actual status of a claimant.

conduct a hearing, with notice and the right to participate extended to all parties.[7] At such a hearing, the employer or insurer bears the burden of proving a change in a claimant's condition that justifies rescission of an award or agreement. *E. g., Virginia Oak Flooring Co.* v. *Chrisley,* 195 Va. 850, 80 S. E. 2d 537 (1954); *J. A. Foust Coal Co.* v. *Messer,* 195 Va. 762, 80 S. E. 2d 533 (1954).

The last sentence of the above quotation from § 65.1–99 prevents an employer or insurance company from recovering benefits erroneously paid prior to the Commission's formal termination of an award or agreement. See *Gray* v. *Underwood Bros.,* 164 Va. 344, 182 S. E. 547 (1935). Accordingly, an employer or insurer with cause to believe that a claimant is no longer entitled to benefits has an obvious incentive unilaterally to cease payment at the time it seeks a § 65.1–99 hearing before the Commission. If the Commission ultimately holds in its favor, the employer or insurer will not be required to pay any further benefits, and it will have protected itself against unmerited payments in the period prior to the Commission's full hearing. If the Commission rules against it, it will be required to reinstate benefits retroactively to the date of the application for a hearing, but at least it will have avoided paying benefits for which there was no true legal obligation.

In order to police this tendency of employers and insurers to terminate first and litigate later, the Commission promulgated its Rule 13. See *Manchester Bd. &*

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[7] There is no dispute in the instant case that the full hearing the Commission ultimately conducts before it formally terminates an award or agreement under § 65.1–99 of the Act satisfies the requirements of the Due Process Clause of the Fourteenth Amendment. Appellants' attack has been directed only at suspensions of benefits prior to the Commission's final hearing.

Paper Co. v. *Parker, supra.*[8] Rule 13 sets forth certain requirements that an employer or insurer must meet, with precision, see *ibid.*, before it can obtain the § 65.1–99 hearing which is a prerequisite to formal termination of an award or agreement on the ground of change in condition.[9] For example, the Rule requires employers and

[8] "The reason for the rule is stated in the opinion of the Commission as follows:

" 'More than thirty years ago when it was found by the Commission that some employers were arbitrarily disregarding the effect of outstanding awards and terminating payments directed by such awards, [Rule 13] . . . was promulgated . . . . The Rule has since been continuously in force.' " 201 Va., at 331, 111 S. E. 2d, at 456.

Rule 13 was promulgated pursuant to the general rulemaking authority vested in the Commission by the Act. Section 65.1–18 of the Act provides, in part: "The Commission may make rules, not inconsistent with this Act, for carrying out the provisions of this Act." The state courts have held that Rule 13 is a valid exercise of the Commission's rulemaking authority. See *Manchester Bd. & Paper Co.* v. *Parker, supra.*

[9] Commission Rule 13 provides:

"Applications for Review on Ground of Change in Condition.—Applications for review under § 65.1–99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

"All applications for hearing by an employer or insurer under § 65.1–99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1–63), medical attention (§ 65.1–88), or medical examination (§ 65.1–91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as

insurers to continue benefits up to a defined date. And since April 1, 1972, the Rule has imposed the following requirements on such applications:

> "All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred."

Thus, under Rule 13, as amended, an employer or insurer must pay benefits up to a certain date, must make application under oath, and must submit "supporting evidence which constitutes a legal basis for changing the existing award . . . ." If these requirements are met and if the Commission finds that "probable cause exists to believe that a change in condition has occurred . . . ," the employer or insurer will be accorded a hearing that may lead to rescission of the prior award or agreement. If the Rule 13 requirements are not met, the request for a hearing will be denied, and the award or agreement at

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of a date fourteen days prior to the date the application is filed, whichever is later. All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

"All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later."

issue will remain subject to enforcement in the state courts.

II

Appellant Dillard was the original named plaintiff in this class action under 42 U. S. C. § 1983. He contended that the Due Process Clause of the Fourteenth Amendment prevented Virginia from permitting the suspension of workmen's compensation benefits without notice to the claimant and an adversary hearing at the time the Commission makes a probable cause determination pursuant to Rule 13. A three-judge United States District Court, over one dissent, rejected this argument on the merits. 347 F. Supp. 71 (ED Va. 1972). Dillard appealed, but then settled his claim, and we remanded the case for a determination of mootness. 409 U. S. 238 (1972). In an unreported order, the District Court subsequently permitted the intervention of appellant Williams and reinstated its published opinion. Williams then appealed, bringing up the due process arguments initially espoused by Dillard.

Appellant Williams was injured in the course of employment in April 1972. In May 1972, the Commission approved an agreement between Williams and his employer's insurance company, one of the appellees herein, for the payment of weekly compensation benefits. In October 1972, the insurance company applied under Rule 13 to the Commission for a hearing to determine whether Williams' disability had ended. Simultaneously, the insurer discontinued payments. Within a few days the Commission made an *ex parte* determination that probable cause existed to believe that a change in Williams' condition had occurred. At this point, Williams made no effort to petition a state court under § 65.1–100 of the Act to reinstate benefits pending the Commission's full hearing. In December 1972, the Commis-

sion conducted an adversary hearing, concluded that the insurance company had not met its burden of proof, and reinstated benefits. On April 17, 1973, the insurance company again petitioned the Commission, claiming a change in Williams' condition. The Commission once more found probable cause on an *ex parte* basis, and the company for the second time terminated benefits. Williams again did not resort to the state trial courts for an enforcement order. Approximately two months later, the District Court permitted Williams to intervene in this lawsuit and, as noted, reinstated its published opinion. Williams then brought this appeal.[10]

Williams' constitutional attack on the Virginia system for suspending workmen's compensation benefits is premised on the assumption that Rule 13, as amended, permits an employer or insurer to shield itself from a state court enforcement suit under § 65.1–100 of the Act in the interim between a probable cause determination

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[10] State proceedings relating to Williams' entitlement to benefits continued after he was permitted to intervene in this case. In September 1973, following an adversary hearing, the Commission formally terminated Williams' right to benefits. Williams appealed the Commission's ruling to the Virginia Supreme Court. On that appeal, he apparently sought review only of the accuracy of the Commission's determination that he was no longer disabled. In an unreported order issued in December 1973, the Virginia Supreme Court affirmed the Commission's ruling. Williams then filed a petition for certiorari in this Court seeking review of the state court holding. That petition, which is pending, No. 73–6431, *Williams* v. *Richmond Guano Co.*, does not raise the same constitutional arguments that Williams has advanced on this appeal. Indeed, although the same counsel represented Williams on certiorari and on the instant appeal, the petition makes no mention of this case. In light of our disposition of the instant case, we need not decide whether Williams might have addressed his present federal constitutional arguments to the Virginia Supreme Court on its review of the final order of the Commission.

by the Commission and the Commission's ultimate full hearing under § 65.1–99 of the Act. Williams in essence reads the phrase of Rule 13 providing that "benefits shall not be suspended" prior to meeting the requirements of the Rule as meaning that benefits may successfully be suspended once those requirements have been met. If this reading of Rule 13 is incorrect, the complexion of this case changes dramatically, because it is then within the power of a claimant to reinstate benefits simply by petitioning a state trial court to perform a ministerial duty. It may well be that this perfunctory enforcement power is so readily available that a claimant could render any suspension of benefits *de minimis*. If so, those in appellants' class may not be able to establish a constitutionally significant injury under any reading of the Due Process Clause of the Fourteenth Amendment.

Every indication in the record and in the state authorities is that Williams had at his disposal a state court enforcement right that he simply failed to utilize. See n. 4, *supra*. As the Commission declared in its motion to dismiss before the District Court:

> "Virginia's statutory framework does not authorize the *termination* of benefits as alleged by plaintiff, it permits only the initiation of a procedure by which benefits may ultimately be terminated. Should plaintiff be dissatisfied with the temporary cessation of benefits pending an administrative hearing, he is entitled by the provisions of § 65.1–100 to reduce his award to judgment in an appropriate court of record and compel the resumption of benefits. It should be noted that in such a case the court has no discretion and must enter judgment against the employer or his insurer." (Emphasis in original; citations omitted.)

One of the appellees makes the same point in its brief,[11] and Williams' counsel conceded at oral argument that, if read literally, § 65.1–100 of the Act permits no other result.[12] Counsel attempted to overcome this concession by arguing that the Virginia courts have not interpreted Rule 13 recently and that they might today hold that the Rule overrides the language of § 65.1–100.[13] This argument plainly has no merit, since the Commission is without power to promulgate a rule that would repeal a section of the Act.[14] Moreover, it is obvious that the Commission had no such purpose. Rule 13 was designed to protect employees, see *Manchester Bd. & Paper Co.* v. *Parker,* 201 Va. 328, 111 S. E. 2d 453 (1959), not to deprive them of rights existing under the Act. It establishes barriers that an employer or insurer must surmount before it may obtain the § 65.1–99 hearing that is a prerequisite to extinguishing a claimant's right to enforce an award or agreement in state court. The Rule is designed to serve as a screening device for eliminating obviously unmeritorious applications for hearings filed by insurers and employers.[15] It is not an authorization for an

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[11] See Brief of Appellee Aetna Casualty and Surety Co. 5:

"Applicants usually cease paying compensation at the time they file the application based on a change of condition, but the actual award is changed only by order of the Commission following a full hearing or agreement of the parties. Although the award speaks in terms of continuing 'during incapacity,' incapacity can be challenged only before the Commission. Therefore, the employee can enforce payments even after the Commission finds 'probable cause' to believe a change has occurred and schedules a hearing just as he can enforce an award against a recalcitrant employer who suspends payments without probable cause."

[12] Tr. of Oral Arg. 53.

[13] *Id.,* at 52, 53, 55.

[14] See n. 8, *supra.*

[15] The Commission states that the purpose of Rule 13 is to require employers and insurers "to submit sufficient information to the

employer or insurer to suspend payments with assurance that a claimant may not have them reinstated under § 65.1–100 of the Act.

The District Court itself noted that Rule 13 probably does not permit an employer or insurer to escape § 65.1–100 of the Act.[16] It reached appellants' federal constitutional claim only by assuming, *arguendo*, "that the Rule is authority for the employer or insurer to terminate payments . . . ." 347 F. Supp., at 75. Based on what has been brought to our attention and our review of state law, such an assumption in all likelihood would be inaccurate.[17] In any event, that court must resolve any

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Commission of the ultimate merit of the suspension that the possibility of fraudulent, frivolous or arbitrary suspensions is eliminiated [*sic*] and the likelihood of suspension in non-fraudulent but otherwise non-meritorious cases is minimized." Motion to Affirm 3. An *amicus* brief indicates that in about one-third of all Rule 13 applications the Commission finds no probable cause and thus does not permit employers or insurers to have a § 65.1–99 hearing. Brief for American Insurance Association et al. 14.

[16] The court declared:

"Nowhere in the Rule does it authorize or direct the employer or insurer to cease payments before a full hearing. It merely provides the Commission will not hear the petition of the employer or insurer asserting any change in condition if payments under the award have not been made up to the date the application is deemed filed, with an admonition that benefits *shall not* be suspended until the supporting evidence submitted with the petition has been reviewed and it is determined probable cause exists to believe a change has occurred, and if a finding of probable cause is made, the application will then be deemed filed. Here again, it does not authorize or direct suspension of payments, but merely provides the insurer or employer may not have a hearing on an alleged change of condition unless and until the provisions of the Rule are complied with." 347 F. Supp., at 74–75 (emphasis in original).

[17] There is also a question in the record whether a probable cause determination by the Commission under Rule 13 is necessarily *ex parte* and whether a claimant is in fact denied notice of such a

doubts on the issue before reaching appellants' federal claim. If there is significant doubt about the status of state law, the court should consider abstention, as the

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proceeding. The District Court noted this at the outset of its opinion:

"The determination of 'probable cause' is to be made from an examination of 'supporting evidence which constitutes a legal basis' for changing the existing award. Nowhere does the Rule say the determination may be made without notice to the employee and a chance to be heard. The mere fact that such an inference may exist—a determination without notice to the employee and an opportunity to be heard—does not render the language objectionable on its face. . . . The [April 1, 1972] amendment to the Rule is new and the evidence does not indicate what the Commission will require in the way of supporting evidence to constitute a legal basis for establishing probable cause to believe a change in condition has occurred." 347 F. Supp., at 75 (citation omitted).

Moreover, we were informed at oral argument that as a matter of practice insurance companies and the Commission regularly inform claimants that a probable cause determination is pending. Tr. of Oral Arg. 43–44. It was also asserted that the Commission would take into account submissions by a claimant when it makes a probable cause determination. *Id.*, at 44. An *amicus* brief indicates that:

"An employee may, under the present Rule 13, file a written statement or submit evidence opposing the probable cause determination. However, in fact this rarely occurs because the employee normally does not have access to the employer's evidence and because the Commission acts rapidly without waiting to receive any submission from the employee. (However, if an employee does send in information even after probable cause is found, the Commission will evaluate the information. If the information indicates that payment should not be suspended, the Commission informs the carrier and the carrier then continues payments to the claimant)." Brief for American Insurance Association et al. 13–14.

If a claimant receives notice of a Rule 13 application and if the Commission will receive and evaluate his counter-affidavits or medical evidence, the constitutional challenge to the Virginia system would arise in a different light even if no recourse to the state courts were available under § 65.1–100 of the Act. As it did with regard

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state law question may well be dispositive. *E. g., Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498 (1972). If, as appears to be the case, state law clearly provided Williams an adequate state court remedy he did not pursue, then the court will be presented with a wholly different issue from the one it decided. Assuming it is also established that the Commission's Rule 13 procedures are necessarily *ex parte,*[18] then the only question is whether the interruption, if any, of benefits between the time of suspension and the time a claimant obtains reinstatement of benefits by petitioning the state courts is of any controlling significance. If the court determines that a claimant as a general rule may obtain reinstatement of benefits without undue delay following a finding of probable cause by the Commission under Rule 13, then the court should dismiss the complaint.

We indicate no view on the question decided by the District Court—whether the suspension of benefits without notice and an adversary hearing denies due process of law, where the funds at issue are private, not public, where the State requires a finding of probable cause and other procedural safeguards short of a prior adversary hearing, and where a full hearing follows suspension of benefits by a period on the average of one month. The judgment is vacated, and the case is remanded for reconsideration in accordance with this opinion.

It is so ordered.

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to the question of the impact of Rule 13 on a claimant's right to reinstate benefits by resort to the state trial courts, the District Court bypassed this question of state law. It "assum[ed] that the Rule does not provide for notice and a hearing to the employee prior to termination of the award . . . ." 347 F. Supp., at 75. The court should have resolved its doubts on this issue before addressing appellants' federal constitutional argument.

[18] See n. 17, *supra.*

MR. JUSTICE DOUGLAS, dissenting.

This case involves a class action brought on behalf of all persons who, as a result of sustaining employment-related injuries, are recipients of benefits under the Virginia Workmen's Compensation Act, Va. Code Ann. § 65.1–1 *et seq.* The action challenges the constitutionality under the Due Process Clause of the Fourteenth Amendment of that part of the Act allowing a termination of benefit payments by the employer or insurer as a result of an asserted change in condition prior to a full hearing on the alleged change before the Commission. The complaint prayed for an injunction to restrain enforcement of that part of the Act. A three-judge District Court was convened, 28 U. S. C. § 2281, and the challenged portions of the Act were found constitutional, one judge dissenting. 347 F. Supp. 71 (ED Va. 1972).

The Act provides a system allowing the employer and the employee to escape personal injury litigation for on-the-job injuries; it provides for the payment of compensation under fixed rules. Once the Industrial Commission approves an award of benefits, the Commission or any party in interest may move for review of the award "on the ground of a change in condition." Va. Code Ann. § 65.1–99. According to the Commission's Rule 13, all such applications by an employer or insurer to decrease or terminate benefits " 'require that an *ex parte* inquiry be held by the Commission to determine whether probable cause exists for a change in the award before any benefits may be temporarily suspended pending a full hearing.' " 347 F. Supp., at 79.

Suspension of benefits awarded by the Commission is thus permitted upon an *ex parte* determination that "probable cause" for termination exists. The parties here do not dispute that the full hearing conducted by the Commission before final termination, with notice

and opportunity for all parties to be heard, satisfies the requirements of due process. At issue is the *ex parte* suspension of benefits of a Commission's award prior to that final hearing. The Court does not reach the constitutionality of the suspension, because a claimant, whose benefits have been so suspended, may bring suit in a state court to have them reinstated, pursuant to Va. Code Ann. § 65.1–100.

I disagree that the opportunity for a claimant to counteract a termination of benefits payable under an award of the Commission by instituting a state court action is an answer to the constitutional challenge to the termination.* The issue here is the necessity of a hearing *before* termination of benefits. Any state remedy which places upon the worker the burden of going to court to redress a termination which has already occurred is simply not in point. It places the burden of affirmative action upon that segment of society least able to bear it at a time which could not be less opportune. As Judge Merhige said below in dissent: "Judges need not blind themselves to what they know as men. I cannot help but believe that the average workingman in Virginia, who has sustained an injury resulting in a substantial reduction of his weekly income, suffers a grave and immediate loss. . . . The very thought that the *ex parte* proceeding permitted by Rule 13 may result in a cessation of milk delivery, or electric power, or fuel to a working man and his family, shocks my conscience." 347 F. Supp., at 81.

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* In *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), wages earned could not be seized under garnishment by a creditor without prior notice and opportunity to be heard. By the same token, in the present case entitlement to an award made by the Commission should not be taken *ex parte* but only after prior notice and opportunity to be heard if procedural due process is to control as it must by reason of the Fourteenth Amendment.

The opportunity for working-class men and women in that grave situation to enter state court and do battle with the corporate employers and insurers who have already terminated their benefits without a hearing is no meaningful solution to their problem.

Since I find the state remedy inapposite, I dissent from the remand to consider its impact.

ALLEE ET AL. *v.* MEDRANO ET AL.

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

No. 72–1125. Argued November 13, 1973—Decided May 20, 1974

Appellee union and the individual appellees, who attempted from June 1966 to June 1967 to unionize farmworkers and persuade them to support or join a strike, were subjected to persistent harassment and violence by appellants and other law enforcement officers. In July 1967 a state court issued a temporary injunction against appellees, proscribing picketing on or near property of one of the major employers in the area. Appellees brought this federal civil rights action, 42 U. S. C. §§ 1983, 1985, attacking the constitutionality of certain Texas statutes and alleging that appellants and the other officers conspired to deprive appellees of their First and Fourteenth Amendment rights. A three-judge District Court declared five of the statutes unconstitutional and enjoined their enforcement, and in addition permanently enjoined appellants and the other officers from intimidating appellees in their organizational efforts. *Held:*

1. The state court injunction did not moot the controversy, since it was the appellants' and the other officers' conduct, not the injunction, that ended the strike. Nor has the case become moot because appellees abandoned their unionization efforts as a result of the harassment, for appellee union still is a live organization with a continuing goal of unionizing farmworkers. Pp. 809–811.

2. The portion of the District Court's decree enjoining police intimidation of the appellees was an appropriate exercise of the court's equitable powers. Pp. 811–816.

(a) The three-judge court could properly consider the question of police harassment under concededly constitutional statutes and grant relief in the exercise of jurisdiction ancillary to that conferred by the constitutional attack on the statutes that plainly required a three-judge court. Pp. 811–812.

(b) This portion of the decree did not interfere with pending state prosecutions, so that special considerations relevant to cases like *Younger* v. *Harris,* 401 U. S. 37, do not apply, nor was there any requirement that appellees first exhaust state remedies before bringing their federal suit. P. 814.

(c) Irreparable injury was shown as evidenced by the District Court's unchallenged findings of police intimidation, and no remedy at law would adequately protect appellees from such intimidation in their lawful effort to unionize the farmworkers. Pp. 814–815.

(d) Where there is a persistent pattern of police misconduct, as opposed to isolated incidents, injunctive relief is appropriate. *Hague* v. *CIO,* 307 U. S. 496. Pp. 815–816.

3. The portion of the District Court's decree holding five of the state statutes unconstitutional with accompanying injunctive relief must be vacated. Pp. 816–820.

(a) Where three of the statutes have been repealed and replaced by more narrowly drawn provisions since the District Court's decision and there are no pending prosecutions under them, the judgment relating to these statutes will have become moot. Since it cannot be definitely determined from the District Court's opinion or the record whether there are pending prosecutions or even whether the District Court intended to enjoin them if there were, the case is remanded for further findings. If there are no pending prosecutions, the court should vacate the judgment as to the superseded statutes. If some are pending, the court should make findings as to whether they were brought in bad faith, and, if so, enter an appropriate decree subject to review both as to the propriety of federal court intervention and as to the merits of any holding striking down the statutes. Pp. 818–820.

(b) The case is remanded for a determination as to whether there are pending prosecutions under the two remaining statutes, and for further findings and reconsideration in light of *Steffel* v. *Thompson,* 415 U. S. 452. If there are pending prosecutions, the court should determine whether they were brought in bad faith. If there are only threatened prosecutions and only declaratory relief is sought, then *Steffel* controls and no *Younger* showing need be made. P. 820.

347 F. Supp. 605, affirmed in part, vacated in part, and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the result in part and dissenting in part, in which WHITE and REHNQUIST, JJ., joined, *post,* p. 821. POWELL, J., took no part in the decision of the case.

Larry F. York, First Assistant Attorney General of Texas, argued the cause for appellants. With him on

the brief were *John L. Hill,* Attorney General, and *Joe B. Dibrell, Lang A. Baker,* and *Gilbert J. Pena,* Assistant Attorneys General.

Chris Dixie argued the cause and filed a brief for appellees.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a civil rights action,[1] 42 U. S. C. §§ 1983, 1985, attacking the constitutionality of certain Texas statutes, brought by appellees. It alleges that the defendants, members of the Texas Rangers and the Starr County, Texas, Sheriff's Department, and a Justice of the Peace in Starr County, conspired to deprive appellees of their rights under the First and Fourteenth Amendments, by unlawfully arresting, detaining, and confining them without due process and without legal justification, and by unlawfully threatening, harassing, coercing, and physically assaulting them to prevent their exercise of the rights of free speech and assembly. A three-judge court was convened which declared five Texas statutes unconstitutional and enjoined their enforcement. 347 F. Supp. 605, 634. In addition, the court permanently enjoined the defendants from a variety of unlawful practices which formed the core of the alleged conspiracy. Five defendants, all members of the Texas Rangers, have perfected this appeal. 28 U. S. C. § 1253. The appellees

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**John B. Abercrombie* and *William D. Deakins, Jr.,* filed a brief for Brown & Root, Inc., et al. as *amici curiae* urging reversal.

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

[1] Jurisdiction in the District Court was based upon 28 U. S. C. § 1343, and a three-judge court was properly convened under 28 U. S. C. § 2281.

consist of the United Farm Workers Organizing Committee, certain named plaintiffs,[2] and the class they represented in the District Court on whose behalf the judgment was also rendered.[3]

From June 1966 until June 1967, the appellees were engaged in an effort to organize into the union the predominantly Mexican-American farmworkers of the lower Rio Grande Valley. This effort led to considerable local controversy which brought appellees into conflict with the state and local authorities, and the District Court found that as a result of the unlawful practices enjoined below the organizing efforts were crushed. This lawsuit followed.

The factual findings of the District Court are not challenged here. In early June 1966, at the beginning of the organizing effort, Eugene Nelson, one of the strikers' principal leaders, stationed himself at the International Bridge in Roma, Texas, attempting to persuade laborers from Mexico to support the strike. He was taken into custody by the Starr County Sheriff, detained for four hours, questioned about the strike, and was told he was under investigation by the Federal Bureau of

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[2] Named in the caption were Francisco Medrano, Kathy Baker, David Lopez, Gilbert Padilla, Magdaleno Dimas, and Benjamin Rodriguez. Other individual plaintiffs were named in the body of the complaint.

[3] The judgment was also rendered for all members of the plaintiff United Farmworkers Organizing Committee, AFL–CIO, and "all other persons who because of their sympathy for or voluntary support of the aims of said Plaintiff union have engaged in, are engaging in, or may hereafter engage in peaceful picketing, peaceful assembly, or other organizational activities of or in support of said Plaintiff union or who may engage in concert of action with one or more of Plaintiffs for the solicitation of agricultural workers or others to join or make common cause with them in matters pertaining to the work and labor of agricultural workers."

Investigation. No charges were ever filed against him. 347 F. Supp., at 612.

In October 1966, about 25 union members and sympathizers picketed alongside the Rancho Grande Farms exhorting the laborers to join the strike; they were ordered to disperse by the sheriffs although their picketing was peaceful. When Raymond Chandler, one of the union leaders, engaged an officer in conversation contesting the validity of the order, he was arrested under Art. 474 of the Texas Penal Code for breach of the peace. Although the maximum punishment for this offense is a $200 fine, bond was set for Chandler at $500. When two of Chandler's friends came to the courthouse to make bond, they were verbally abused, told they had no business there, and that if they did not leave they would be placed in jail themselves. 347 F. Supp., at 612–613. They left.[4]

Later that month, when the president of the local union and others were in the courthouse under arrest, they shouted "viva la huelga" in support of the strike. A deputy sheriff struck the union official and held a gun at his forehead, ordering him not to repeat those words in the courthouse because it was a "respectful place." *Id.*, at 613. As the strike continued through the year and the Texas Rangers were called into the local area, there were more serious incidents of violence. In May 1967 some union pickets gathered in Mission, Texas, to protest the carrying of produce from the valley on the Missouri-Pacific Railroad. They were initially charged with trespass on private property; this was changed to unlawful assembly, and finally was superseded by complaints of secondary picketing. The Reverend Edgar

[4] This was not the only abuse of the bonding process. Later when Eugene Nelson was arrested for threatening the life of a Texas Ranger, see *infra*, at 807, the deputy sheriff rejected for no valid reason a bond he knew was good.

Krueger and Magdaleno Dimas were taken into custody by the Rangers. As a train passed, the Rangers held these two prisoners' bodies so that their faces were only inches from the train. *Id.*, at 615.

A few weeks later the Rangers sought to arrest Dimas for allegedly brandishing a gun in a threatening manner, and found him by "tailing" Chandler and Moreno, also union members. Chandler was arrested with no explanation as was Moreno, who was also assaulted by Captain Allee at the time. These two men were later charged with assisting Dimas to evade arrest, although by Allee's own testimony they were never told Dimas was sought by the Rangers. Indeed, because the officers had no arrest warrant or formal complaint against Dimas, they could not then arrest him, so they put in a call to a justice of the peace who arrived on the scene and filled out a warrant on forms he carried with him. The Rangers then broke into a house and arrested Dimas and Rodriguez, another union member, in a violent and brutal fashion. Dimas was hospitalized four days with a brain concussion, and X-rays revealed that he had been struck so hard on the back that his spine was curved out of shape. Rodriguez had cuts and bruises on his ear, elbow, upper arm, back, and jaw; one of his fingers was broken and the nail torn off. *Id.*, at 616–617.

Earlier, in May, Nelson had gone down to the Sheriff's office, according to appellees, to complain that the Rangers were acting as a private police force for one of the farms in the area. The three-judge District Court found that Nelson was then arrested and charged with threatening the life of certain Texas Rangers, despite the fact that Captain Allee conceded there was no serious threat. Allee had directed that the charges be filed to protect the Rangers from censure if something happened to Nelson. *Id.*, at 615.

During this entire period the Starr County Sheriff's office regularly distributed an aggressive anti-union newspaper. A deputy driving an official car would pick up the papers each week and bring them back to the Sheriff's office; they would then be distributed by various deputies. *Id.*, at 617. The District Court included copies of the paper in an appendix to its opinion; a typical headline was "Only Mexican Subversive Group Could Sympathize with Valley Farm Workers." The views of the Texas Rangers were similarly explicit. On a number of occasions they offered farm jobs to the union leaders, at the union demand wage, in return for an end to the strike. *Id.*, at 613, 614. The Rangers told one union member that they had been called into the area to break the strike and would not leave until they had done so. *Id.*, at 613.

Among other findings of the three-judge District Court were that the defendants selectively enforced the unlawful assembly law, Art. 439 of the Texas Penal Code, treating as criminal an inoffensive union gathering, 347 F. Supp., at 613; solicited criminal complaints against appellees from persons with no knowledge of the alleged offense, *id.*, at 615; and filed baseless charges against one appellee for impersonating an officer.[5]

The three-judge District Court found that the law enforcement officials "took sides in what was essentially a labor-management controversy." *Id.*, at 618. Although there was virtually no evidence of assault upon

[5] Deputy Paul Pena filed these charges against Reynaldo De La Cruz although Pena had never seen the offense, which was wearing a badge around the union hall. The badge in question was of the shield type, while those worn by the officers were of the star type, and Pena conceded that he knew that De La Cruz and Dimas had worn similar badges when directing traffic at union functions. 347 F. Supp., at 616.

anyone by union people during the strike, the officials "concluded that the maintenance of law and order was inextricably bound to preventing the success of the strike." *Ibid.* Thus, these were not a series of isolated incidents but a prevailing pattern throughout the controversy.

I

It is argued that a state injunction [6] against the appellees, issued on July 11, 1967, ended the strike and thus rendered the controversy moot. That is not the case.

After summarizing the defendants' unlawful practices, the District Court concluded that "[t]he union's efforts collapsed under this pressure in June of 1967 and this suit was filed in an effort to seek relief." *Ibid.* Thus it was the defendants' conduct, which is the subject of this suit, that ended the strike, not the state court injunction, which came afterward. With the protection of the federal court decree, appellees could again begin their efforts.

Moreover, the state court injunction is quite limited. It proscribes picketing by the appellees and those acting in concert with them only on or near property owned by La Casita Farms, Inc., the plaintiff in the state case. But the appellants agreed at oral argument that La Casita is *only one of the major employers in the area,* and some of the incidents involved occurred at other locations. Moreover the state court injunction was only temporary, and on appeal the Texas Court of Civil Appeals, after finding that most of the trial court findings were unsupported, affirmed only because of the limited nature of review, under Texas law, of a temporary injunction. The appellate court concluded that "nothing in this

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[6] *La Casita Farms, Inc.* v. *United Farm Workers Organizing Comm.,* Dist. Ct. of Starr County, Texas, No. 3809, July 11, 1967. Appellants' exhibit D–1 in the District Court.

opinion is to be taken as a ruling that the evidence before us would support the issuance of a permanent injunction . . . ." *United Farm Workers Organizing Comm.* v. *La Casita Farms, Inc.*, 439 S. W. 2d 398, 403. We were advised at oral argument that no permanent injunction against picketing has ever been issued, and we cannot assume that one will be.

Nor can it be argued that the case has become moot because appellees have abandoned their efforts as a result of the very harassment they sought to restrain by this suit. There can be no requirement that appellees continue to subject themselves to physical violence and unlawful restrictions upon their liberties throughout the pendency of the action in order to preserve it as a live controversy. In the face of appellants' conduct, appellees sought to vindicate their rights in the federal court. In June 1967 they rechanneled their efforts from direct attempts at unionizing the workers to seeking the protection of a federal decree, and hence they brought this suit. In their amended complaint, filed in October 1967, they charged that the defendants' conduct, aimed at all those who make common cause with appellees, "chill[ed] the willingness of people to exercise their First Amendment rights," resulting, as the three-judge District Court found, in the "collapse" of the union drive. Appellees continued to prosecute the suit and won a judgment in December 1972. We may not assume that because during this period they directed their efforts to the judicial battle, they have abandoned their principal cause. Rather, the very purpose of the suit was to seek protection of the federal court so that the efforts at unionization could be renewed. It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the

defendants "would be free to return to '[their] old ways.'" *Gray* v. *Sanders*, 372 U. S. 368, 376; *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 43; *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632; *NLRB* v. *Raytheon Co.*, 398 U. S. 25, 27; *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403, 406. The appellee union remains very much a live organization and its goal continues to be the unionization of farmworkers. The essential controversy is therefore not moot, but very much alive.

II

We first consider the provisions of the federal court decree enjoining police intimidation of the appellees.[7]

[7] "It is further ordered, adjudged and decreed by the Court that Defendants, their successors, agents and employees, and persons acting in concert with them, are permanently enjoined and restrained from any of the following acts or conduct directed toward or applied to Plaintiffs and the persons they represent, to-wit:

"A. Using in any manner Defendants' authority as peace officers for the purpose of preventing or discouraging peaceful organizational activities without adequate cause.

"B. Interfering by stopping, dispersing, arresting, or imprisoning any person, or by any other means, with picketing, assembling, solicitation, or organizational effort without adequate cause.

"C. Arresting any person without warrant or without probable cause which probable cause is accompanied by intention to present appropriate written complaint to a court of competent jurisdiction.

"D. Stopping, dispersing, arresting or imprisoning any person without adequate cause because of the arrest of some other person.

"E. As used in this Paragraph 16, Subparagraphs A, B and D above, the term 'adequate cause' shall mean (1) actual obstruction of a public or private passway, road, street, or entrance which actually causes unreasonable interference with ingress, egress, or flow of traffic; or (2) force or violence, or the threat of force or violence, actually committed by any person by his own conduct or by actually aiding, abetting, or participating in such conduct by another person; or (3) probable cause which may cause a Defendant to believe in good faith that one or more particular persons did violate a criminal

This part of the decree complements the other relief, in that it places boundaries on all police conduct, not just that which is based upon state statutes struck down by the federal court. The complaint charged that the enjoined conduct was but one part of a single plan by the defendants, and the District Court found a pervasive pattern of intimidation in which the law enforcement authorities sought to suppress appellees' constitutional rights. In this blunderbuss effort the police not only relied on statutes the District Court found constitutionally deficient, but concurrently exercised their authority under valid laws in an unconstitutional manner. While it is argued that a three-judge District Court could not properly be convened if police harassment under concededly constitutional statutes were the only question presented to it, it could properly consider the question and grant relief in the exercise of jurisdiction ancillary to that conferred by the constitutional attack on the state statutes which plainly required a three-judge court.[8]

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law of the State of Texas other than those specific laws herein declared unconstitutional, or a municipal ordinance."

[8] It is argued that *Public Service Comm'n* v. *Brashear Lines,* 312 U. S. 621, holds that there is no ancillary jurisdiction in three-judge courts. In *Brashear* the plaintiffs refused to pay fees assessed under the statute challenged in their suit; when their attack on the statute failed the defendants sought damages, and the Court held that the damages action should have been heard by a single district judge. This was not a proper exercise of ancillary jurisdiction because the defendants' claim was completely unrelated to the basis on which the three-judge court was convened, and there was no purpose to be served by having it determined by the same tribunal. But we have held that "[o]nce [a three-judge court is] convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court." *United States* v. *Georgia Public Service Comm'n,* 371 U. S. 285, 287–288. Indeed, the three-judge court is required to hear the nonconstitutional attack upon the statute, *Florida Lime Growers* v. *Jacobsen,* 362

That part of the decree in question here prohibits appellants from using their authority as peace officers to arrest, stop, disperse, or imprison appellees, or otherwise interfere with their organizational efforts, without

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U. S. 73, 85; *Rosado* v. *Wyman*, 397 U. S. 397, 402. The instant case is nearly identical to *Milky Way* v. *Leary*, 397 U. S. 98, in which we considered and summarily affirmed the judgment of a three-judge court regarding the assertedly illegal application of a New York statute which was concededly constitutional; this decision was rendered in the exercise of ancillary jurisdiction acquired as a result of a facial attack on a different but related state statute. 305 F. Supp. 288, 296 (SDNY). The part of the decree enjoining police misconduct is intimately bound up with and ancillary to the remainder of the court's judgment, and even *Brashear* held that the court has jurisdiction to hear every question pertaining to the prayer for the injunction "in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties." 312 U. S., at 625 n. 5.

This view was followed in *Perez* v. *Ledesma*, 401 U. S. 82, in which a three-judge District Court had sustained a state obscenity statute against the federal constitutional attack that provided the basis for convening it. But the District Court went on to determine that the arrests of the plaintiffs and the seizures incident thereto were unconstitutional because no prior adversary hearing had been held, 304 F. Supp. 662, 667 (ED La.), and therefore issued an order suppressing the evidence in the state court case. We reviewed that order on the merits, assuming it was properly before us as an appeal "from an order granting or denying . . . an interlocutory or permanent injunction in any civil" action required to be heard by a three-judge court. See 401 U. S., at 89 (STEWART, J., concurring). The basis for ancillary jurisdiction here is at least as compelling.

It is true that we also held in *Perez* that an order striking down a local parish ordinance was not properly before us. But that was an attack on a wholly different enactment not involving detailed factual inquiries common with and ancillary to the constitutional challenge on the state law supporting the three-judge court's jurisdiction. And central to our determination was the finding that the order regarding the parish ordinance "was not issued by a three-judge court, but rather by Judge Boyle, acting as a single district judge." *Id.*, at 87. That is obviously not the case here.

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"adequate cause." "Adequate cause" is defined as (1) actual obstruction of public or private passways causing unreasonable interference, (2) force or violence, or threat thereof, actually committed by any person, or the aiding and abetting of such conduct, or, (3) probable cause to believe in good faith that a criminal law of the State of Texas has been violated, other than the ones struck down in the remainder of the decree. On its face the injunction does no more than require the police to abide by constitutional requirements; and there is no contention that this decree would interfere with law enforcement by restraining the police from engaging in conduct that would be otherwise lawful.

Thus the only question before us is whether this was an appropriate exercise of the federal court's equitable powers. We first note that this portion of the decree creates no interference with prosecutions pending in the state courts, so that the special considerations relevant to cases like *Younger* v. *Harris,* 401 U. S. 37, do not apply here. Nor was there any requirement that appellees first exhaust state remedies before bringing their federal claims under the Civil Rights Act of 1871 to federal court. *McNeese* v. *Board of Education,* 373 U. S. 668; *Monroe* v. *Pape,* 365 U. S. 167. Nonetheless there remains the necessity of showing irreparable injury, "the traditional prerequisite to obtaining an injunction" in any case. *Younger, supra,* at 46.

Such a showing was clearly made here as the unchallenged findings of the District Court show. The appellees sought to do no more than organize a lawful union to better the situation of one of the most economically oppressed classes of workers in the country. Because of the intimidation by state authorities, their lawful effort was crushed. The workers, and their leaders and organizers were placed in fear of exercising their

constitutionally protected rights of free expression, assembly, and association. Potential supporters of their cause were placed in fear of lending their support. If they were to be able to regain those rights and continue furthering their cause by constitutional means, they required protection from appellants' concerted conduct. No remedy at law would be adequate to provide such protection. *Dombrowski* v. *Pfister,* 380 U. S. 479, 485–489.

Isolated incidents of police misconduct under valid statutes would not, of course, be cause for the exercise of a federal court's equitable powers. But "[w]e have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied." *Cameron* v. *Johnson,* 390 U. S. 611, 620, citing *Cox* v. *Louisiana,* 379 U. S. 559; *Wright* v. *Georgia,* 373 U. S. 284; *Edwards* v. *South Carolina,* 372 U. S. 229. Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate. In *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, we affirmed the granting of such relief under strikingly similar facts. There also law enforcement officials set out to crush a nascent labor union. The police interfered with the lawful distribution of pamphlets, prevented the holding of public meetings, and ran some labor organizers out of town. The District Court declared some of the municipal ordinances unconstitutional. In addition, it enjoined the police from "exercising personal restraint over [the plaintiffs] without warrant or confining them without lawful arrest and production of them for prompt judicial hearing . . . or interfering with their free access to the streets, parks, or public places of the city," or from "interfering with the right of the [plaintiffs], their agents and those acting with them, to communicate their views as individuals

to others on the streets in an orderly and peaceable manner." *Id.*, at 517. The lower federal courts have also granted such relief in similar cases.[9]

For reasons to be stated, that portion of this relief based on holdings that certain state statutes are unconstitutional should be modified. In all other respects this portion of the District Court decree was quite proper.[10]

III

Finally, we consider the portion of the District Court's judgment declaring five Texas statutes unconstitutional, with the accompanying injunctive relief. We have been pressed with arguments by the appellants that these parts of the decree are inconsistent with the teachings of *Younger* v. *Harris*, 401 U. S. 37, and *Samuels* v. *Mackell*, 401 U. S. 66. For reasons explained below, it is unnecessary to reach these contentions at present.

Younger and its companion cases are grounded upon the special considerations which apply when a federal

[9] In *NAACP* v. *Thompson*, 357 F. 2d 831 (CA5), the Court of Appeals reversed the denial of relief by the District Court, concluding that defendants believed that plaintiffs' demonstrations "must be suppressed and that, in order to do so, they intend to take advantage of any law or ordinance, however inapplicable or however slight the transgression, and to continue to harass and intimidate [the] plaintiffs." *Id.*, at 838. The findings here show at least that much. In *Lankford* v. *Gelston*, 364 F. 2d 197 (CA4) (en banc), the court ordered the police enjoined from making searches without probable cause after concluding that the "raids were not isolated instances undertaken by individual police officers." *Id.*, at 202. See also *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (CA2).

[10] There was no challenge here to the District Court's conclusion that this was a proper class action, see n. 14, *infra*. Moreover as to this portion of the decree, directed at police misconduct generally rather than to any particular state statute, named plaintiffs intimidated by misconduct may represent all others in the class of those similarly abused, without regard to the asserted state statutory basis for the police actions.

court is asked to intervene in pending state criminal prosecutions. *Steffel* v. *Thompson,* 415 U. S. 452. Although both parties here have assumed the relevance of *Younger,* we have been unable to find any precise indication in the District Court opinion or in the record that there were pending prosecutions at the time of the District Court decision. Indeed, the chronology of events gives rise to the contrary inference. Although the District Court issued its opinion in December 1972, the union effort which was the source of this contest had been interrupted more than five years earlier. It seems likely that any state prosecutions initiated during the effort would have been concluded by that time unless they had been restrained by a temporary order of the federal court. But there is no indication that such an order was ever issued. Moreover, the injunctive relief granted does not appear to be directed at restraining any state court proceedings.[11]

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[11] The decree is not directed at any state prosecutors or state judges with the exception of one justice of the peace whose involvement apparently consisted of issuing warrants without proper basis. Moreover it does not in terms restrain any prosecutions, but only the "arresting, imprisoning, filing criminal charges, threatening to arrest, or ordering or advising or suggesting that [appellees] disperse under authority of any portion of" the statutes struck down. A reading of the complaint suggests that no injunctive relief against pending prosecutions was ever requested. As to whether there in fact were pending prosecutions, our only guidance from the District Court is a passing reference that "plaintiffs [are] now facing charges in the Texas courts . . . ," 347 F. Supp., at 620, but it is impossible to determine against whom any charges might be pending. Indeed, in light of the District Court's failure to treat the statutes separately in their findings of harassment, we cannot be certain that their reference to pending charges here is a finding that there are charges pending under each of the statutes. And if there are state charges pending, we could do no more than speculate as to why trial never commenced during the five-year pendency of the federal suit. This may be the result of an informal agreement with the federal court, or it may indicate

If in fact there were no pending prosecutions, the relief could have impact only on future events in which the challenged statutes might be invoked by the appellants. Since this remains a live, continuing controversy, such relief would ordinarily be appropriate if justified by the merits of the case. *Gray* v. *Sanders,* 372 U. S. 368, 376. But here we have a special situation, for three of the statutes in question have since been repealed by the Texas Legislature. Article 474 of the Penal Code, the breach-of-the-peace provision, has been replaced by §§ 42.01, 42.03, and 42.05 in the new codification; Art. 482, the abusive-language statute, has been replaced by § 42.01; and Art. 439, the unlawful-assembly provision, has been replaced by § 42.02. These new enactments, which replaced the earlier statutes as of January 1, 1974, are more narrowly drawn than their predecessors. Whatever the merits of the District Court's conclusions on the earlier statutes, any challenge to the new provisions presents a different case.

Thus, although there was a live controversy as to these statutes at the time of the District Court decree, if there are no pending prosecutions under the old statutes, the portions of the District Court's judgment relating to them has become moot.[12] But because we cannot determine with certainty whether there are pending prosecutions, or even whether the District Court intended to enjoin them if there were, the proper disposition is to remand the case to the District Court for further find-

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that the State has abandoned any intention to bring these cases to trial. Indeed it may be that state law would bar prosecutions now after such a delay. See Tex. Const., Art. 1, § 10, and Tex. Code Crim. Proc., Art. 32.01. It is therefore appropriate to remand to the District Court for further findings on this question.

[12] In the federal system an appellate court determines mootness as of the time it considers the case, not as of the time it was filed. *Roe* v. *Wade,* 410 U. S. 113, 125.

ings. Cf. *Diffenderfer* v. *Central Baptist Church,* 404 U. S. 412. If there are no pending prosecutions *under these superseded statutes,* the District Court should vacate both the declaratory and injunctive relief as to them. If there are pending prosecutions remaining against any of the appellees,[13] then the District Court should make findings as to whether these particular prosecutions were brought in bad faith, with no genuine expectation of conviction.[14] If it so finds, the court will

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[13] If there are pending prosecutions against members of the class not named in the action, the District Court must find that the class was properly represented. Appellants stipulated in District Court that "plaintiffs are properly representative of the class they purport to represent." Document 33, ¶ 2, Record on Appeal. In this regard we note that the union was itself a named plaintiff, and the judgment was issued on behalf of all of its members.

In this case the union has standing as a named plaintiff to raise any of the claims that a member of the union would have standing to raise. Unions may sue under 42 U. S. C. § 1983 as persons deprived of their rights secured by the Constitution and laws, *American Fed. of State, Co., & Mun. Emp.* v. *Woodward,* 406 F. 2d 137 (CA8), and it has been implicitly recognized that protected First Amendment rights flow to unions as well as to their members and organizers. *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722; cf. *NAACP* v. *Button,* 371 U. S. 415, 428. If, as alleged by the union in its complaint, its members were subject to unlawful arrests and intimidation for engaging in union organizational activity protected by the First Amendment, the union's capacity to communicate is unlawfully impeded, since the union can act only through its members. The union then has standing to complain of the arrests and intimidation and bring this action.

[14] See *Dombrowski* v. *Pfister,* 380 U. S. 479, 490: "[A]ppellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities." See also *Cameron* v. *Johnson,* 390 U. S. 611, 619–620, and *Perez* v. *Ledesma,* 401 U. S. 82, 118 n. 11 (separate opinion of BRENNAN, J.).

enter an appropriate decree which this Court may ultimately review, both as to the propriety of federal court intervention in the circumstances of the case, and as to the merits of any holding striking down the state statutes.

As to the two remaining statutes, Tex. Civ. Stat., Arts. 5154d and 5154f, it is not necessary for other reasons for us at this time to reach any *Younger* questions or the merits of the decision below as to the statutes' constitutionality. As to these also we must remand for a determination as to whether there are pending prosecutions, although if there are none the appellees might still be threatened with prosecutions in the future since these statutes are still in force. But if there are only threatened prosecutions, and the appellees sought only declaratory relief as to the statutes, then the case would not be governed by *Younger* at all, but by *Steffel* v. *Thompson,* 415 U. S. 452, decided this Term.[15] The District Court, of course, did not have the benefit of our opinion in *Steffel* at the time of its decision. We therefore think it appropriate to vacate the judgment of the District Court as to these statutes and remand for further findings and reconsideration in light of *Steffel* v. *Thompson.* If there are pending prosecutions then the District Court should determine whether they were brought in bad faith, for the purpose of harassing appellees and deterring the exercise of First Amendment rights, so that allowing the prosecutions to proceed will result in irreparable injury to the appellees. If there are no pending prosecutions and only declaratory relief is sought, then *Steffel* clearly controls and no *Younger* showing need be made.

[15] We do not reach the question reserved in *Steffel* as to whether a *Younger* showing is necessary to obtain injunctive relief against threatened prosecutions. See generally Note, Federal Relief Against Threatened State Prosecutions: The Implications of *Younger, Lake Carriers* and *Roe,* 48 N. Y. U. L. Rev. 965 (1973).

In summary, we affirm the decree granting injunctive relief against police misconduct, with appropriate modifications to delete reference to the five statutes held unconstitutional by the District Court. We vacate the District Court's judgment as to those five statutes, and remand for further proceedings consistent with this opinion.

It is so ordered.

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

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, concurring in the result in part and dissenting in part.

On June 1, 1966, appellee United Farm Workers Organizing Committee, AFL–CIO (the union), called a strike of farmworkers in Starr County, Texas. After the strike collapsed a year later the union and six individuals active in the strike [1] brought this action in United States District Court for the Southern District of Texas against five Texas Rangers, the Sheriff, two Deputy Sheriffs, and a Special Deputy of Starr County, Texas, and a Starr County Justice of the Peace, alleging that the defendants unlawfully suppressed the plaintiffs and the class of union members and sympathizers they purported to represent in the exercise of their First and Fourteenth Amendment rights of free speech and association during the strike.[2] The suppression was alleged to have been caused in part through the enforcement of six Texas statutes which plaintiffs claimed to have been unconstitutional. The District Court, convened as a

[1] Francisco Medrano, Kathy Baker, David Lopez, Gilbert Padilla, Magdaleno Dimas, and Benjamin Rodriguez.

[2] Jurisdiction is alleged under 28 U. S. C. §§ 1343, 2201, 2202, 2281, and 2284, and 42 U. S. C. §§ 1983 and 1985.

three-judge court, agreed with plaintiffs as to five of the statutes [3] and declared them to be unconstitutional and enjoined their enforcement. The District Court also entered an injunction prohibiting acts of misconduct by defendants and those associated with them. 347 F. Supp. 605 (1972). The five Texas Rangers appealed the District Court's judgment to this Court. We noted probable jurisdiction. 411 U. S. 963 (1973).

The Court today vacates the judgment of the District Court as it deals with the relief granted against the enforcement of the statutes, and remands for further findings and for reconsideration, in the case of the relief granted with respect to two of the statutes, in light of *Steffel* v. *Thompson,* 415 U. S. 452 (1974). In so doing the Court avoids significant legal issues which are fairly presented in this appeal and which must be resolved now. They deserve full treatment for the benefit not only of the District Court on remand but of other courts that must wrestle with the myriad problems presented in applying the doctrine of *Younger* v. *Harris,* 401 U. S. 37 (1971). I undertake to deal with some of those issues. The Court neither accepts nor rejects my reasoning and ultimate resolution of the issues; the majority simply chooses not to reach the issues. I, therefore, concur only in the result of the remand. The Court also affirms the decree granting injunctive relief against police misconduct as slightly modified to reflect the remand. For the reasons stated below I dissent from that result.

I

The facts as found by the District Court are not in dispute. A review of those facts is necessary for an

[3] Tex. Penal Code, Arts. 439 (unlawful assembly), 474 (breach of the peace), and 482 (abusive language) (1952), and Tex. Rev. Civ. Stat., Arts. 5154d (mass picketing) and 5154f (secondary picketing and boycotting) (1971).

understanding of some of the difficult legal issues in this appeal.

(a) On June 8, 1966, one Eugene Nelson, a strike leader, was taken into custody and detained for four hours without any charges being filed against him. While in custody he was questioned about his strike activities and informed that the Federal Bureau of Investigation would be investigating him regarding alleged threats of violence against the local courthouse and buses used to transport Mexican farmworkers to their jobs. When taken into custody, Nelson was at an international bridge attempting to persuade workers to join the strike.

(b) Another union leader, Raymond Chandler, was arrested on October 12, 1966, at a picketing site when he refused to obey an order to disperse and became involved in an altercation using loud and vociferous language to a deputy sheriff of Starr County. Chandler was apparently arrested for violating Tex. Penal Code, Art. 474, the disturbing-the-peace statute. Bond was set at $500 although the maximum punishment for violation of Art. 474 is a $200 fine. Two of Chandler's friends who came to the courthouse to make bond were verbally abused and threatened with arrest by deputy sheriffs.

(c) On October 24, 1966, a deputy sheriff used violence and the threat of deadly force to subdue the president of the local union who, while under arrest and in custody in a courthouse, had just shouted out "viva la huelga" with some fellow arrestees.

(d) On November 9, 1966, the Texas Rangers, who had by this time been called in to help keep peace and order during the pendency of the strike, served a warrant of arrest on a Reynaldo De La Cruz, charging a violation of Tex. Rev. Civ. Stat., Art. 5154f, on November 3, 1966, when members of the union picketed produce packing sheds located on Missouri Pacific Rail-

road tracks. While De La Cruz was under arrest two Texas Rangers made anti-union statements to the arrestee.

(e) Charges were filed by a deputy sheriff against Reynaldo De La Cruz on December 28, 1966, for impersonating an officer by wearing a badge in and around the union hall. The deputy had not witnessed the offense; the badge was of the shield type, while sheriff's deputies and Texas Rangers wore badges in the shape of stars. The deputy who filed the charges admitted that he was aware of his own knowledge that similar badges had been worn by De La Cruz and another when directing traffic at Union functions. Also on that date Librado De La Cruz attempted to grab a nonstriking farm employee by the coat, and was arrested immediately and charged with assault.

(f) On the evening of January 26, 1967, about 20 union supporters were gathered at the Starr County Courthouse to conduct a peaceful prayer vigil in protest of arrests of union members earlier that day. Two members of the group mounted the courthouse steps, and when the group was ordered by a sheriff's deputy to leave the courthouse grounds, the two on the steps refused and were arrested for unlawful assembly, apparently in violation of Tex. Penal Code, Art. 439. One of the two arrested was Gilbert Padilla, the first of the named plaintiffs to enter the chronology. The other was a minister.

(g) On February 1, 1967, nine persons were arrested and charged with disturbing the peace, apparently in violation of Tex. Penal Code, Art. 474, for exhorting field laborers to quit work.

(h) Three months later, on May 11, 1967, other events occurred: appellant Captain A. Y. Allee of the Texas Rangers informed picketing strikers that he could get them

a job within 10 minutes at the union-demanded wage. Also on that day a Texas Ranger shoved two persons connected with the strike, including one of the named plaintiffs, David Lopez. Both of those shoved attempted to file charges of assault but the county attorney determined that there was insufficient evidence to go forward with the complaint.

(i) On the following day, May 12, 1967, strikers were allowed to peacefully picket in accordance with Tex. Rev. Civ. Stat., Art. 5154d, the mass picketing statute, and were allowed to depart after being detained for a short period of time at the picketing site.

(j) On May 12, 1967, Eugene Nelson was arrested for threatening the life of certain Texas Rangers although appellant Allee did not take the threat seriously, and a bond was not accepted until tax records could be checked following the weekend, although there was no valid reason for waiting since the deputy sheriff to whom the bond was tendered knew full well that the surety was a landowner and a person of substance in Starr County.

(k) On May 26, 1967, 14 persons were arrested for trespassing. The charge was later changed to unlawful assembly, and this charge was superseded by a secondary picketing and boycott charge. Ten persons were arrested when they allegedly attempted to block a train carrying produce. The second group of four persons was arrested later in the evening. The four were apparently arrested for unsuccessfully encouraging bystanders to picket and were ultimately charged with secondary picketing and boycotting upon the complaint of a railroad special agent who had left the scene prior to the events which caused this second series of arrests. Included in the group was Magdaleno Dimas, another named plaintiff. The findings recite that a Mrs. Krueger, another one of this second group, was arrested "either for

taking a picture of her husband's arrest or attempting to strike Captain Allee with her camera in her husband's defense." 347 F. Supp., at 615. The four arrestees in the second group were roughly handled. The findings concerning this entire incident are not set out with clarity.

(l) On May 31, 1967, the Texas Rangers arrested apparently 13 pickets for allegedly violating the mass picketing statute, Tex. Rev. Civ. Stat., Art. 5154d.

(m) On June 1, 1967, the Texas Rangers sought and arrested Magdaleno Dimas at the home of Kathy Baker, another named plaintiff, for allegedly having previously brandished a gun in a threatening manner in the presence of a special deputy of Starr County. Two other persons were arrested for assisting Dimas to evade arrest. Benjamin Rodriguez, a third named plaintiff, was arrested at the same time the police apprehended Dimas, although the District Court does not explain why Rodriguez was arrested. The arrests of Dimas and Rodriguez were found by the District Court to have been accomplished in a brutal and violent fashion.

(n) While the strike was in progress the Starr County Sheriff's office assisted in the regular distribution of a strongly anti-union newspaper. Each week deputies would pick up and then locally distribute copies of the paper.

II

In this part, I consider the problems of mootness and standing. In Part III, I discuss *Younger* v. *Harris*, 401 U. S. 37 (1971), and its applicability to the facts of the instant case. The injunction against police misconduct is dealt with in Part IV.

The principal relief granted by the District Court was the declaration that five Texas statutes are unconstitutional and the injunction against their continued enforcement. The District Court determined on the

facts as it found them that appellees had overcome the burden imposed by *Younger* v. *Harris, supra,* and the court was, therefore, empowered to reach the merits of the constitutional challenges to the statutes. Although the District Court recited evidence as to arrests and charges having been filed, the court did not make explicit findings of specific prosecutions pending at the time of the commencement of the action or at the time of its decision. Since the facts of possible prosecutions pending now and at the commencement of the action are crucial to matters of mootness, standing, and the applicability of *Younger* v. *Harris,* we should remand to the District Court for further findings in this area.

Three of the statutes held to be unconstitutional by the District Court have been repealed by the Texas Legislature in a new codification of the Penal Code. Articles 439 (unlawful assembly), 474 (breach of the peace), and 482 (abusive language) can no longer be employed to arrest appellees or members of their class. On remand the District Court should first determine whether appellees had standing to commence this action respecting these three statutes. "It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. *Massachusetts* v. *Mellon,* 262 U. S. 447, 488 (1923)." *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974). Even if by the operation, *i. e.,* arrest and prosecution, or threatened operation of the statutes, one or more appellees had standing to commence this action, the District Court will be obliged to resolve the "question as to the *continuing* existence of a live and acute controversy." *Steffel* v. *Thompson,* 415 U. S., at 459. (Emphasis in original.) See also *Indiana Employment Division* v. *Burney,* 409 U. S. 540 (1973). Since the statutes have been re-

pealed threats of future prosecution can no longer suffice to establish a live controversy. The injury that appellees faced and face must then result from pending prosecutions under each of the challenged statutes now repealed.

The two other statutes held unconstitutional by the District Court, Tex. Rev. Civ. Stat., Arts. 5154d and 5154f, have not been repealed, and I cannot say, on this record, that the possibility of future prosecutions is or is not real. The District Court should examine the standing of appellees to challenge the constitutionality of these statutes under the same guidelines as applicable to the three repealed statutes, except that prosecution remains hypothetically possible under these two statutes. See *Steffel* v. *Thompson, supra,* at 459.

We have recently held in *O'Shea* v. *Littleton, supra,* at 493, that standing must be personal to and satisfied by "those who seek to invoke the power of federal courts." See also *Bailey* v. *Patterson,* 369 U. S. 31, 32–33 (1962); *Long* v. *District of Columbia,* 152 U. S. App. D. C. 187, 190, 469 F. 2d 927, 930 (1972). If an individual named appellee was and is subject to prosecution under one of the challenged statutes, that appellee would have standing to challenge the constitutionality of that statute. If an individual named appellee was and is threatened with prosecution under one of the extant statutes, that appellee would have standing to challenge its constitutionality. Prosecutions instituted against persons who are not named plaintiffs cannot form the basis for standing of those who bring an action. In particular, a named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he

does not share. Standing cannot be acquired through the back door of a class action. *O'Shea* v. *Littleton, supra; Bailey* v. *Patterson, supra,* at 32–33.[4]

In addition to any individual named appellees the union itself may have standing to challenge the constitutionality of the statutes. The Court has long recognized that the First Amendment's guarantees of free speech and assembly have an important role to play in labor disputes. *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940); *Thomas* v. *Collins,* 323 U. S. 516, 532 (1945). I agree with the Court that unions, as entities, in addition to union members and organizers, are entitled to the benefit of those guarantees and that a union may sue under 42 U. S. C. § 1983 to enforce its First Amendment rights.

Here the appellee union alleged in the complaint that it was deprived of its constitutional rights of free speech and assembly by the actions of defendants in enforcing the challenged Texas statutes. If, as claimed by the union, union members were subject to unlawful arrest and threats of arrest in their First Amendment protected organizational activity on behalf of the union, the union would have derivatively suffered or have been in the position to suffer derivatively real injury and would have standing to complain of that injury and bring this action.[5] If a person who was a member of the union both at the time of that person's arrest and at the present time

[4] The Court states that "the District Court must find that the class was properly represented." *Ante,* at 819 n. 13. I take this to mean that the named plaintiff must be an appropriate representative for the class; the named plaintiff must have suffered the same injury as the class purportedly represented, and that injury must be sufficient to accord the named plaintiff standing to sue in his own right. *Bailey* v. *Patterson,* 369 U. S. 31, 32–33 (1962); *Long* v. *District of Columbia,* 152 U. S. App. D. C. 187, 190, 469 F. 2d 927, 930 (1972).

[5] See *Sierra Club* v. *Morton,* 405 U. S. 727, 739 (1972); *NAACP* v. *Button,* 371 U. S. 415, 428 (1963).

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would have standing individually to challenge the constitutionality of one of the five statutes, then the Union itself would have such standing, since the inability of the union member to communicate freely restricts the ability of the union to communicate. As the Court states, *ante,* at 819 n. 13, a union "can act only through its members." [6]

III

(A)

The District Court on remand will be faced with the issue of the applicability of *Younger* v. *Harris,* 401 U. S. 37 (1971), to appellees. Since standing and the continued existence of a live controversy as to the action in relation to the three repealed statutes depend on the pendency of prosecutions under each of the statutes, it will be necessary for appellees to meet *Younger* standards to reach the constitutional merits of any of these statutes.

To the extent that they can prove standing, the individual appellees will be seeking federal court interference in their own state court prosecutions. The union, to the extent that it has standing, will be seeking interference with state court prosecutions of its members. There is an identity of interest between the union and its prosecuted members; the union may seek relief only because of the prosecutions of its members,[7] and

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[6] The union may, of course, be directly subject to criminal prosecution. A union prosecuted or threatened with prosecution *qua* union would be in the same position as an individual litigant with regard to standing and *Younger* v. *Harris,* 401 U. S. 37 (1971). The special rules outlined in this opinion are designed for the more common situation where the union is not injured by being proceeded against directly in the operation of the criminal laws, but, rather, is injured derivatively from prosecutions and threats of prosecutions of its members.

[7] See n. 6, *supra.*

only by insuring that such prosecutions cease may the union vindicate the constitutional interests which it claims are violated. The union stands in the place of its prosecuted members even as it asserts its own constitutional rights. The same comity considerations apply whether the action is brought in the name of the individually arrested union member or in the name of the union, and there is no inequity in requiring the union to abide by the same legal standards as its members in suing in federal court. If the union were unable to meet the requirements of *Younger,* its members subject to prosecution would have a full opportunity to vindicate the First Amendment rights of both the union and its members in the state court proceedings. Any other result would allow the easy circumvention of *Younger* by individuals who could assert their claims of First Amendment violations through an unincorporated association of those same individuals if the association is immune from *Younger* burdens.

This result is not contrary to that reached in *Steffel* v. *Thompson,* 415 U. S. 452 (1974), where the arrest of one demonstrator was not imputed for *Younger* purposes to petitioner who brought suit for declaratory relief against the application of the state statute under which the other demonstrator was arrested and petitioner was only threatened with arrest. There was no indication in that case that petitioner and the arrestee were associated otherwise than in the distribution of antiwar handbills. Furthermore, in *Steffel,* the petitioner departed to avoid arrest while his companion in handbilling stayed. The joint activity of petitioner and his companion in *Steffel* ceased prior to the arrest of the companion. Finally, there is no indication that the arrestee would seek to or be able to vindicate petitioner's rights in the criminal proceeding, and on such a factual showing it would be unfair to re-

quire petitioner to await the outcome of state court proceedings he was not a party to and had no apparent connection with. No such unfairness inheres in this situation where the union might be required to await state criminal trials of its members to vindicate rights it holds in common with those members and was deprived of derivatively only through prosecutions directed at those members.[8]

The process of determining when *Younger* applies becomes more complex when dealing with the two extant statutes. If there are state court prosecutions against the individual appellees or the union under these statutes then *Younger* requirements must be met. If there are prosecutions against members of the union under these statutes (and the union asserts standing derivatively) then the *Younger* hurdle must be met for the reasons stated. If standing of individual appellees or the union to challenge one of the statutes is based *solely* on threatened prosecutions, and the relief pursued below with respect to that statute is declaratory only, then *Younger* does not apply. *Steffel* v. *Thompson, supra.* If appellees seek injunctive relief with respect to the operation or enforcement of a statute for the violation of which prosecutions are threatened, the question of whether *Younger* applies has not been answered by this Court. *Steffel* v. *Thompson, supra,* at 463. Since the issue may well not arise on remand it would be premature now to attempt to resolve it. The development of what relief was and still is requested by appellees is a matter

[8] There is no need now to attempt to further define those situations in which it would be proper to impute the state criminal prosecution of one who is not a federal plaintiff to one who is. The association of the state criminal defendant and the federal plaintiff necessary for imputation will depend upon facts of joint activity and common interest.

best left to the District Court on remand.[9] Finally, if the union sues on the basis of injury to its members, then since, as to a statute challenged, one member must, if suing on his own behalf, meet the requirements of *Younger,* the union must do so, even though other of its members would not be so burdened if they had brought suit individually. The requirements of *Younger* are not to be evaded by artificial niceties.

(B)

The next step in the analysis is to define the burdens imposed by *Younger* v. *Harris.* There we held that before a federal court can interfere with state criminal proceedings great and immediate irreparable injury must be shown "above and beyond that associated with the defense of a single prosecution brought in good faith." 401 U. S., at 48. The injury must include, except in extremely rare cases, "the usual prerequisites of bad faith and harassment." *Id.,* at 53. In *Younger* the Court made clear that the mere fact that the statute under which the federal court plaintiff is being proceeded against is unconstitutional on its face "does not in itself justify an injunction against good-faith attempts to

[9] The relief open to the District Court on remand is limited by the repeal of three of the statutes. Since the statutes no longer exist, they can have no conceivable further "chilling effect" on others in the exercise of their constitutionally protected rights. The justification has disappeared, then, for permitting a litigant to challenge a statute, not because of the unconstitutional application of the statute as to his conduct, but rather because the statute *might* as to *other* persons be applied in an unconstitutional manner. By repealing the statutes, the State has "remove[d] the seeming threat or deterrence to constitutionally protected expression," and the District Court should not apply the "strong medicine" of the overbreadth doctrine, which "has been employed by the Court sparingly and only as a last resort" to hold statutes unconstitutional on their face. *Broadrick* v. *Oklahoma,* 413 U. S. 601, 613 (1973).

enforce it." *Id.*, at 54. The Court described as "important and necessary" the State's task of enforcing statutes which may have an incidental inhibiting effect on First Amendment rights, "against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution." *Id.*, at 52.

Younger principles not only mandate federal court abstention in the case of good-faith enforcement of facially unconstitutional statutes, but also require that claims of unconstitutionality, other than facial invalidity, be presented, in the first instance, to the state court in which the criminal prosecution involving the claimed constitutional deprivation is pending. In *Perez* v. *Ledesma*, 401 U. S. 82 (1971), the United States District Court upheld the challenged Louisiana anti-obscenity statute as valid on its face [10] but ruled that the arrests of the state court defendants-federal court plaintiffs and the seizure of the allegedly obscene materials were invalid because of a lack of a prior adversary hearing on the character of the materials. We held such interference to be improper:

> "The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, see *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), subject, of course, to review by certiorari or appeal in this Court or, in a proper case, on federal habeas corpus. Here Ledesma was free to present his federal constitutional claims concerning arrest and seizure of materials or other matters to the Louisiana courts in the manner permitted in that State. Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary

[10] But see n. 18, *infra*.

> circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate. . . . There is nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good-faith attempt to enforce the State's criminal laws." *Id.*, at 84–85.

A state court is presumed to be capable of fulfilling its "solemn responsibility . . . 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . .' *Robb* v. *Connolly,* 111 U. S. 624, 637 (1884)." *Steffel* v. *Thompson,* 415 U. S., at 460–461. Yet a state court cannot effectively fulfill its responsibility when the prosecutorial authorities take deliberate action, in bad faith, unfairly to deprive a person of a reasonable and adequate opportunity to make application in the state courts for vindication of his constitutional rights. When such an individual, deprived of meaningful access to the state courts, faces irreparable injury to constitutional rights of great and immediate magnitude, either in the immediate suit or in the substantial likelihood of "repeated prosecutions to which he will be subjected," *Younger* v. *Harris,* 401 U. S., at 49, and the injury demands prompt relief, federal courts are not prevented by considerations of comity from granting the extraordinary remedy of interference in pending state criminal prosecutions.

A breakdown of the state judicial system which would allow federal intervention was the allegation of appellants in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). In that case appellants had offered to prove, *inter alia,* that the state prosecutor was holding public hearings at which were being used photostatic copies of illegally seized evidence, which evidence had already been ordered suppressed by a state court. It was alleged further that

the prosecutor was threatening to use other copies of the illegally seized documents before the grand jury to obtain indictments. If proved, the allegations in *Dombrowski* made out a clear case of a breakdown in the checks and balances in the state criminal justice system. The courts had lost control of a prosecutor embarked on an alleged campaign of harassment of appellants, designed to discourage the exercise of their constitutional rights. Under such circumstances federal intervention would be authorized.

To meet the *Younger* test the federal plaintiff must show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in the exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts. The federal plaintiff must prove both bad faith and requisite injury. In judging whether a prosecution has been commenced in bad faith, the federal court is entitled to take into consideration the full range of circumstances surrounding the prosecutions which the federal plaintiff would have the district court interfere with. A federal court must be cautious, however, and recognize that our criminal justice system works only by according broad discretion to those charged to enforce laws. Cf. *Santobello* v. *New York,* 404 U. S. 257 (1971). In this regard, prosecutors will often, in good faith, choose not to prosecute or to discontinue prosecutions for entirely legitimate reasons. An individual, once arrested, does not have a "right" to proceed to trial in order to make constitutional claims respecting his arrest. Conversely, prosecutors may proceed to trial with less than an "open and shut" case against the defendants. In *Cameron* v. *Johnson,* 390 U. S. 611, 621 (1968), the Court noted:

"[T]he question for the District Court was not the

> guilt or innocence of the persons charged; the question was whether the satute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights. The mere possibility of erroneous application of the statute does not amount 'to the irreparable injury necessary to justify a disruption of orderly state proceedings.' *Dombrowski* v. *Pfister, supra,* at 485. The issue of guilt or innocence is for the state court at the criminal trial; the State was not required to prove appellants guilty in the federal proceeding to escape the finding that the State had no expectation of securing valid convictions." (Footnote omitted.)

One step removed from the decision of the prosecutor to prosecute is the decision of the policeman to arrest. The bad-faith nature of a prosecution may sometimes be inferred from the common activity of the prosecutor and the police to employ arrests and prosecutions unlawfully to discourage the exercise of civil rights. The conclusion that the prosecutor and police are acting as one to deprive persons of their rights should not be inferred too readily on the basis of police action alone. Just as is the case with prosecutors, the police possess broad discretion in enforcing the criminal laws. Police cannot reasonably be expected to act upon a realization that a law that they are asked to enforce may be unconstitutional. Even when police cross the line of legality as they enforce statutes they may not be acting willfully; the precise contours of probable cause, like the Fourth Amendment's stricture against unreasonable search and seizure, are far from clear. When a policeman willfully engages in patently illegal conduct in the course of an arrest there still should be clear and convincing proof, before bad faith can be found, that this was part of a common plan or scheme, in concert with the prosecutorial au-

thorities, to deprive plaintiffs of their constitutional rights. Willful, random acts of brutality by police, although abhorrent in themselves, and subject to civil remedies, will not form a basis for a finding of bad faith. The police may, of course, embark on a campaign of harassment of an individual or a group of persons without the knowledge or assistance of the prosecutorial authorities. The remedy in such a case would not lie in enjoining state prosecutions, which would provide no real relief, but in reaching down through the State's criminal justice system to deal directly with the abuses at the primary law enforcement level. Cf. *Lankford* v. *Gelston,* 364 F. 2d 197 (CA4 1966). See, *infra.*

Unless the injury confronting a state criminal defendant is great, immediate, and irreparable, and constitutes harassment, the prosecution cannot be interfered with under *Younger.* The severity of the standard reflects the extreme reluctance of federal courts to interfere with pending state criminal prosecutions.

If the federal court plaintiff seeks injunctive or declaratory relief based on claimed facial invalidity of a statute, the injury may derive not only from the prosecutions the plaintiff is currently facing where a violation of that statute is alleged, but also from the probability of future prosecutions under that statute. Evidence of multiple arrests and prosecutions of persons other than the federal plaintiff under that statute may well bear on the likelihood of future arrests and prosecutions of the federal plaintiff. A state criminal defendant seeking relief against more than one statute, must prove the requisite degree of injury separately for each statute he challenges. Any other rule would encourage insubstantial and multiple attacks on the constitutionality of state statutes by persons hoping to meet the strict standards of injury by accumulating effects under many

state provisions in order to reach the constitutional merits of only one or a few. Furthermore, the considerations of comity which underlie *Younger* would be ill served if a federal court were to employ a showing of bad faith and harassment respecting prosecutions brought under one facially challenged statute as a pretext for searching a State's statutory code for unconstitutional provisions to strike down. Cf. *Boyle* v. *Landry,* 401 U. S. 77, 81 (1971).

The same rule must, perforce, apply when the relief sought is limited in scope, by way of constitutional challenges to statutes as applied, to interference only with specific prosecutions. Since no relief is requested which could affect the future operation or enforcement of a statute (as would be the case when a statute is challenged on its face), the injury must derive solely from the imminence of the single prosecution. The possibility of future arrests, under color of any state statutes, is irrelevant to proof of injury from the challenged prosecution. It will be the rare case, indeed, where a single prosecution provides the quantum of harm that will justify interference. On the other hand, in the case of an attack on the facial constitutionality of a statute, the likely prospect of multiple prosecutions, brought also in bad faith and without hope of conviction, for the violation of the same statute which formed the basis for the pending prosecutions of the federal court plaintiff, might well constitute a sufficient showing of harm to justify a federal court's decision to reach the constitutionality of the statute.

A special problem in proof of *Younger* injury arises with the Union: shall the Union be permitted to aggregate the injuries which all its members will reasonably suffer under the operation of statutes, or must the injury test be satisfied independently by one person who was and is a member of the Union? For the reason ex-

pressed above as to why prosecutions of union members should be attributed to the union for *Younger* purposes—that any other rule would allow of easy and unfair circumvention of *Younger*—the necessary injury must be confronted by any single member.[11] If no single member faces *Younger* injury, then the union, which operates through its members, cannot realistically be said to face such injury.

With these principles in mind it is appropriate to turn to the facts in the instant case. The District Court assumed that *Younger* was applicable, and held, on the basis of the facts that it found, that the requirements of *Younger* had been met. The District Court then proceeded to the constitutional merits of each of the challenged statutes. The District Court's *Younger* holding was in error.

There is no reason for deferring review of the District Court's legal conclusion that *Younger* was satisfied, although the Court would, apparently, allow appellees to have a second chance at proving this element of their case. Although the trial of this action took place in 1968, the District Court's decision had not been handed down by the time *Younger* was issued in 1971. In September 1971, the parties were requested by the District Court to file supplemental briefs on the impact of *Younger* on this cause. In their briefs, appellants argued that the federal court was required under *Younger* to abstain, while appellees argued that *Younger* did not apply to the instant case, and, alternatively, that if *Younger* did apply the test of *Younger*

[11] Proof that other union members have been subject to bad-faith arrests and prosecutions under a statute may be relevant to a claim that a union member faces injury from a substantial likelihood of being arrested and prosecuted in bad faith in the future under color of the same statute. See *supra,* at 838.

had been met. Appellees did not request hearings to adduce further proof relating to *Younger* bad faith and harassment. There is, therefore, no basis for reopening the matter on remand, and taking up valuable judicial time relitigating an issue as to which both sides have had their day in court. Failure to decide now whether appellees have met the *Younger* requirements with respect to challenges to the five statutes whose validity remains in issue would cause needless delay in a lawsuit already far removed in time from the events which precipitated it. With respect to the three repealed statutes, if the action is not moot appellees will be met with a *Younger* burden they have been unable to satisfy. With respect to the two extant statutes, the action will be moot, appellees will have failed to satisfy *Younger,* or appellees will not have had to satisfy *Younger,* only having been threatened with prosecutions. In any case, resolution of the *Younger* issues in this case at this time by the Court will expedite proceedings on remand and remove from this suit controverted matters ripe for judicial determination.

Appellees can, of course, seek to further amend their amended complaint to make further allegations of fact regarding the events which took place during the one-year strike, and the District Court will then have to judge whether after nearly seven years "justice so requires" the amendment. Fed. Rule Civ. Proc. 15 (a).

The findings of fact by the District Court do not justify the legal conclusion that any of the appellees were in danger of suffering harm that was great, immediate, and irreparable, and constituted harassment, with respect to any one of the statutes. Such a showing must be made by each appellee separately regarding each statute. I now turn to an analysis of the facts, first on

the injury-harassment issue, and then to determine whether there was bad faith.

The only persons found to have been arrested for violating Tex. Penal Code, Art. 439 (unlawful assembly), were the two leaders of the January 26, 1967, prayer vigil. For five months thereafter no arrests took place under this statute. At the end of May 1967, 14 other persons [12] were arrested for trespassing, and later charged with unlawful assembly. These latter charges were pending only for three days before being dropped and replaced with charges of secondary picketing and boycotting. The evidence relating to Art. 439 is clearly insufficient to sustain any inference that any appellee, including the union, faced the prospect of repeated arrests in the future under this statute. There is no showing that having to defend the state criminal actions instituted as a result of the arrests that were made under the statute would be in any manner unusually onerous and seriously damaging to any of the arrestees. They were traditional arrests with traditional burdens of defending against charges.

On two occasions arrests were made for violating Tex. Penal Code, Art. 474 (breach of the peace): of Raymond Chandler on October 12, 1966, and of nine persons (apparently not including Mr. Chandler [13]) on February 1, 1967. Thereafter, to June 1967, no arrests were made and no charges were filed for violations of this provision. No inference can be made that any person faces the likelihood of repeated and unwarranted arrests under this statute. There is nothing in the findings to suggest and no reason to believe that the few prosecutions resulting from enforcement of this statute will

[12] See ¶ 7.20 of the amended complaint, and 347 F. Supp. 605, 615 (SD Tex. 1972).

[13] See ¶ 7.13 of the amended complaint, and 347 F. Supp., at 614.

result in any extraordinary hardship differing from that ordinarily associated with the usual defense of a criminal action.

It appears that five members of the Union were arrested for violating Tex. Penal Code, Art. 482 (abusive language) on January 26, 1967, about midway through the strike.[14] The absence of *Younger* injury is even clearer in the challenge to this statute.

Another example of a single instance of enforcement of a statute is the arrest of 13 persons, on one occasion, May 31, 1967, for violating Tex. Rev. Civ. Stat., Art. 5154d (mass picketing). The facts are totally insufficient for a finding of the serious injury required under *Younger*.

Fourteen persons who were arrested for trespassing on May 26, 1967, were later charged with unlawful assembly, but those charges were pending only for three days, at the end of which time the 14 were charged with violating Tex. Rev. Civ. Stat., Art. 5154f, the secondary picketing and boycott provision. The only other time persons were charged with violating Art. 5154f was on November 9, 1966, when a complaint was filed against 10 persons for illegal picketing on November 3, 1966. The District Court does not challenge the grounds for issuing the complaint, but questions only the manner of the custody following the arrest of one of the 10, but that objectionable action had nothing whatever to do with the *offense* for which the individual was arrested. As with the four other statutes found unconstitutional, the test of serious injury under *Younger* is not met by such an inadequate showing of future harm.

Appellees also failed to prove that any prosecutions which might have resulted from these arrests were brought in bad faith. Very nearly all the evidence of

[14] See ¶ 7.11 of the amended complaint, and 347 F. Supp., at 613.

bad faith found by the District Court relates to activities of the Texas Rangers and the Starr County Sheriff's Office, not of the prosecutors. Evidence bearing on the allegations of prosecutorial bad faith is restricted to three items: first, the District Court is mildly critical of an investigation, apparently inadequate, made by the County Attorney of Starr County into the shoving incident of May 11, 1967, and the subsequent decision not to go forward with the complaint which had been filed by the two men who had been shoved; second, a prosecutor conceivably could have had something to do with the excessively high bond set after Raymond Chandler's arrest on October 12, 1966, but there is no finding on this point; third, those arrested on February 1, 1967, for disturbing the peace were informed by the Justice of the Peace, on instructions from the County Attorney, that if they ever appeared in that court again under the same charge they would have to post bond.[15] The record does not contain a finding that prosecutions were brought and then promptly dropped; in one instance persons arrested for violating an unchallenged statute on May 26, 1967, were later charged first with violating Tex. Penal Code, Art. 439, a challenged statute, and subsequently with violating Tex. Rev. Civ. Stat., Art. 5154f, also a challenged statute.

Nor can the isolated instances of police misconduct by Texas Rangers and Starr County Sheriff's deputies found by the District Court turn a series of prosecutions, apparently instituted in good faith (even assuming that all persons who were arrested are or were facing prosecutions as a result of their arrests), into a campaign of terror against the union which could only be remedied

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[15] I can find nothing improper with this warning. A second offense under the same statute is usually looked on more seriously than a first.

by recourse to the federal courts. Excluding the distribution of the antiunion newspaper, which activity could hardly be said to have a direct and immediate disruptive effect on daily picketing and other organizational efforts of the Union, the District Court found only 12 days during this long controversy in which law enforcement or judicial officers of Texas acted in an improper fashion in dealing with strikers or strike sympathizers; this is an average of one per month. One of the "abuses" found by the District Court was the shoving of two persons. On another occasion, May 26, 1967, a camera was confiscated, two men were held near a passing train, and four persons were "roughly handled," 347 F. Supp., at 615, after their arrest by the Texas Rangers. All that happened on May 11, 1967, was that Captain Allee [16] of the Texas Rangers told picketing strikers that he could get them all jobs at the Union-demanded wage. "[P]icketing occurred every day," of the strike with the exception of Sundays, *id.,* at 612, yet no allegedly harassing action was taken against the strikers after June 8, 1966, to October 12, 1966, a period of over four months, or after February 1, 1967, to May 11, 1967, a period of over three months. Finally, it is not surprising that the Texas Rangers and Sheriff's deputies would have found occasions to enforce laws governing picketing, assembly, and the peace of the community, against persons who sought to attain their goals by picketing, assembling, and otherwise making themselves and their cause heard in Starr County. Judging by the infrequency of occasions of enforcement of such laws the strike did not

[16] Captain Allee is, apparently, no longer in active service having retired from the Texas Rangers. According to appellees he is no longer a member of the Texas Department of Public Safety. Defendants' Supplemental District Court Brief 6 (filed Oct. 26, 1971). If appellees no longer have an active controversy with Captain Allee the suit should be dismissed as moot as to him.

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become an object of obsessive interest with the law enforcement personnel in Starr County.

In sum, the findings cannot be read as showing either bad faith or the requisite injury with respect to the operation and enforcement of any of the five challenged statutes. Appellees have totally failed to satisfy the demands of *Younger* v. *Harris,* 401 U. S. 37 (1971).

IV

The District Court not only declared five Texas statutes unconstitutional and enjoined their enforcement, but also issued an injunction against what I shall term "police misconduct." The injunction against police misconduct is issued on behalf of the named plaintiffs and the class they represent,

> "to-wit, the members of Plaintiff United Farm Workers Organizing Committee, AFL–CIO, and all other persons who because of their sympathy for or voluntary support of the aims of said Plaintiff union have engaged in, are engaging in, or may hereafter engage in peaceful picketing, peaceful assembly, or other organizational activities of or in support of said Plaintiff union or who may engage in concert of action with one or more of Plaintiffs for the solicitation of agricultural workers or others to join or make common cause with them in matters pertaining to the work and labor of agricultural workers."

The injunction itself appears as paragraph 16 of the District Court's Final Judgment. This remarkable injunction reads in full as follows:

> "16. It is further ordered, adjudged and decreed by the Court that Defendants, their successors, agents and employees, and persons acting in concert with them, are permanently enjoined and restrained

from any of the following acts or conduct directed toward or applied to Plaintiffs and the persons they represent, to-wit:

"A. Using in any manner Defendants' authority as peace officers for the purpose of preventing or discouraging peaceful organizational activities without adequate cause.

"B. Interfering by stopping, dispersing, arresting, or imprisoning any person, or by any other means, with picketing, assembling, solicitation, or organizational effort without adequate cause.

"C. Arresting any person without warrant or without probable cause which probable cause is accompanied by intention to present appropriate written complaint to a court of competent jurisdiction.

"D. Stopping, dispersing, arresting or imprisoning any person without adequate cause because of the arrest of some other person.

"E. As used in this Paragraph 16, Subparagraphs A, B and D above, the term 'adequate cause' shall mean (1) actual obstruction of a public or private passway, road, street, or entrance which actually causes unreasonable interference with ingress, egress, or flow of traffic; or (2) force or violence, or the threat of force or violence, actually committed by any person by his own conduct or by actually aiding, abetting, or participating in such conduct by another person; or (3) probable cause which may cause a Defendant to believe in good faith that one or more particular persons did violate a criminal law of the State of Texas other than those specific laws herein declared unconstitutional, or a municipal ordinance."

This Court lacks jurisdiction to review this injunction on direct appeal from the District Court; but assuming

this Court has jurisdiction over this portion of the final judgment, it should be remanded to the District Court along with the remainder of its judgment. For my part, if I were to rule on the merits of the injunction against police misconduct I would reverse.

(A)

The Court does not have jurisdiction on appeal over paragraph 16 of the Final Judgment. The proper course is to vacate and remand this portion of the District Court judgment for entry of a fresh judgment from which timely appeal can be taken to the Court of Appeals for the Fifth Circuit. See *Edelman* v. *Townsend,* 412 U. S. 914, 915 (1973).

This Court may hear on appeal

> "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U. S. C. § 1253.

Congress has provided, by 28 U. S. C. § 2281 that no interlocutory or permanent injunction against the enforcement, operation, or execution of a state statute may be granted on the ground of unconstitutionality unless the application for the injunction is heard and determined by a three-judge district court.

"This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.' *Phillips* v. *United States* [312 U. S. 246,] 250." *Goldstein* v. *Cox,* 396 U. S. 471, 478 (1970). In consonance with that philosophy in *Public Service Comm'n* v. *Brashear Lines,* 312 U. S. 621 (1941),

the Court, in a unanimous opinion written by Mr. Justice Black, held that following the denial by a three-judge District Court of the application for an injunction against an allegedly unconstitutional state statute, a single District Judge should have heard the motion to assess damages arising out of the temporary restraining order granted by a single District Judge pending the hearing by the three-judge court on the injunction application.

> "The limited statutory duties of the specially constituted three judge District Court had been fully performed before the motion for assessment of damages was filed. For § 266 of the Judicial Code provides for a hearing by three judges, instead of one district judge, only in connection with adjudication of a very narrow type of controversy—applications for temporary and permanent injunctions restraining state officials from enforcing state laws or orders made pursuant thereto upon the ground that the state statutes are repugnant to the Federal Constitution. The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called. Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judge requirement of § 266 had no application." *Id.,* at 625 (footnotes omitted).

The Court was careful to state that a three-judge court "has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties." *Id.,* at 625 n. 5.

We reaffirmed our *Brashear* holding in *Perez* v. *Ledesma,* 401 U. S. 82 (1971). In *Perez* the appellees were charged in informations filed in state court with vio-

lations of a Louisiana statute and a local parish ordinance. The three-judge Federal District Court "held" the state statute to be facially constitutional,[17] but ruled that arrests and seizures of materials were invalid and entered a suppression order and required the return of the seized materials to the appellees. The District Court also expressed its view that the parish ordinance was invalid. The District Judge who initially referred the action to the three-judge court adopted that court's view and declared the ordinance invalid. We refused to review the decision concerning the local ordinance, stating:

> "Even if an order granting a declaratory judgment against the ordinance had been entered by the three-judge court below (which it had not), that court would have been acting in the capacity of a single-judge court. We held in *Moody* v. *Flowers,* 387 U. S. 97 (1967), that a three-judge court was not properly convened to consider the constitutionality of a statute of only local application, similar to a local ordinance. Under 28 U. S. C. § 1253 we have jurisdiction to consider on direct appeal only those civil actions 'required . . . to be heard and determined' by a three-judge court. Since the constitutionality of this parish ordinance was not 'required . . . to be heard and determined' by a three-judge panel, there is no jurisdiction in this Court to review that question.
>
> "The fact that a three-judge court was properly convened in this case to consider the injunctive relief requested against the enforcement of the state statute, does not give this Court jurisdiction on direct appeal over other controversies where there is no independent jurisdictional base. Even where

[17] See n. 18, *infra.*

> a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them. See *Public Service Comm'n* v. *Brashear Freight Lines,* 306 U. S. 204 (1939)." 401 U. S., at 86–87.[18] (Footnote omitted.)

Brashear Lines and *Perez* are authority for the proposition that a three-judge district court convened under

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[18] The Court would rely on *Milky Way* v. *Leary,* 397 U. S. 98 (1970), for the contrary proposition: that this Court has jurisdiction to review by way of direct appeal ancillary matters decided by a three-judge district court in the exercise of its primary three-judge court review of the constitutional validity of state statutes. The precedential value of our summary affirmance in this case is somewhat diminished by the fact that the *Brashear* problem was not raised in any of appellees' briefs. In fact, one of the appellees, contrary to *Brashear,* appears to concede that this Court possesses jurisdiction to review ancillary matters decided by a properly convened three-judge court. Motion to Dismiss or Affirm of Appellee Frank S. Hogan 9 (No. 992, O. T. 1969). It should be noted, further, that *Perez* v. *Ledesma,* which included a full analysis of ancillary jurisdiction on direct appeal from a three-judge court, was decided after *Milky Way* was summarily affirmed.

Although the District Court in *Perez* stated that it held the state statute to be facially constitutional, the decision of the District Court there that the arrests and seizures were unconstitutional appears in fact to have derived from a broad condemnation of obscenity statutes, including the state statute dealt with in that case, without provisions incorporated therein protecting against criminal liability for acts occurring prior to an adversary judicial determination of obscenity. 304 F. Supp. 662, 667 (ED La. 1969). In effect, then, the District Court in *Perez* acted broadly to render a nullity the Louisiana statute, see *id.,* at 673 (Rubin, J., dissenting), and we, therefore, properly had jurisdiction over the appeal and we properly ruled on the question of whether the District Court could have interfered with state court criminal proceedings by invalidating arrests and seizures made without any prior adversary hearing.

§ 2281 must restrict itself narrowly to the adjudication of those matters which bear directly on the grant or denial of injunctive relief against state statutes. So long as the constitutional claim is not insubstantial the three-judge court may consider nonconstitutional claims urged alternatively in support of the injunctive relief, and we have jurisdiction to review such nonconstitutional portions of the district court's decision. *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73 (1960).[19] Indeed, a three-judge district court would be required to give priority to consideration of a statutory claim over a constitutional claim. *Rosado* v. *Wyman,* 397 U. S. 397, 402 (1970). However, in ruling on nonconstitutional challenges to the operation of state statutes, the district court remains concerned with the same form of relief—injunctive—directed at the same state statutes, as it would if it were ruling on the constitutional claim, and is not, therefore, involved in solving any "other controversy" between the parties. *Perez, supra.* Similarly, the only noninjunctive relief regularly granted by three-judge district courts is a declaratory judgment of unconstitutionality. Not only is a finding of unconstitutionality a necessary concomitant to the enjoining of the operation and enforcement of a state statute on constitutional grounds, but a declaration of unconstitutionality does not reach in its effect beyond the same state statutes which are subject to the injunction.

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[19] The Court in *Jacobsen* reasoned that

"[t]o hold to the contrary would be to permit *one* federal district judge to enjoin enforcement of a state statute on the ground of federal unconstitutionality whenever a non-constitutional ground of attack was also alleged, and this might well defeat the purpose of § 2281." 362 U. S., at 80. (Emphasis in original.)

To hold that a three-judge district court is not required to hear matters unrelated to the determination of whether to enjoin the enforcement of state statutes, would pose no similar risk.

A three-judge district court should not venture beyond these two narrow and necessary exceptions to the general rule that a three-judge court is not required to hear any matters beyond the constitutional challenge to the statute which led to its convening. For example, a three-judge court should not retain jurisdiction to assess damages, *Brashear Lines, supra,* or to insure enforcement of a decree which it entered adjudging the statute unconstitutional. Cf. *Hamilton* v. *Nakai,* 453 F. 2d 152, 160–161 (CA9 1971), cert. denied, 406 U. S. 945 (1972).

Any other rule would

> "encumber the district court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court." *Rosado* v. *Wyman, supra,* at 403.

And any other rule would burden this Court through the unnecessary expansion of our jurisdiction on direct appeal. The District Court's broad injunction against police misconduct in this case without even a semblance of reasoned analysis provides a compelling example of the need for a review by an intermediate appellate tribunal to sort out the facts and issues necessary for review here, should that occur. This case presents a glaring example of an undue burden placed on this Court: to wrestle with difficult legal issues on the basis of a record inadequately digested and analyzed by the District Court and untouched by the scrutiny of the Court of Appeals. From its findings of fact the District Court has drawn almost impressionistic conclusions regarding the scope and impact of the perceived abuses of the Texas law enforcement authorities. It is as if the District Court viewed the conduct of the police and prosecutors as directed against one individual, rather than many, over a brief period of time, rather than a year. This

is an instance where the remoteness of intervening appellate review would have provided a salutary perspective on the factually complex and impassioned debate waged in the trial court.

Even if the general rule were other than that no ancillary relief in aid of injunctive relief should issue from a three-judge court, the injunction against police misconduct in this case could not be considered to be ancillary to the primary relief so as to confer jurisdiction upon this Court on direct appeal. Enjoining enforcement of *state statutes* is a far different enterprise from enjoining *specific police misconduct;* a separate review of the first by this Court and the second by a court of appeals would not result in a fragmented appeal. In the application of the *Younger* v. *Harris,* 401 U. S. 37 (1971), test of "bad faith and harassment" a court would look to certain specific types of police and prosecutorial misconduct as a predicate for reaching the merits of the constitutional attack against state statutes for the violation of which persons are being subject to prosecution. A finding of police harassment necessary for the issuance of an injunction against police misconduct is not quasi-jurisdictional as with *Younger,* but is a determination on the merits. Under *Younger* a court is concerned principally with police and prosecutorial misconduct which denies to a person subject to the state laws a fair opportunity to have his challenges to those laws heard by the state courts, whereas, in weighing whether to issue an injunction against police misconduct, a court would likely be concerned solely with police misconduct which itself denies persons their constitutional rights. While there may be some overlap of facts possibly relevant to the quasi-jurisdictional *Younger* v. *Harris* determination and to the merits of whether to grant an injunction against police misconduct, there would be no identity of

proof, the legal standards to apply to the facts would not be the same, and the nature and object of each determination would be different.

Thus, an injunction against *police misconduct* would not be so related to injunctive relief against the operation of *unconstitutional state statutes* as to require a three-judge district court, even if *Brashear* and *Perez* did not apply to foreclose our consideration of paragraph 16 of the District Court's judgment. Upon the issuance of the declaratory and injunctive relief against the five Texas statutes the three-judge District Court should have dissolved itself and referred the case to the single District Judge to whom the case was originally assigned for whatever further proceedings were necessary.

(B)

Assuming, *arguendo,* that this Court has jurisdiction to review the injunction against police misconduct, the proper course would be to vacate and remand that portion of the District Court's judgment.

The injunction against police misconduct was entered by the District Court without benefit of independent analysis in its findings or opinion. The penultimate paragraph in the opinion of the District Court is the sole discussion provided regarding the injunction that was later entered:

> "In addition, plaintiffs are also entitled to a permanent injunction restraining the defendants not only from any future acts enforcing the statutes here declared void, but also restraining them from any future interference with the civil rights of plaintiffs and the class they represent. Hairston v. Hutzler, 334 F. Supp. 251 (W. D. Pa. 1971)." 347 F. Supp., at 634.

The District Court's catch-all discussion of the facts appears to have been made solely with a view of overcoming the *Younger* barrier to adjudication of appellees' claims and not to establish any legal rationale for the injunction against police misconduct. The injunction's crucial term "adequate cause" is defined, in part, by reference to the declarations of unconstitutionality of the five Texas statutes. Evidently, the District Court's purpose in including this further injunctive relief against police misconduct in its judgment was to protect the integrity and aid in the enforcement of the primary declaratory and injunctive relief ordered by the Court. If the Court now remands to the District Court that part of the judgment which encompasses the primary relief, it would seem logical to also send back for reconsideration the relief which the District Court apparently premised on the existence of the primary relief. Since it is possible that following the remand the District Court will conclude that no relief directed against the operation or enforcement of the challenged statutes should be entered, the District Court should have the opportunity to consider whether the injunction against police misconduct would any longer be appropriate.

(C)

Finally, I am satisfied the District Court abused its discretion when it granted this injunction against police misconduct.

The injunction as entered would allow review by the federal court, by way of contempt proceedings, of claims which would, at the same time, be *sub judice* in ongoing state criminal proceedings. For example, assume a deputy sheriff made an arrest without a warrant and incident to that arrest seized evidence relevant to proof of a criminal offense. The arrestee can seek to suppress

the evidence in his state criminal trial on the ground that the arrest which preceded the seizure was not based upon probable cause. The injunction against police misconduct would permit a trial of the same claim in federal court. Final Judgment, par. 16 (C). *Perez* v. *Ledesma,* 401 U. S. 82 (1971), and *Samuels* v. *Mackell,* 401 U. S. 66 (1971), would require a *Younger* showing before any contempt citation could issue in such a situation. An injunction which contemplates this type of interference in state criminal proceedings is invalid on its face. "A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable." *O'Shea* v. *Littleton,* 414 U. S., at 500. Although *O'Shea* dealt with the propriety of an injunction which would purport to punish as contempt actions of judicial officers taken during the course of state criminal proceedings, the potential for disruption of state criminal proceedings, which was a principal concern in our analysis in *O'Shea,* is just as real a possibility in the case of the District Court's injunction against police misconduct. However accomplished

> "such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized . . . ." *Id.,* at 502.

The injunction, in its paragraph 16 (B), appears to leave no room for temporary restraint for investigation of suspicious activities premised on less than probable cause which this Court has held to be constitutional. *Terry* v. *Ohio,* 392 U. S. 1 (1968).

The problems created by this injunction against police misconduct are manifold. In the enforcement of the in-

junction, the District Court will likely place itself on a collision course with our holdings in *Younger* and *O'Shea*. The fact that the law enforcement officers in Starr County and, indeed, in the whole State of Texas will be compelled to enforce the law only under threat of criminal contempt proceedings in the United States District Court of the Southern District of Texas, illustrates the reckless course of action embarked upon by the District Court in issuing this injunction. Federal district courts were not meant to be super-police chiefs, disciplining individual law enforcement officers for infractions of the rules for arrests and searches and seizures. A district court which improperly intrudes upon local police functions "can undermine the important values of police self-restraint and self-respect." *Long* v. *District of Columbia*, 152 U. S. App. D. C. 187, 194, 469 F. 2d 927, 934 (1972) (Wright, J., concurring).

For all the problems that this injunction is likely to create, I find no reason to believe that it will provide meaningful relief for appellees. Comment, The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L. J. 143 (1968).[20]

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[20] The author of the Comment wrote:

"For tolerated constitutional violations, a prohibitory injunction which only ordered high police officials to refrain from unconstitutional conduct would be useless—the problem lies not in what such officials are doing but in what they are *not* doing. Purely prohibitory injunctions would have to be directed against the subordinate policemen who were acting illegally. But courts would be unable to enforce such injunctions unless they were willing to take over the task of disciplining individual policemen. Such an approach would be highly inefficient since the court's only means of enforcing its orders directly against policemen—a contempt proceeding—would be far too cumbersome and heavy-handed to deal effectively with large numbers of alleged violations.

"If the injunction is to have any utility as a remedy for tolerated police abuse, it must require affirmative action by the officials

The District Court, here, has entered an injunction which is ineffective in providing relief to appellees and likely to provoke extreme resentment among those the injunction restrains [21] and genuine concern among all those who still adhere to the proposition that state and federal relations should be governed by notions of comity.

In any event, I believe that the facts which were found by the District Court [22] do not support the granting of a prohibitory or mandatory injunction against police conduct.

> "[R]ecognition of the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is '"both great and immediate."' [*Younger* v. *Harris,* 401 U. S. 37, 46 (1971).]" *O'Shea* v. *Littleton,* 414 U. S., at 499.

Injunctions against police misconduct should be issued, if at all, in only the most extreme cases, see, *e. g., Lankford* v. *Gelston,* 364 F. 2d 197 (CA4 1966), and then only to the extent that the relief granted would not "unnecessarily involve the courts in police matters and dictate action in situations in which discretion and flex-

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responsible for police conduct." 78 Yale L. J., at 147. (Emphasis in original; footnote omitted.)

[21] The injunction may run against all the judicial officers in Texas. A Justice of the Peace is a named defendant. The injunction enjoins "Defendants, their successors, agents and employees, and persons acting in concert with them." *O'Shea* v. *Littleton,* 414 U. S. 488 (1974), would seem plainly to forbid anticipatory interference by an injunction in the official activities of state judicial officers.

[22] See Parts I and III, *supra.*

ibility are most important. In order for a court to grant an injunction, there should be a showing that there is a substantial risk that future violations will occur." *Long* v. *District of Columbia, supra,* at 192, 469 F. 2d, at 932. The acts of police misconduct were few and scattered. There was no basis for the issuance of an injunction against police misconduct.

Syllabus

AIR POLLUTION VARIANCE BOARD OF COLORADO *v.* WESTERN ALFALFA CORP.

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 73-690. Argued April 25, 1974—Decided May 20, 1974

A state health inspector entered respondent's outdoor premises in the daylight without its knowledge or consent and without a warrant, to make an opacity test of smoke being emitted from respondent's chimneys. In a hearing requested by respondent, the Colorado Air Pollution Variance Board on the basis of such test found the emissions violated the state act, denied respondent a variance, and entered a cease-and-desist order. The County District Court set aside the Board's decision, and the Colorado Court of Appeals affirmed, holding that the test constituted an unreasonable search within the meaning of the Fourth Amendment. *Held:* The Fourth Amendment, made applicable to the States by the Fourteenth, does not extend to sights seen in "the open fields," *Hester* v. *United States,* 265 U. S. 57, 59, such as here where the inspector did not enter the respondent's plant or offices but had sighted what anyone who was near the plant could see in the sky. Pp. 864–865.

510 P. 2d 907, reversed and remanded.

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

William Tucker, Assistant Attorney General of Colorado, argued the cause for petitioner. With him on the brief were *John P. Moore,* Attorney General, *John E. Bush,* Deputy Attorney General, and *John Brown,* Special Assistant Attorney General.

Donald D. Cawelti argued the cause for respondent. With him on the brief was *George D. Blackwood, Jr.*

Edmund W. Kitch argued the cause for the United States as *amicus curiae* urging reversal. On the brief

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were *Solicitor General Bork, Assistant Attorney General Johnson, Harriet S. Shapiro,* and *Edmund B. Clark.**

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

An inspector of a division of the Colorado Department of Health entered the outdoor premises of respondent without its knowledge or consent. It was daylight

*Briefs of *amici curiae* urging reversal were filed by *William J. Brown,* Attorney General, and *Richard P. Fahey* and *John Eufinger,* Assistant Attorneys General, for the the State of Ohio; and by the Attorneys General and other officials for 34 States as follows: *Evelle J. Younger,* Attorney General of California, *Robert H. O'Brien,* Assistant Attorney General, and *Nicholas C. Yost, C. Foster Knight,* and *Daniel J. Taaffe,* Deputy Attorneys General; *Gary K. Nelson,* Attorney General of Arizona; *Jim Guy Tucker,* Attorney General of Arkansas; *Robert K. Killian,* Attorney General of Connecticut; *Arthur K. Bolton,* Attorney General of Georgia; *George Pai,* Attorney General of Hawaii; *W. Anthony Park,* Attorney General of Idaho; *William J. Scott,* Attorney General of Illinois; *Richard C. Turner,* Attorney General of Iowa, and *Clifford Peterson,* Assistant Attorney General; *Vern Miller,* Attorney General of Kansas; *Ed W. Hancock,* Attorney General of Kentucky; *William J. Guste, Jr.,* Attorney General of Louisiana; *Jon A. Lund,* Attorney General of Maine; *Francis B. Burch,* Attorney General of Maryland, and *Martin A. Ferris III,* Special Assistant Attorney General; *Robert H. Quinn,* Attorney General of Massachusetts; *Frank J. Kelley,* Attorney General of Michigan; *Warren R. Spannaus,* Attorney General of Minnesota; *Clarence A. H. Meyer,* Attorney General of Nebraska; *Robert List,* Attorney General of Nevada; *Warren B. Rudman,* Attorney General of New Hampshire, and *Donald W. Stever,* Assistant Attorney General; *William F. Hyland,* Attorney General of New Jersey; *David L. Norvell,* Attorney General of New Mexico; *Louis J. Lefkowitz,* Attorney General of New York; *Robert Morgan,* Attorney General of North Carolina; *Allen I. Olson,* Attorney General of North Dakota; *Larry Derryberry,* Attorney General of Oklahoma; *Lee Johnson,* Attorney General of Oregon; *Richard J. Israel,* Attorney General of Rhode Island; *Daniel R. McLeod,* Attorney General of South Carolina; *Kermit A. Sande,* Attorney General of

and the inspector entered the yard to make a Ringelmann test[1] of plumes of smoke being emitted from respondent's chimneys. Since that time Colorado has adopted a requirement for a search warrant for violations of air quality standards.[2] At the time of the instant inspection the state law required no warrant and none was sought. Indeed, the inspector entered no part of respondent's plant to make the inspection.

A federal Act under the administration of the Environmental Protection Agency (EPA) sets certain air quality standards, 81 Stat. 485, 42 U. S. C. § 1857 *et seq.* The States have the primary responsibility to assure the maintenance of air quality standards, 42 U. S. C. § 1857c–2 (a). Yet if the EPA has approved or promulgated "an applicable implementation" plan, a State may not adopt or enforce a "less stringent" one, 42 U. S. C. § 1857d–1. There is no conflict between a federal standard and state action, the sole question presented being whether Colorado has violated federal constitutional procedures in making the inspection in the manner described.

Respondent requested a hearing before Colorado's Air Pollution Variance Board. The Board held a hearing

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South Dakota; *David M. Pack,* Attorney General of Tennessee; *John L. Hill,* Attorney General of Texas; *Chauncey H. Browning, Jr.,* Attorney General of West Virginia; *Robert W. Warren,* Attorney General of Wisconsin, and *Theodore L. Priebe,* Assistant Attorney General.

[1] This test is prescribed by Colo. Rev. Stat. Ann. § 66–29–5 (Supp. 1967). It requires a trained inspector to stand in a position where he has an unobstructed view of the smoke plume, observe the smoke, and rate it according to the opacity scale of the Ringelmann chart. The person using the chart matches the color and density of the smoke plume with the numbered example on the chart. The Ringelmann test is generally sanctioned for use in measuring air pollution. See cases collected in *Portland* v. *Fry Roofing Co.,* 3 Ore. App. 352, 355–358, 472 P. 2d 826, 827–829.

[2] Colo. Rev. Stat. Ann. § 66–29–8 (2)(d) (Supp. 1969).

and found that respondent's emissions were in violation of the state Act.[3] While the test challenged here was made on June 4, 1969, the Board after noting that Colorado's Health Department had been in conference with respondent "in regard to its air pollution violations since September, 1967," after approving the readings made by the field inspector on the day in question, and after holding that tests submitted in rebuttal by respondent were not acceptable, denied a variance and entered a cease-and-desist order. Respondent sought review in the District Court for Weld County which set aside the Board's decision. The Colorado Court of Appeals affirmed, 510 P. 2d 907; and the Supreme Court denied certiorari.

The petition for certiorari which we granted, 414 U. S. 1156, raised three questions, presenting in differing postures questions under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp* v. *Ohio,* 367 U. S. 643.

The main thrust of the opinion of the Court of Appeals is directed at the Fourth Amendment problem. It held that under *Camara* v. *Municipal Court,* 387 U. S. 523, and *See* v. *City of Seattle,* 387 U. S. 541, the act of conducting the tests on the premises of respondent without either a warrant or the consent of anyone from respondent constituted an unreasonable search within the meaning of the Fourth Amendment. We adhere to *Camara* and *See* but we think they are not applicable here. The field inspector did not enter the plant or offices. He was not inspecting stacks,[4] boilers, scrubbers,

[3] The Air Pollution Variance Board, after the Division of Administration, Colorado Department of Health, had issued a cease-and-desist order, received a request from respondent for a hearing which was granted and held September 11, 1969.

[4] EPA studies indicate that tests of stacks are expensive and may require 300 man-hours of skilled work. 39 Fed. Reg. 9309. And

flues, grates, or furnaces; nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. The Court in *Hester* v. *United States,* 265 U. S. 57, 59, speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in "the open fields." The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded. Under the Noise Control Act of 1972, 86 Stat. 1234, 42 U. S. C. § 4901 *et seq.* (1970 ed., Supp. II), an inspector may enter a railroad right-of-way to determine whether noise standards are being violated. The invasion of privacy in either that case or the present one, if it can be said to exist, is abstract and theoretical. The EPA regulation for conducting an opacity test requires the inspector to stand at a distance equivalent to approximately two stack heights away but not more than a quarter of a mile from the base of the stack with the sun to his back from a vantage point perpendicular to the plume; and he must take at least 25 readings, recording the data at 15- to 30-second intervals. Depending upon the layout of the plant, the inspector may operate within or without the premises but in either case he is well within the "open fields" exception to the Fourth Amendment approved in *Hester.*

The Court of Appeals went on to say that since respondent was not aware that the inspector had been on the premises until the cease-and-desist notice, the hearing it received "lacked the fundamental elements of due process of law, since the secret nature of the investiga-

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see Schulze, The Economics of Environmental Quality Measurement, 23 J. Air Poll. Control Assn. 671 (1973); 40 CFR § 60.85, Method 9.

tion foreclosed Western from putting on any rebuttal evidence." [5]

Whether the Court referred to Colorado "due process" or Fourteenth Amendment "due process" is not clear.[6] If it is the former, the question is a matter of state law beyond our purview. Since we are unsure of the grounds of that ruling we intimate no opinion on that issue. But on our remand we leave open that [7] and any other questions that may be lurking in the case.

Reversed and remanded.

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[5] 510 P. 2d, at 909.

[6] In the District Court's opinion it is said that one challenge to the hearing before the Variance Board was "whether or not due process of law and equal protection of the law contrary to the 14th Amendment of the Constitution of the United States and Section 25, Article 2 of the Constitution of the State of Colorado was denied" by the Board. App. 136.

[7] See *California* v. *Krivda,* 409 U. S. 33; *Department of Mental Hygiene* v. *Kirchner,* 380 U. S. 194; *Minnesota* v. *National Tea Co.,* 309 U. S. 551.

Reporter's Note

The next page is purposely numbered 901. The numbers between 652 and 901 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.

ORDERS FROM APRIL 1 THROUGH MAY 13, 1974

APRIL 1, 1974

Dismissal Under Rule 60

No. 72–1704. PRUITT ET AL. *v.* SOUTH GWINNETT VENTURE ET AL. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 482 F. 2d 389.

Affirmed on Appeal

No. 73–1188. WOHLGEMUTH, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. *v.* WILLIAMS ET AL. Appeal from D. C. W. D. Pa. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 366 F. Supp. 541.

Appeals Dismissed

No. 73–985. WOOD *v.* ATKINSON. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 231 Ga. 271, 201 S. E. 2d 394.

No. 73–1218. PFEIFER ET AL. *v.* BOARD OF EDUCATION OF UPPER SANDUSKY EXEMPTED VILLAGE SCHOOL DISTRICT. Appeal from Ct. App. Ohio, Wyandot County, dismissed for want of substantial federal question.

No. 73–1252. NATIONAL UNION OF HOSPITAL & NURSING HOME EMPLOYEES, AFL–CIO, RWDSU, LOCAL 1199–W. VA., ET AL. *v.* BLUEFIELD SANITARIUM, INC. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–5943. CARUTHERS *v.* CALIFORNIA. Appeal from Ct. App. Cal., 1st 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. 73–6022. DIGGS *v.* ROSS ET AL. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. A–875 (73–6430). BEKENY *v.* UNITED STATES. Application for stay of execution and enforcement of judgment of the United States Court of Appeals for the Second Circuit, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. A–881. SAPERE *v.* UNITED STATES. Application for stay of execution and enforcement of judgment of the United States Court of Appeals for the Second Circuit, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–882. DOE (DYMAN) ET AL. *v.* UNITED STATES. Application for stay of execution and enforcement of judgment of the United States Court of Appeals for the Second Circuit, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. D–20. IN RE DISBARMENT OF LEVIN. It having been reported to the Court that Robert Bernard Levin, of New York City, 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 19, 1973 [414 U. S. 1037], having suspended the said Robert Bernard Levin 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 Robert Bernard Levin 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. Motion of the United States for leave to amend complaint granted. [For earlier orders herein, see, *e. g.*, 414 U. S. 1107.]

No. 72–1554. SUPER TIRE ENGINEERING CO. ET AL. *v.* MCCORKLE ET AL. C. A. 3d Cir. [Certiorari granted, 414 U. S. 817.] Motion of petitioners for leave to file supplemental brief after argument granted.

No. 73–375. OTTE, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES ET AL. C. A. 2d Cir. [Certiorari granted, 414 U. S. 1156.] Motion of respondent city of New York for divided argument granted.

No. 73–582. CITY OF PITTSBURGH *v.* ALCO PARKING CORP. ET AL. Sup. Ct. Pa. [Certiorari granted, 414 U. S. 1127.] Motion of Council for Private Enterprise et al. for leave to file a brief as *amici curiae* granted.

No. 73–696. EMPORIUM CAPWELL CO. *v.* WESTERN ADDITION COMMUNITY ORGANIZATION ET AL.; and

No. 73–830. NATIONAL LABOR RELATIONS BOARD *v.* WESTERN ADDITION COMMUNITY ORGANIZATION ET AL. C. A. D. C. Cir. [Certiorari granted, 415 U. S. 912.] Motion of Department Store Employees Union for leave to file a brief as *amicus curiae* granted.

No. 73–6363. WALDEN ET AL. *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 73–6214. WHITE *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

Certiorari Denied. (See also Nos. 73–1252, 73–5943, and 73–6022, *supra.*)

No. 72–5866. BEEBE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 467 F. 2d 222.

No. 73–826. KING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 484 F. 2d 924.

No. 73–927. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1404.

No. 73–936. HON KEUNG KUNG *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied.

No. 73–958. UNIVERSAL UNDERWRITERS INSURANCE CO. *v.* GRIFFIN. Sup. Ct. La. Certiorari denied. Reported below: 283 So. 2d 748.

No. 73–965. MORAN SHIPPING CO. ET AL. *v.* BLANCO. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 63.

No. 73–1026. ILLINOIS *v.* NUNN. Sup. Ct. Ill. Certiorari denied. Reported below: 55 Ill. 2d 344, 304 N. E. 2d 81.

No. 73–1035. PITCHER ET VIR *v.* IBERIA PARISH SCHOOL BOARD. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 280 So. 2d 603.

No. 73–1100. BURDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 486 F. 2d 302.

No. 73–1101. SHEET METAL WORKERS' INTERNATIONAL ASSN., LOCAL NO. 17, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari denied.

No. 73–1112. ACUNA ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 206, 479 F. 2d 1356.

No. 73–1124. NORMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–1127. VICTORY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 75, 305 N. E. 2d 461.

No. 73–1142. BANK OF COMMERCE OF LAREDO *v.* CITY NATIONAL BANK OF LAREDO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 284.

No. 73–1172. AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS *v.* BLUE CROSS OF FLORIDA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 225.

No. 73–1178. POBLINER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 32 N. Y. 2d 356, 298 N. E. 2d 637.

No. 73–1208. OLDENDORFF *v.* PARKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 375.

No. 73–1211. CARTER ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 255 Ark. 225, 500 S. W. 2d 368.

No. 73–1213. GRACE ET AL. *v.* LUDWIG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 484 F. 2d 1262.

No. 73–1219. BUXTON *v.* AERO MAYFLOWER TRANSIT CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 489 F. 2d 754.

No. 73–1223. BRIZARD *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: See 64 N. J. 156, 313 A. 2d 216.

No. 73–1226. SINCLAIR *v.* BOUGHTON, AKA SINCLAIR. C. A. 6th Cir. Certiorari denied.

No. 73–1228. HANSEN *v.* AHLGRIMM ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–1235. AMERICAN INVESTORS ASSURANCE CO. ET AL. *v.* FIRST NATIONAL BANK OF ALBUQUERQUE ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–1236. MILLS *v.* SUPERIOR COURT OF ALAMEDA COUNTY ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–1268. SKAAR ET UX. *v.* WISCONSIN DEPARTMENT OF REVENUE. Sup. Ct. Wis. Certiorari denied. Reported below: 61 Wis. 2d 93, 211 N. W. 2d 642.

No. 73–1269. LOMBARDI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 658, 303 N. E. 2d 705.

No. 73–1278. TANG *v.* APPELLATE DIVISION OF NEW YORK SUPREME COURT, FIRST DEPARTMENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 138.

No. 73–1328. LAVALLEE, CORRECTIONAL SUPERINTENDENT *v.* MOSHER. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 1346.

No. 73–5681. DORAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 483 F. 2d 369.

No. 73–5728. EHRENBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5832. THOMPSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5867. MASON ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 18 Md. App. 130, 305 A. 2d 492.

No. 73–5884. OWENS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–5941. HENRY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–5955. STEWART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6007. CARRION *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 488 F. 2d 12.

No. 73–6024. VALDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6025. GORHAM *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 282 So. 2d 874.

No. 73–6026. ALEXANDER *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 7th Cir. Certiorari denied.

No. 73–6063. GALLINGTON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 488 F. 2d 637.

No. 73–6067. HAWK *v.* CITY OF DETROIT ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–6069. SPIERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–6102. HORNBECK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 1325.

No. 73–6110. GOODELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6132. RAMOS ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 73–6134. EDWARDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–6142. RADUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 220.

No. 73–6164. FRANCIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 968.

No. 73–6177. MCCOY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–6205. HEIMFORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6216. NELSON *v.* HENDERSON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 551.

No. 73–6219. COLEMAN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 501 S. W. 2d 583.

No. 73–6231. SMILGUS *v.* KENT, JUDGE. C. A. 6th Cir. Certiorari denied.

No. 73–6236. YEAGER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 276.

No. 73–6244. FREEMAN *v.* BLACKLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 73–6245. DAYE *v.* COOPER ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–6248. WALLACE *v.* HOFFMAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 73–6253. HARRISH *v.* CITY OF PARMA. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 72–637. KENNECOTT COPPER CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 467 F. 2d 67.

No. 73–627. MAYES *v.* TEXAS. County Ct. at Law No. 4, Harris County. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–922. BROWN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 208.

No. 73–1255. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* SOLAR FUEL CO. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 481 F. 2d 1399.

No. 73–6011. MCCALVIN ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 55 Ill. 2d 161, 302 N. E. 2d 342.

No. 73–996. ERCKMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

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

Petitioner was convicted after a jury trial of three counts of willfully filing false income tax returns in violation of § 7206 (1) of the Internal Revenue Code, 26 U. S. C. § 7206 (1). An important prosecution witness at trial was Internal Revenue Special Agent Eugene Konrad, who had interviewed petitioner about his tax returns before the prosecution was instituted and whose

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testimony played a major role in establishing the willfulness of petitioner's acts. To facilitate his cross-examination of Konrad, petitioner moved under the Jencks Act, 18 U. S. C. § 3500, for production of Konrad's report to the Chief of the Intelligence Division of the Internal Revenue Service in Chicago concerning the interview. Following the *in camera* examination mandated by § 3500 (c), the District Court refused to order production of the report on the ground that "there is no material . . . in the special agent's report . . . that is reasonably necessary for the defendant's use in making adequate trial preparation."

The Court of Appeals correctly held that "this was an improper test" to apply to determine whether a statement must be produced under § 3500. The court, following its recent decision in *United States* v. *Cleveland,* 477 F. 2d 310, 315–316 (CA7 1973), found that the agent's report was a "statement" within the meaning of the Jencks Act, § 3500 (e), see also *Clancy* v. *United States,* 365 U. S. 312 (1961), and that it therefore must be produced if it "relates to the subject matter as to which the witness has testified." § 3500 (b). Since the Court of Appeals found that "some of it clearly relates to the subject matter of his testimony," it held that Konrad's report should have been produced for the petitioner's use in cross-examination.

But the Court of Appeals then went on to conclude, on the basis of its own examination of the report and without permitting petitioner's counsel to see it, that "the report would have been of no assistance to defendant" and that "there was no inconsistency between Konrad's report and his testimony at trial." It therefore held the failure to produce the report to be harmless error. As to this point, Judge Fairchild disagreed, saying that he would "give defense counsel an opportunity

to see the material erroneously withheld and to attempt to persuade the court that the error was not harmless before the court decides that it was."

In my view, Judge Fairchild was clearly correct. I believe that the procedure employed by the Court of Appeals improperly denied petitioner the opportunity to examine the agent's report and to argue to the court that the error was not harmless.[1] This result is compelled by the rationale of our *Jencks* decision and the statute which followed it. In *Jencks*, this Court held that relevant and material statements of Government witnesses *must* be turned over to the defense regardless of the trial judge's view as to their usefulness in cross-

[1] The Solicitor General, in his Memorandum in Opposition, p. 2 n. 1, claims that petitioner has raised the contention that he should have been permitted to see the Jencks Act materials to enable him to argue that the error was not harmless "for the first time" in this Court, and argues that "petitioner's failure to make that claim below precludes its assertion here." While the principle is of course sound, the Solicitor General has misapprehended the record in this case. True, petitioner did not raise this argument in his brief before the Court of Appeals, obviously because at that time he had no reason to do so; petitioner was then arguing that the trial judge had erred in failing to order the agent's report disclosed to him, and had no reason to anticipate that the Court of Appeals would accept this argument but hold the error to be harmless, particularly since the Government never contended that the error was harmless. But petitioner did raise this argument at the first opportunity, in his petition for rehearing in the Court of Appeals. At p. 3, petitioner argued:

"In the alternative, it is respectfully requested that the defendant be granted a rehearing after 'defense counsel is given an opportunity to see the material erroneously withheld' and then be permitted 'to attempt to persuade the court that the error was not harmless.' (Order, Page 8)."

The next two pages of the petition for rehearing were devoted to argument in support of this contention. Clearly, petitioner has adequately preserved the point for our review.

examination. This Court expressly disapproved of the practice of submitting such statements to the trial judge for an *in camera* examination because "only the defense is adequately equipped to determine the[ir] effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense." *Jencks* v. *United States,* 353 U. S. 657, 668–669 (1957). The Jencks Act expressly reaffirmed this aspect of our decision, see S. Rep. No. 569, 85th Cong., 1st Sess., 3 (1957); *Campbell* v. *United States,* 365 U. S. 85, 92 (1961), and on its face gives the defendant the right to examine any relevant statements of Government witnesses to make his own determination of their usefulness. The Act makes clear that it is not ordinarily part of the business of the federal judiciary to determine whether the defense could effectively utilize a producible statement.

The Act thus recognizes that it is impossible for a judge to be fully aware of all the possibilities for impeachment inhering in a prior statement of a Government witness. Of course, it may not be difficult to lay the witness' testimony and his prior statement side by side to compare them for any obvious inconsistencies. This is apparently what the Court of Appeals did here, in view of its conclusions that there was "no inconsistency between Konrad's report and his testimony at trial." But, as we have said before, this hardly exhausts the utility of the statement for purposes of cross-examination:

> " 'Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process.' " *Clancy* v. *United States,*

supra, at 316, quoting *Jencks* v. *United States, supra,* at 667.

A judge—especially an appellate judge whose only contact with a case is through an examination of a cold record—simply does not have the familiarity with the intimate details of a case necessary to make an adequate determination of the full impeachment value of a witness' prior statement.

> "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event . . . may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances." *Alderman* v. *United States,* 394 U. S. 165, 182 (1969).

Thus, we have held in a closely related context that:

> "[It is not] realistic to assume that the trial court's judgment as to the utility of the material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis* v. *United States,* 384 U. S. 855, 874–875 (1966).

Of course, whenever an appellate court considers whether a Jencks Act error is harmless, it must of necessity move into the usually forbidden territory of speculation about the utility to the defense of the witness' prior statement. But in view of these considerations, we have held that the harmless-error doctrine should be employed with restraint in Jencks Act cases. *Rosenberg* v. *United States,* 360 U. S. 367 (1959). We warned in

Rosenberg that "[a]n appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." *Id.*, at 371.[2] And we rejected the Government's harmless-error argument in *Clancy* v. *United States, supra,* at 316, saying: "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

These same considerations require that the petitioner have the opportunity to examine the agent's report and to attempt to demonstrate to the court that the error was not harmless. Affording the petitioner such an opportunity will minimize to the extent possible the dangers of permitting judicial speculation as to the utility of a statement to the defense. "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the . . . judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny . . . demand[ed]." *Alderman* v. *United States, supra,* at 184.

Our judicial system is designed to function in the context of adversary proceedings. We are therefore reluctant to authorize *ex parte, in camera* determinations unless they are truly necessary to protect important

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[2] In *Rosenberg,* we held that the failure to turn over the statement of a Government witness to the defense was harmless error only because "the very same information was possessed by defendant's counsel as would have been available were error not committed." 360 U. S., at 371. The Court of Appeals in this case acknowledged that *Rosenberg* did not dispose of this case because of the presence of other relevant information in the agent's report which the petitioner did not already have available.

governmental interests. Indeed, in *Dennis* and *Alderman* the Court, in order to avoid *in camera* determinations akin to those approved by the Court of Appeals here, ordered disclosure of the testimony and conversations involved despite substantial countervailing interests—in *Dennis,* the interest in grand jury secrecy, and in *Alderman,* the interest in national security. In sharp contrast, there is no justification here for not disclosing the agent's statement to the defense, and thus no necessity for the *in camera* determination engaged in by the Court of Appeals. The court had already determined that the Jencks Act gave petitioner the right to examine the agent's report in the first place; at that point, no substantial governmental interest in refusing disclosure of the report remained.[3] Yet disclosure of the report is essential to permit the defense to make an informed

[3] In *Palermo* v. *United States,* 360 U. S. 343 (1959), we upheld use of an *in camera* procedure for determining whether a witness' statement is required to be produced under the Jencks Act because such a procedure was necessary to protect one of the Act's major purposes. As Mr. Justice Frankfurter put it:

"The Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of [subsection] (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Id.,* at 354.

Palermo's approval of an *in camera* procedure with respect to the issue involved in that case is surely not determinative here. The issue involved in *Palermo,* whether the statement met the Act's definition of a producible statement, is one that is much more within the traditional competence of the judiciary than is speculation about the utility of a statement to the defense. More important, the witness' statement in this case concededly does come within the definition of those that Congress has ordered to be produced to the defense, and thus there is no substantial governmental interest requiring protection through *in camera* proceedings.

presentation of the uses to which he might have put the report. And without consideration of such a presentation by counsel, the Court of Appeals could not make a truly informed decision on the harmless-error question.

I would grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand this case for further proceedings consistent with this opinion.

No. 73–1093. CALIFORNIA *v.* PASCHALL. Ct. App. Cal., 2d App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 73–1227. LAVALLEE, CORRECTIONAL SUPERINTENDENT *v.* WILLIAMS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 487 F. 2d 1006.

No. 73–1166. HUTTON ET AL. *v.* JOHNS HOPKINS UNIVERSITY; and

No. 73–1249. JOHNS HOPKINS UNIVERSITY *v.* HUTTON ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 488 F. 2d 912.

No. 73–1246. VIRGINIA ELECTRIC & POWER CO. *v.* HADEN, TAX COMMISSIONER. Sup. Ct. App. W. Va. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: —— W. Va. ——, 200 S. E. 2d 848.

No. 73–6252. JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Petition for certiorari denied as untimely filed. 28 U. S. C. 2101 (c). Reported below: 487 F. 2d 212.

Rehearing Denied

No. 73–5688. HART *v.* COINER, WARDEN, 415 U. S. 938;

No. 73–5846. DULLES *v.* DULLES, 415 U. S. 926; and

No. 73–5983. WHATLEY *v.* ANDERSON, WARDEN, ET AL., 415 U. S. 929. Petitions for rehearing denied.

APRIL 2, 1974

Dismissals Under Rule 60

No. 72–619. FARAH MANUFACTURING CO., INC. *v.* EL PASO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, ET AL. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 465 F. 2d 1402.

No. 73–6357. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 487 F. 2d 1398.

APRIL 4, 1974

Dismissal Under Rule 60

No. 73–909. SMALDONE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Petition for writ of certiorari as to petitioner Michael J. Valley dismissed under Rule 60 of the Rules of this Court. Reported below: 485 F. 2d 1333.

APRIL 5, 1974

Dismissals Under Rule 60

No. 73–1337. COTLER *v.* UNITED STATES. C. A. 2d Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 490 F. 2d 1406.

No. 73–6082. OLVERA *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 488 F. 2d 607.

APRIL 12, 1974

Dismissal Under Rule 60

No. 73–1415. PHILLIPS PETROLEUM CO. *v.* STUDIENGESELLSCHAFT KOHLE M. B. H. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

April 15, 1974

Vacated and Remanded on Appeal

No. 70–120. Mailliard et al. *v.* Gonzalez et al. Appeal from D. C. N. D. Cal. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration of the injunction in light of *Steffel* v. *Thompson,* 415 U. S. 452 (1974), and *Zwickler* v. *Koota,* 389 U. S. 241 (1967). Mr. Justice Douglas would affirm the judgment.

No. 71–1511. Norvell, Attorney General of New Mexico *v.* Apodaca. Appeal from Sup. Ct. N. M. Judgment vacated and case remanded for further consideration in light of *Lubin* v. *Panish,* 415 U. S. 709 (1974). Reported below: 83 N. M. 663, 495 P. 2d 1379.

No. 72–193. Fowler et al. *v.* Culbertson. Appeal from D. C. S. C. Judgment vacated and case remanded for further consideration in light of *Lubin* v. *Panish,* 415 U. S. 709 (1974).

No. 72–455. Bush *v.* Sebesta et al.; and

No. 72–5187. Fair *v.* Taylor et al. Appeals from D. C. M. D. Fla. Motion of appellant in No. 72–5187 for leave to proceed *in forma pauperis* granted. Judgment vacated and cases remanded for further consideration in light of *Lubin* v. *Panish,* 415 U. S. 709 (1974); *Storer* v. *Brown,* 415 U. S. 724 (1974); and *American Party of Texas* v. *White,* 415 U. S. 767 (1974).

No. 72–1734. Samkowski, Acting Director, Marion County Department of Public Welfare *v.* Carter et al.; and

No. 73–37. Stanton, Director, Indiana Department of Public Welfare, et al. *v.* Carter et al. Appeals from D. C. S. D. Ind. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment vacated and cases remanded for further consideration in

light of *Edelman* v. *Jordan,* 415 U. S. 651 (1974). MR. JUSTICE DOUGLAS would affirm the judgment for the reasons set forth in his dissent in *Edelman* v. *Jordan,* 415 U. S. 651, 678 (1974). MR. JUSTICE BRENNAN would affirm the judgment.

No. 73–544. LUCAS ET AL. *v.* ARKANSAS. Appeal from Sup. Ct. Ark. Judgment vacated and case remanded for further consideration in light of *Lewis* v. *City of New Orleans,* 415 U. S. 130 (1974). [For dissenting opinion of MR. JUSTICE DOUGLAS, see *infra,* p. 924.] Reported below: 254 Ark. 584, 494 S. W. 2d 705.

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

A North Little Rock policeman on routine patrol drove his car at midnight through a parking lot adjacent to a motel and restaurant. He heard loud language and thought a fight was in progress. He rolled the window down and heard one of the appellants say, "Well, there goes the big, bad mother fucking cops." He ignored this and slowly drove on. The language grew louder. He pulled over behind a large parking sign. An appellant said, "Look at the chicken shit mother fucker hide over there behind that sign." He drove back. An appellant then said, "Now the sorry son-of-a-bitch is going to come back over here." Appellants were arrested and convicted of breaching the peace, in violation of Arkansas law.[1] The Supreme Court of Arkansas affirmed the convictions. 254 Ark. 584, 494 S. W. 2d 705 (1973).

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[1] Ark. Stat. Ann. § 41–1412 (1964) provides:

"If any person shall make use of any profane, violent, vulgar, abusive or insulting language toward or about any other person in his presence or hearing, which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault, [he] shall be deemed guilty of a breach of the peace . . . ."

The Court today vacates the state court judgment and remands for further consideration in light of *Lewis* v. *City of New Orleans,* 415 U. S. 130 (1974). I dissent.

The Arkansas Court has already clearly construed § 41–1412 to apply only to "fighting words," as defined in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942), in *Gooding* v. *Wilson,* 405 U. S. 518, 523–525 (1972), and in *Lewis, supra,* at 132. That court, in *Holmes* v. *State,* 135 Ark. 187, 204 S. W. 846 (1918), held that the statute was narrow in its scope. "It is not sufficient that the language used gives offense to the person to whom or about whom it is addressed, but it must be that which in its ordinary acceptation is calculated to give offense and to arouse to anger." 135 Ark., at 189, 204 S. W., at 847. In its opinion in this case, the Arkansas Court reaffirmed its prior interpretation of the statute:

> "As we construe § 41–1412 it is narrowed to 'fighting words' addressed to, toward, or about another person in his presence or hearing, which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault. We can conceive of no stronger 'fighting words' than those employed by the appellants in this case, and there is substantial evidence they were calculated to arouse to anger the officer to whom they were spoken or addressed. As a matter of fact the appellant, Fred Lucas, admits that if the mildest of the epithets employed by him, were directed to or about him, it would arouse him to anger." 254 Ark., at 589–590, 494 S. W. 2d, at 708.

I am at a loss to understand what this Court further requires in a narrowing interpretation under its version of the *Chaplinsky* standard espoused in *Gooding.*[2] Ap-

[2] The standard of responsibility is not left open as the Court said

parently, not only must every statute regulating speech in the 50 States parrot the wording the Court desires, but a state court must play the role of a ventriloquist's dummy mouthing ceremonial phrases in order to obtain the seal of this Court's approval. There can be no question whatsoever that the Arkansas Court, in this case and in its earlier opinion in *Holmes,* narrowed the statute within the confines of the Court's *Gooding* doctrine,[3] and there is therefore nothing more for that court

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it was in *Gooding* and in *Ashton* v. *Kentucky,* 384 U. S. 195 (1966). The statute punishes language which *in its ordinary acceptation* is calculated to cause a breach of the peace. The statute on its face does not permit or require an inquiry into the respective boiling points of the particular individuals or groups involved in each case, but restricts the factfinder to language that would, in its common or ordinary acceptation, be calculated to cause a breach of the peace.

In *Chaplinsky,* the Court accepted a limiting construction which held that the statute was "not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." 315 U. S., at 573. In its *Holmes* case, the Arkansas Supreme Court pronounced exactly the same standard: "It is not sufficient that the language used gives offense to the person to whom or about whom it is addressed, but it must be that which in its ordinary acceptation is calculated to give offense and to arouse to anger." 135 Ark., at 189, 204 S. W., at 847.

[3] My Brother DOUGLAS asserts that the principle enunciated in *Gooding* and *Lewis* is not "new." It hardly needs stating, however, that the speech at issue in *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), and in *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), and the manner and place of delivery, are not at all similar to the speech at issue in *Chaplinsky, Gooding,* and *Lewis.*

Cantwell was a case where the State sought to punish Jehovah's Witnesses, who claimed to be ordained ministers, for a message which attacked the Catholic religion. This the State could not do. But we expressly noted that the case involved "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse." 310 U. S., at 310. In *Terminiello* the petitioner was arrested for an address made under the auspices of the Christian Veterans of America. Our concern there was the protection of

to do. I disagree with this roughshod treatment of the opinions of the Supreme Court of the State of Arkansas. I would affirm, and not vacate, the court's judgment.

No. 73–893. COMMUNIST PARTY ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL. Appeal from D. C. E. D. Mich. Judgment vacated and case remanded for further consideration in light of *American Party of Texas* v. *White,* 415 U. S. 767 (1974). Reported below: 362 F. Supp. 27.

Affirmed on Appeal

No. 73–1184. SCHWEGMANN BROTHERS GIANT SUPER MARKETS *v.* LOUISIANA MILK COMMISSION; and

No. 73–1259. LOUISIANA MILK COMMISSION *v.* SCHWEGMANN BROTHERS GIANT SUPER MARKETS. Affirmed on appeal from D. C. M. D. La. Reported below: 365 F. Supp. 1144.

No. 73–5954. DOE ET AL. *v.* FLOWERS, COMMISSIONER, DEPARTMENT OF WELFARE. Appeal from D. C. N. D. W. Va. Motion of appellants for leave to proceed *in forma pauperis* granted. Judgment affirmed. MR. JUSTICE DOUGLAS would reverse the judgment for the reasons set forth in his dissent in *Edelman* v. *Jordan,* 415

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ideas, manifestly a part of an informed and free public discourse, and essential to the preservation of responsive government and peaceful, orderly change. We expressly did *not* reach the question "whether the content of petitioner's speech was composed of derisive, fighting words which carried it outside the scope of the constitutional guarantees." 337 U. S., at 3.

Before we rush headlong into scrapping legislative enactments that on their face, or as applied, appear to interfere with some form of speech, we should pause long enough to inquire into "the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, [and] the purported or asserted community interest in preventing that speech." *Lewis* v. *City of New Orleans,* 415 U. S. 130, 136–137 (1974) (dissenting opinion).

U. S. 651, 678 (1974). MR. JUSTICE BRENNAN dissents and would reverse the judgment for the reasons set forth in his dissent in *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974).

Appeals Dismissed

No. 73–955. CEJA *v.* STATE POLICE MERIT BOARD OF ILLINOIS ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 12 Ill. App. 3d 52, 298 N. E. 2d 378.

No. 73–1292. ZANES-EWALT WAREHOUSE, INC. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL. Appeal from Sup. Ct. Tex. dismissed for want of substantial federal question. Reported below: 502 S. W. 2d 689.

No. 73–1302. COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 210, LASALLE COUNTY, ET AL. *v.* MINI, SUPERINTENDENT OF SCHOOLS OF LASALLE COUNTY, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 55 Ill. 2d 382, 304 N. E. 2d 75.

No. 73–1297. EVERSON EVANGELICAL CHURCH OF NORTH AMERICA ET AL. *v.* WESTERN PENNSYLVANIA CONFERENCE OF UNITED METHODIST CHURCH. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 454 Pa. 434, 312 A. 2d 35.

Certiorari Granted—Vacated and Remanded

No. 72–1379. KELLY *v.* OHIO. Ct. App. Ohio, Portage County. Certiorari granted, judgment vacated, and case remanded for further consideration in light of

Lewis v. *City of New Orleans,* 415 U. S. 130 (1974). [For dissenting opinion of MR. JUSTICE DOUGLAS, see *infra,* this page.]

No. 72–1738. ROSEN *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lewis* v. *City of New Orleans,* 415 U. S. 130 (1974). [For dissenting opinion of MR. JUSTICE DOUGLAS, see *infra,* this page.]

No. 73–537. KARLAN *v.* CITY OF CINCINNATI. Sup. Ct. Ohio. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lewis* v. *City of New Orleans,* 415 U. S. 130 (1974). Reported below: 35 Ohio St. 2d 34, 298 N. E. 2d 573.

MR. JUSTICE DOUGLAS, dissenting.*

These cases all involve convictions under ordinances and statutes which punish the mere utterance of words variously described as "abusive," "vulgar," "insulting," "profane," "indecent," "boisterous," and the like.[1] The provisions are challenged as being unconstitutionally vague and overbroad. The "void for vagueness" doctrine is, of course, a due process concept implementing principles of fair warning and nondiscriminatory enforcement. Vague laws may trap those who desire to be law abiding by not providing fair notice of what is prohibited. *Papachristou* v. *City of Jacksonville,* 405 U. S. 156, 162 (1972); *United States* v. *Harriss,* 347 U. S. 612, 617 (1954). They also provide opportunity for arbitrary and discriminatory enforcement since those

*This opinion applies also to No. 73–544, *Lucas* v. *Arkansas, supra,* p. 919; No. 72–1379, *Kelly* v. *Ohio, supra,* p. 923; and No. 72–1738, *Rosen* v. *California, supra,* this page.

[1] The statutes and respective authoritative constructions are set forth in the Appendix to this opinion, *infra,* p. 929.

who apply the laws have no clear and explicit standards to guide them. *Coates* v. *City of Cincinnati,* 402 U. S. 611, 614 (1971); *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, 90–91 (1965). Further, when a vague statute "'abut[s] upon sensitive areas of First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned* v. *City of Rockford,* 408 U. S. 104, 109 (1972), quoting *Baggett* v. *Bullitt,* 377 U. S. 360, 372 (1964), and *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958).

Overbreadth, on the other hand, "offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" *Zwickler* v. *Koota,* 389 U. S. 241, 250 (1967), quoting *NAACP* v. *Alabama,* 377 U. S. 288, 307 (1964). A vague statute may be overbroad if its uncertain boundaries leave open the possibility of punishment for protected conduct and thus lead citizens to avoid such protected activity in order to steer clear of the uncertain proscriptions. *Grayned* v. *City of Rockford, supra,* at 109; *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965). A statute is also overbroad, however, if, even though it is clear and precise, it prohibits constitutionally protected conduct. *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508–509 (1964); *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960).

The statutes before us punish the mere utterance of words. They thus attempt to regulate the delicate area of speech and they are all overbroad since "as authoritatively construed [they are] susceptible of application to speech, although vulgar or offensive, that is protected by

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the First and Fourteenth Amendments." *Gooding* v. *Wilson,* 405 U. S. 518, 520 (1972). We have consistently held that "[i]t matters not that the words [the speaker] used might have been constitutionally prohibited under a narrowly and precisely drawn statute." *Ibid.* In the area of free speech, the value of protected expression is deemed to justify "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister, supra,* at 486. The specific conduct involved is thus not relevant. "It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech." *Coates* v. *City of Cincinnati, supra,* at 616.

The landmark case in the area is *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), which involved the conviction of a Jehovah's Witness for violation of a statute prohibiting "offensive or derisive" speech. There the State Supreme Court had narrowed the statute by construing it as applicable only to what were referred to as "fighting words" [2]—words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.,* at 572. We held that the statute, as thus "narrowly drawn and limited," [3] *id.,* at 573, was constitutional.

We explained the rationale of *Chaplinsky*'s fighting-words limitation in *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), which involved a conviction under a Chicago disorderly conduct ordinance. The case grew out of a

[2] See, *e. g., State* v. *Brown,* 68 N. H. 200, 38 A. 731 (1895).

[3] See *Cantwell* v. *Connecticut,* 310 U. S. 296, 311 (1940).

disturbance following a public address by Terminiello under the auspices of the Christian Veterans of America. In reversing the conviction, we explained:

> "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> "Accordingly a function of free speech under our system of government is to invite dispute . . . . Speech is often provocative and challenging. . . . That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire* . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.*, at 4.

The constitutional necessity of limiting this type of statute to words which " 'by their very utterance inflict injury or tend to incite an immediate breach of the peace' " was expressly reaffirmed in *Gooding* v. *Wilson, supra,* at 522, where we held facially unconstitutional a Georgia statute which proscribed "opprobrious" or "abusive" language and which had been held by state courts to apply to utterances which were "not 'fighting' words as *Chaplinsky* defines them." *Id.*, at 525.

This principle was again enunciated in *Lewis* v. *City of New Orleans,* 415 U. S. 130 (1974), and four cases are today remanded for reconsideration in light of *Lewis.* If the principle announced in *Lewis* were new, I would agree with this disposition. Only state courts can construe these statutes since "we lack jurisdiction authoritatively to construe state legislation." *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 369 (1971). Before we strike down a statute as facially unconstitutional,

the state courts should have the opportunity to construe the statute, if possible, as within our constitutional pronouncements. Under our constitutional scheme, federal courts were not designed as the only protectors of federal rights. Article VI, cl. 2, expressly directs that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus "[s]tate courts are bound equally with the federal courts" to protect federal rights. *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 247 (1952). The decisions of this Court are to guide state courts in the exercise of this duty.

But experience has shown that such guidance is often unheeded. The duty of the States in this area has long been clear. After *Chaplinsky,* federal intervention in *Terminiello* should have been unnecessary. After *Chaplinsky* and *Terminiello, Gooding* should have been unnecessary. Yet after them all, the State Supreme Court in *Lewis,* on reconsideration in light of *Gooding,* again failed to narrow the ordinance and affirmed a conviction which we found necessary to reverse. The principle in *Lewis* was not new; it was not new in *Gooding,* or in *Terminiello,* or even in *Chaplinsky.*[4] State courts, however, have consistently shown either inability or unwillingness to apply its teaching. I thus see nothing to be gained by state court reconsideration in light of *Lewis.* I would reverse these judgments out of hand.

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[4] See, *e. g., Cantwell* v. *Connecticut, supra.* Nor were *Gooding* and *Lewis* the only recent instances of its reaffirmance. See, *e. g., Cohen* v. *California,* 403 U. S. 15, 20 (1971); *Bachellar* v. *Maryland,* 397 U. S. 564, 567 (1970); *Street* v. *New York,* 394 U. S. 576, 592 (1969).

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Karlan v. *City of Cincinnati,* No. 73–537, involves a violation of Cincinnati Municipal Code § 901–D4, which provides:

> "No person shall wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the city or any portion thereof . . . ."

The ordinance was held by the court below, 35 Ohio St. 2d 34, 298 N. E. 2d 573 (1973), to withstand facial constitutional attack on the authority of *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163, 168, 285 N. E. 2d 714, 718–719 (1972), which, rather than limit the ordinance in *Chaplinsky* terms, gave it blanket approval: "As reasonably construed, the ordinance neither prohibits the lawful exercise of any constitutional right nor escapes the understanding of any person of 'common intelligence' who desires to obey it." The ordinance thus remains unconstitutionally overbroad since it prohibits words which are merely "rude" and has not been limited to words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Lucas v. *Arkansas,* No. 73–544, involves a violation of Ark. Stat. Ann. § 41–1412 (1964), which provides:

> "If any person shall make use of any profane, violent, vulgar, abusive or insulting language toward or about any other person in his presence or hearing, which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to

> cause a breach of the peace or assault, [he] shall be deemed guilty of a breach of the peace . . . ."

In purporting to limit the statute, the court below held:

> "As we construe § 41–1412 it is narrowed to 'fighting words' addressed to, toward, or about another person in his presence or hearing, *which language in its common acceptation is calculated* to arouse to anger the person about or to whom it is spoken or addressed or *to cause a breach of the peace* or an assault." 254 Ark. 584, 589, 494 S. W. 2d 705, 708 (1973). (Emphasis added.)

This construction leaves the statute overbroad since it permits punishment for words which, though not likely to cause a breach of the peace, are "calculated" to do so. In striking down a similar construction in *Gooding* v. *Wilson,* we said: " '[T]o make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility.' " 405 U. S. 518, 527, quoting *Ashton* v. *Kentucky,* 384 U. S. 195, 200 (1966). The construction here does not even require that the words be calculated to cause a breach of the peace; it is enough that they are calculated to arouse anger in the addressee.

Kelly v. *Ohio,* No. 72–1379, involves a violation of Codified Ordinances of the City of Kent § 509.02 (A) which provides:

> "[N]o person shall willfully conduct himself in a noisy, boisterous or other disorderly manner by either words or acts which disturb the good order and quiet of the Municipality."

While finding that petitioner's language constituted "fighting words," the court below did not construe the ordinance as limited to such words. The court below

merely held that petitioner's words could constitutionally be proscribed:

> "Defendant, maintaining freedom of speech is constitutionally protected, declares the ordinance is unconstitutional because it punishes both protected and unprotected conduct (i. e., by words or acts). We do not find the ordinance overbroad as to the words used herein, nor constitutionally protected premised on the evidence before the Court, hence neither the words nor acts herein are found to be constitutionally protected." Ohio Ct. App., No. 466 (July 31, 1972).

But, "[i]t matters not that the words [petitioner] used might have been constitutionally prohibited under a narrowly and precisely drawn statute," for petitioner may attack an overly broad statute without demonstrating that his own conduct could not be regulated by a more precisely drawn act. *Gooding* v. *Wilson,* 405 U. S., at 520.

Rosen v. *California,* No. 72–1738, involves Calif. Penal Code § 415, which provides:

> "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct . . . or use[s] any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor . . . ."

There has been no limiting construction of the "vulgar" language component of the provision. The jury here was instructed that: "Vulgar means coarse, ill-bred, ill-mannered, rude . . . . Profane means serving to debase or defile that which is holy or worthy of reverence . . . .

Indecent means . . . hardly suitable." See L. A. Super. Ct. App. Dept., No. CR A 11557 (Jan. 2, 1973). It hardly needs stating that States are not free to penalize speech merely because it is "coarse," "ill-bred," or "hardly suitable."

No. 72–1671. McConnell, District Attorney of Waukesha County, Wisconsin *v.* Unitarian Church West et al. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Steffel* v. *Thompson*, 415 U. S. 452 (1974). Mr. Justice Douglas dissents from the remand. Reported below: 474 F. 2d 1351.

Certiorari Granted—Reversed and Remanded. (See No. 73–1131, *ante*, p. 100.)

Miscellaneous Orders

No. 31, Orig. Utah *v.* United States. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs, may be filed by the parties on or before May 15, 1974. Reply briefs, if any, may be filed on or before May 29, 1974. [For earlier orders herein, see, *e. g.*, 406 U. S. 940.]

No. 73–362. Morton, Secretary of the Interior, et al. *v.* Mancari et al. [Probable jurisdiction noted, 414 U. S. 1142]; and

No. 73–364. Amerind *v.* Mancari et al. [Probable jurisdiction noted, 415 U. S. 946.] Appeals from D. C. N. M. Motion of appellants for additional time for oral argument and for divided argument granted and 15 additional minutes allotted for that purpose. Appellees also allotted 15 additional minutes for oral argument. Motion of Mexican American Legal Defense & Educational Fund for leave to file a brief as *amicus curiae* granted.

No. 73–437. MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 73–457. PUBLIC SERVICE COMMISSION OF NEW YORK *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 73–464. MUNICIPAL DISTRIBUTORS GROUP *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. [Certiorari granted, 414 U. S. 1142.] Motion of petitioners for divided argument granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 73–477. GERSTEIN *v.* PUGH ET AL. C. A. 5th Cir. [Certiorari granted, 414 U. S. 1062.] Case restored to calendar for reargument.

No. 73–596. PEARSON ET AL. *v.* ECOLOGICAL SCIENCE CORP. ET AL. C. A. 5th Cir. Application for stay and injunction presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Motion of Thomas G. Jenny for leave to intervene denied.

No. 73–679. WOLFF, WARDEN, ET AL. *v.* MCDONNELL. C. A. 8th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of respondent to vacate order allowing the Solicitor General to participate in oral argument as *amicus curiae* denied. Motions of Guadalupe Guajardo, Jr., for leave to proceed *in forma pauperis* and for leave to file a brief as *amicus curiae* denied.

No. 73–831. WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO. C. A. 3d Cir. [Certiorari granted, 414 U. S. 1128.] Motion of Harry C. Batchelder, Jr., to permit John J. Witmeyer III to present oral argument *pro hac vice* on behalf of respondent granted. Consideration of respondent's suggestion of mootness deferred to hearing of case on the merits.

No. 73–841. HOLDER, U. S. DISTRICT JUDGE *v.* BANKS. C. A. 7th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of petitioner to dispense with printing appendix

and to proceed on original record granted. Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted. Motion of petitioner for divided argument denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 73–846. WINGO, WARDEN *v.* WEDDING. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1157.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 73–5661. ADAMS ET AL. *v.* SECRETARY OF THE NAVY ET AL. C. A. 9th Cir. [Certiorari granted, 414 U. S. 1128.] Motion for appointment of counsel granted. It is ordered that William A. Dougherty, Esquire, of Tustin, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioners in this case.

No. 73–5845. JACKSON *v.* METROPOLITAN EDISON CO. C. A. 3d Cir. [Certiorari granted, 415 U. S. 912.] Motion of Public Service Commission of New York for leave to file a brief as *amicus curiae* granted.

No. 73–5740. BARKER *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS;

No. 73–6195. SAYLES *v.* GESELL, U. S. DISTRICT JUDGE; and

No. 73–6290. COZZETTI *v.* FOLEY, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 73–689. MANESS *v.* MEYERS, JUDGE. 169th Jud. Dist. Ct. Tex., Bell County. Certiorari granted.

No. 73–1245. UNITED STATES ET AL. *v.* BISCEGLIA. C. A. 6th Cir. Certiorari granted. Reported below: 486 F. 2d 706.

No. 73–1270. KELLEY *v.* SOUTHERN PACIFIC CO. C. A. 9th Cir. Certiorari granted. Reported below: 486 F. 2d 1084.

No. 73–1285. WOOD ET AL. *v.* STRICKLAND ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 485 F. 2d 186.

No. 73–1123. UNITED STATES *v.* FEOLA. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 486 F. 2d 1339.

Certiorari Denied. (See also No. 73–955, *supra.*)

No. 71–1512. BROWN ET AL. *v.* APODACA ET AL. Sup. Ct. N. M. Certiorari denied.

No. 73–704. TARIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–716. GARNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–829. TOLBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–833. DOYLE *v.* COMMISSIONER OF PATENTS. C. C. P. A. (Pat.) Certiorari denied. Reported below: 482 F. 2d 1385.

No. 73–850. RON *v.* UNITED STATES;

No. 73–5825. GARNER *v.* UNITED STATES; and

No. 73–5891. LEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 485 F. 2d 677.

No. 73–886. BROWNDALE INTERNATIONAL, LTD. *v.* BOARD OF ADJUSTMENT FOR DANE COUNTY ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 60 Wis. 2d 182, 208 N. W. 2d 121.

No. 73–909. SMALDONE ET AL. *v.* UNITED STATES;
No. 73–5735. GARCEO *v.* UNITED STATES; and
No. 73–5863. VALLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 485 F. 2d 1333.

No. 73–913. HANLY ET AL. *v.* SAXBE, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 484 F. 2d 448.

No. 73–941. HOLTZMAN ET AL. *v.* SCHLESINGER, SECRETARY OF DEFENSE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 484 F. 2d 1307.

No. 73–943. CITIZENS ENVIRONMENTAL COUNCIL ET AL. *v.* BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 484 F. 2d 870.

No. 73–944. PELZER REALTY CO., INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 438.

No. 73–975. MOTOROLA, INC. *v.* MCLAIN, REGIONAL DIRECTOR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 1339.

No. 73–984. WICHITA INDIAN TRIBE OF OKLAHOMA ET AL. *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 29, 479 F. 2d 1369.

No. 73–994. MINTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–1002. DRESSER OFFSHORE SERVICES, INC., ET AL. *v.* RICHARD. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 2d 1402.

No. 73–1011. DATRONICS ENGINEERS, INC. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 250.

No. 73–1022. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 1027.

No. 73–1031. ROBINSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–1032. SLUTSKY ET AL., DBA "THE NEVELE" *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 832.

No. 73–1044. PETRUCCI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 486 F. 2d 329.

No. 73–1049. FERRARO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 749.

No. 73–1050. BIGHEART *v.* PAPPAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 482 F. 2d 1066.

No. 73–1061. W. T. GRANT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 483 F. 2d 1115.

No. 73–1074. ROGERS MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 644.

No. 73–1079. BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–1092. CALDWELL, ADMINISTRATRIX, ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 423, 481 F. 2d 898.

No. 73–1117. DIAPULSE CORPORATION OF AMERICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 485 F. 2d 677.

No. 73–1118. FEHRS FINANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 487 F. 2d 184.

No. 73–1143. BOOKBINDERS LOCAL NO. 60, INTERNATIONAL BROTHERHOOD OF BOOKBINDERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 486 F. 2d 837.

No. 73–1152. FOX RIVER PATTERN, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 483 F. 2d 1406.

No. 73–1155. HICKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 486 F. 2d 325.

No. 73–1185. DUFFY ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 282.

No. 73–1190. HYDROMETALS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 1236.

No. 73–1200. PENNSYLVANIA ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 486 F. 2d 1124.

No. 73–1232. CLEARY *v.* CHALK ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 415, 488 F. 2d 1315.

No. 73–1242. BATES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 51 Ala. App. 338, 285 So. 2d 501.

No. 73–1253. MURPHY ET AL., DBA UTAH OIL LAND CO. *v.* LANDSBURG, TRUSTEE. C. A. 3d Cir. Certiorari denied. Reported below: 490 F. 2d 319.

No. 73–1262. JENKS *v.* JUDD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–1263. PEARSON BROS. CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 1406.

No. 73–1264. ALLEN, AKA MINDER, ET VIR *v.* 1901 WYOMING AVENUE COOPERATIVE ASSN. Ct. App. D. C. Certiorari denied.

No. 73–1272. G. I. DISTRIBUTORS, INC., ET AL. *v.* MURPHY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1167.

No. 73–1276. TROXEL MANUFACTURING CO. *v.* SCHWINN BICYCLE CO. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 968.

No. 73–1282. FOUNTAIN ET AL. *v.* FOUNTAIN ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 214 Va. 347 and 351, 200 S. E. 2d 513 and 515.

No. 73–1296. SHREVES *v.* SHREVES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–1299. PASCOE STEEL CORP. *v.* WIEMAN-SLECHTA CO. C. A. 8th Cir. Certiorari denied. Reported below: 489 F. 2d 760.

No. 73–1300. KOZEMCHAK ET AL. *v.* UKRAINIAN ORTHODOX CHURCH OF AMERICA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 1330.

No. 73–1301. BORDEN ET AL. *v.* DIRECTOR, DEPARTMENT OF ASSESSMENTS AND TAXATION OF MARYLAND, ET AL. Ct. App. Md. Certiorari denied. Reported below: See 19 Md. App. 112, 309 A. 2d 773.

No. 73–1306. STARNES *v.* NORFOLK & WESTERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1398.

No. 73–1312. BARR ET AL. *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 37 Ohio App. 2d 51, 306 N. E. 2d 425.

No. 73–1331. SIMMONS *v.* BUDDS ET AL. Sup. Ct. Conn. Certiorari denied.

No. 73–1384. ARDAC, INC. ET AL. *v.* MICRO-MAGNETIC INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 488 F. 2d 770.

No. 73–5660. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5699. WATSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 34.

No. 73–5710. ENRIQUEZ *v.* UNITED STATES;

No. 73–5853. BARRERA ET AL. *v.* UNITED STATES; and

No. 73–5874. PINTO, AKA BEN SADOUN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 333.

No. 73–5720. WHIPPLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 482 F. 2d 616.

No. 73–5752. BAXTER ET AL. *v.* UNITED STATES; and

No. 73–5769. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 150 and 199.

No. 73–5739. MAZZARINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5757. HOGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 486 F. 2d 222.

No. 73–5767. TABAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5770. OWEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5777. GLASSEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 488 F. 2d 143.

No. 73–5779. SCOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 485 F. 2d 576.

No. 73–5784. GREEN *v.* UNITED STATES;
No. 73–5796. JONES *v.* UNITED STATES; and
No. 73–5803. BEASLEY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 485 F. 2d 60.

No. 73–5785. GANT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 487 F. 2d 30.

No. 73–5793. WILSON, AKA STURGIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–5836. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 983.

No. 73–5838. BRADLEY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 1405.

No. 73–5865. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 485 F. 2d 1383.

No. 73–5883. PICKARD *v.* NEVADA. C. A. 9th Cir. Certiorari denied.

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No. 73–5894. BRYANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 486 F. 2d 1407.

No. 73–5903. BROWN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: See 432 F. 2d 552.

No. 73–5911. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 959.

No. 73–5921. CASTANEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5930. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 214.

No. 73–5949. WEEKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 342.

No. 73–5950. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 686.

No. 73–5952. BATY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 240.

No. 73–5956. NEITZEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1399.

No. 73–5958. OLGUIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5968. WAGNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5969. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 215.

No. 73–5974. WINGFIELD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 231 Ga. 92, 200 S. E. 2d 708.

No. 73–6006. ARBUCKLE *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 1406.

No. 73–6034. ALVAREZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 751.

No. 73–6039. HUTCHINSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 73–6046. ETCHISON *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 190 Neb. 629, 211 N. W. 2d 405.

No. 73–6047. HUNTER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 283 So. 2d 1.

No. 73–6075. BOOKER *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 488 F. 2d 229.

No. 73–6084. NORTHERN *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6086. HADSELL *v.* WASHINGTON BOARD OF PRISON TERMS AND PAROLES. Sup. Ct. Wash. Certiorari denied.

No. 73–6095. HORTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 488 F. 2d 1086.

No. 73–6125. RAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 456 F. 2d 1006.

No. 73–6166. DIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1398.

No. 73–6172. LOY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1405.

No. 73–6187. FRANKLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1398.

No. 73–6188. URBANIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 490 F. 2d 384.

No. 73–6193. TOMPKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 487 F. 2d 146.

No. 73–6249. BROWN *v.* SWENSON, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 487 F. 2d 1236.

No. 73–6257. SMITH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6260. COLLINS *v.* DALLAS COUNTY JAIL SHERIFFS DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1056.

No. 73–6262. LANDRY *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 73–6265. O'BERRY *v.* JORANDBY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 686.

No. 73–6266. LINDSEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 501 S. W. 2d 647.

No. 73–6270. HINTON *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 1398.

No. 73–6273. SIMS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 499 S. W. 2d 54.

No. 73–6275. MAGEE *v.* GEARY, SHERIFF. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–6278. BATES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6283. GRATTON *v.* CALIFORNIA ADULT AUTHORITY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 73–6289. SHEARER *v.* OHIO. Ct. App. Ohio, Fairfield County. Certiorari denied.

No. 73–6291. BLAIR *v.* ARIYOSHI, LIEUTENANT GOVERNOR OF HAWAII, ET AL. Sup. Ct. Hawaii. Certiorari denied. Reported below: 55 Haw. 85, 515 P. 2d 1253.

No. 73–6293. EASTER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6295. THOMAS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6299. FULGHUM *v.* NORTH CAROLINA. Gen. Ct. Justice, Super Ct. Div., Wake County, N. C. Certiorari denied.

No. 73–6306. KAPEWA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–6311. HOHENSEE *v.* GRIER. C. A. 3d Cir. Certiorari denied. Reported below: 481 F. 2d 1398.

No. 73–6318. LEM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 756.

No. 73–6327. WALLACE ET VIR *v.* SCHULIMSON, DIRECTOR, DIVISION OF WELFARE OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 73–6335. TAYLOR *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 291 Ala. 756, 287 So. 2d 901.

No. 73–6394. FALKNER ET UX. *v.* GOODHART, JUDGE. C. A. 5th Cir. Certiorari denied.

No. 73–721. MEYERS ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 483 F. 2d 294.

MR. JUSTICE DOUGLAS, dissenting.

The petitioners seek damages from the State of Pennsylvania arising from a bus accident allegedly caused by the improper design, construction, and maintenance of the highway. Seven children were fatally injured when the bus, carrying a group of young people, rotated 180 degrees on wet pavement and went through the guardrail and over the embankment. A study by the National Transportation Safety Board suggested that the accident was caused in part by the "low basic skid resistance of the pavement in wet weather, and the probable presence of water draining across the pavement in an abnormal manner." It also suggested that the fatalities and injuries resulted in part from an "ineffective highway guardrail which failed to prevent the bus from rolling down an embankment." [1] In bringing the action in Federal District Court petitioners contended that the State was liable because it had failed to make the road conform to applicable federal highway regulations which were binding upon Pennsylvania because of its acceptance of federal highway funds. The District Court dismissed the action, 344 F. Supp. 1337, and the Court of Appeals affirmed, 483 F. 2d 294, finding that petitioners had no private right of action for the State's failure to conform to the federal regulations and that the State was immune from the suit in federal court because of the Eleventh Amendment.[2]

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[1] The District Court accepted these conclusions of the National Transportation Board as correct for the purpose of considering respondents' motions to dismiss. 344 F. Supp. 1337, 1340 n. 5

[2] "The Judicial power of the United States shall not be construed

As the District Court noted, the State here was "performing its traditional state governmental function in designing, constructing, and maintaining highways within its own boundaries." 344 F. Supp., at 1345. But in recent years States have voluntarily subjected themselves to federal regulations in this area in order to achieve the benefits of federal funding, and thus to a significant extent the traditional state autonomy has been displaced by the federal role. Under the Federal Aid-Highway Act, 23 U. S. C. § 101 *et seq.*, the Secretary of Transportation must approve each state project, § 106 (a), and he is to withhold his approval of the plans and specifications if they are not conducive to safety, § 109 (a). Section 109 (e) requires conformance to certain safety regulations for funds to be allowed, and § 114 (a) provides that state highway construction is subject to the inspection and approval of the Secretary. Section 116 provides that the Secretary may withhold his approval of further projects if the State has not fulfilled its duty to properly maintain its highways.

The Congress has enlarged the federal role in ensuring highway safety since passage of the Federal Aid-Highway Act. In 1965 Congress added 23 U. S. C. § 135, 79 Stat. 578, requiring each State to have a federally approved highway safety program "designed to reduce traffic accidents and deaths." And because of the absence of effective state action, the following year the Congress passed the Highway Safety Act, 23 U. S. C. § 401 *et seq.*, which repealed the former § 135 (see 80 Stat. 734). Section 402 (a) provides that the Secretary promulgate regulations for the state highway safety program. Pursuant to this provision the Secretary has promulgated

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to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

regulations regarding highway skid resistance and guardrailings. 344 F. Supp., at 1348 n. 14. Congress increased the federal role because state highway safety programs had "generally been missing." [3] As in the Federal Aid-Highway Program, the Secretary is to withhold federal funds from States which do not comply with the federal regulations. See 23 U. S. C. §§ 116 (c), 402 (b).

The court below recognized that the State may waive its immunity under the Eleventh Amendment when "it leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation." *Parden* v. *Terminal R. Co.*, 377 U. S. 184, 196. In *Parden*, the Court found that Alabama, "when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." *Id.*, at 192. But the court below distinguished *Parden* by finding that there was no indication that Congress intended to condition the receipt of federal funds upon the State's submission to liability for violation of the accompanying regulations. Yet even respondents here concede that the State is bound by the federal regulations because the State has accepted federal funds. But, respondents argue, the federal regulations are not mandatory because "[t]he State has the option at any time to ignore the Federal Aid Highway Act and its progeny, the only result being the cessation of Federal Aid."

The fact is, however, that Pennsylvania has not exer-

[3] H. R. Rep. No. 681, 89th Cong., 1st Sess. (1965). Although the highway involved here was initially constructed before passage of the Highway Safety Act, petitioners contended in the District Court that under the legislation the State was required to maintain the highway in accordance with the new standards and that it had failed to meet this obligation. This contention, of course, goes to the merits of petitioners' claim and need not be resolved in determining whether the action was properly dismissed.

cised that option. To the contrary, the state legislature has required the Secretary of Highways to enter "into all necessary contracts and agreements with the proper agencies of the government of the United States, and shall do all other things necessary and proper in order to obtain the benefits afforded under . . . [the Federal Aid Highway programs] or any other act of Congress providing Federal aid for highway purposes." Pa. Stat. Ann., Tit. 36, § 670–1004.

"Where a State has consented to join a federal-state cooperative project, it is realistic to conclude that the State has agreed to assume its obligations under that legislation." *Edelman* v. *Jordan,* 415 U. S. 651, 685. (DOUGLAS, J., dissenting). Here the State has made that explicit by its own legislation. It has continued to seek and accept all of the federal funding available to it since the adoption of the statutes and regulations which petitioners here contend the State has violated. It would thus appear that the State is subject to whatever remedies are available when it is contended that a State has not conformed to the federal requirements.

The explicit statutory remedy, noted above, is that the Secretary may terminate federal highway aid under the appropriate legislation. The District Court concluded that since this was the only sanction expressly authorized by the statute, "the Highway Safety Act creates no duty on behalf of the states running toward these plaintiffs and creates no private action for breach thereof." 344 F. Supp., at 1348. The Court of Appeals, affirming, found no private right of action implied by the Act. The court relied on its prior decision in *Mahler* v. *United States,* 306 F. 2d 713, which found that the purpose of the federal regulations was to protect the federal investment in the roads, not to assure travelers that the roads were safely constructed and maintained. But the High-

way Safety Act was enacted subsequent to the *Mahler* decision and, as noted above, it makes clear the federal concern for highway safety. It is well established that a federal statute may by implication create a private action for its violation, maintainable by one in the class of persons for whose protection the statute was enacted. *J. I. Case Co.* v. *Borak,* 377 U. S. 426. And the fact that the statute provides explicitly for administrative action to accomplish its purpose does not alone negate the inference that a private action has also been created, even though the administrative regulation appears comprehensive. *Id.,* at 432–433; *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 402 n. 4 (Harlan, J., concurring). The question is whether "damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." *Bivens, supra,* at 402. The congressional policy involved here was to coerce the States to adopt "coordinated, State action programs of highway safety . . . if one life is saved, the establishment of coordinated action programs will be a success." [4]

By voluntarily entering into the federal highway program the State has waived any immunity from suit charging it with failure to perform its obligations under that program. See my dissent in *Edelman* v. *Jordan, supra.* Because I believe that the right of private action under the federal highway program is an important question, and that the Eleventh Amendment issue was wrongly decided below, I would grant certiorari.

No. 73–931. CALIFORNIA *v.* BROWN ET AL. Sup. Ct. Cal. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 9 Cal. 3d 612, 510 P. 2d 1017.

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[4] H. R. Rep. No. 681, *supra,* n. 3, at 8.

No. 73–1356. Rose, Warden *v.* Morelock. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 487 F. 2d 1402.

No. 73–963. Dravo Corp. et al. *v.* Illinois et al. App. Ct. Ill., 5th Dist. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 10 Ill. App. 3d 944, 295 N. E. 2d 284.

No. 73–1063. Hanners *v.* United States. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 485 F. 2d 1333.

No. 73–5945. Johnson, aka Thomas *v.* United States. Ct. App. D. C. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 309 A. 2d 497.

No. 73–6144. Williams *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 502 S. W. 2d 130.

No. 73–1109. Canales et al. *v.* City of Alviso et al. Ct. App. Cal., 1st App. Dist. Motion of Alviso Ad Hoc Committee for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 73–1191. Hourihan *v.* Dakin et al. C. A. 1st Cir. Petition for writ of certiorari denied as untimely filed. 28 U. S. C. § 2101 (c).

No. 73–1261. Albright, Administrator *v.* R. J. Reynolds Tobacco Co. C. A. 3d Cir. Motion to substitute Charles M. Albright in place of Mary Albright, Administratrix of Estate of Charles Albright, as party petitioner granted. Certiorari denied. Reported below: 485 F. 2d 678.

No. 73–1295. Oxnard School District Board of Trustees *v.* Soria et al. C. A. 9th Cir. Application

for stay presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied. Certiorari denied. Reported below: 488 F. 2d 579.

Rehearing Denied

No. 72–1637. NATIONAL LABOR RELATIONS BOARD *v.* MAGNAVOX COMPANY OF TENNESSEE, 415 U. S. 322;

No. 72–5830. PATTERSON *v.* WARNER ET AL., 415 U. S. 303;

No. 73–393. TAGER *v.* UNITED STATES, 414 U. S. 1162;

No. 73–492. KUNSTSAMMLUNGEN ZU WEIMAR *v.* FEDERAL REPUBLIC OF GERMANY ET AL., 415 U. S. 931;

No. 73–694. TAGER *v.* UNITED STATES, 415 U. S. 914;

No. 73–878. PACIFIC TRANSPORT CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 415 U. S. 948;

No. 73–5573. FLETCHER *v.* UNITED STATES, 415 U. S. 922;

No. 73–5621. THROWER *v.* UNITED STATES, 415 U. S. 933;

No. 73–5755. SHARROW *v.* ABZUG ET AL., 415 U. S. 958;

No. 73–5812. WOLF *v.* HOLLOWELL, PENITENTIARY SUPERINTENDENT, 415 U. S. 946; and

No. 73–6036. FISCHLER *v.* ITT FEDERAL ELECTRIC CORP. ET AL., 415 U. S. 943. Petitions for rehearing denied.

No. 73–698. FRIENDS OF THE EARTH ET AL. *v.* STAMM, COMMISSIONER, BUREAU OF RECLAMATION, ET AL., 414 U. S. 1171. Motion of Shonto Chapter of the Navajo Nation et al. for leave to file a brief as *amici curiae* in support of rehearing granted. Petition for rehearing denied.

APRIL 16, 1974

Dismissal Under Rule 60

No. 73–596. PEARSON ET AL. *v.* ECOLOGICAL SCIENCE CORP. ET AL. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

APRIL 22, 1974

Affirmed on Appeal

No. 73–6355. KLEIN *v.* MAYO ET AL. Affirmed on appeal from D. C. Mass. Reported below: 367 F. Supp. 583.

Appeal Dismissed

No. 73–6346. TOLAND *v.* NEW JERSEY. Appeal from Super. Ct. N. J. dismissed for want of substantial federal question. Reported below: 123 N. J. Super. 286, 302 A. 2d 543.

Vacated and Remanded on Appeal

No. 73–1217. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. *v.* NUECES COUNTY NAVIGATION DISTRICT ET AL. Appeal from D. C. N. D. Tex. Judgment vacated and case remanded with directions to dismiss case as moot.

*Miscellaneous Orders**

No. ———. ELLIS *v.* HARADA ET AL. Motion of petitioner for leave to dispense with printing petition denied.

No. ———. PITT RIVER TRIBE *v.* UNITED STATES. Ct. Cl. Motion of petitioner to waive type-size requirement of Rule 39 of the Rules of this Court denied. Reported below: 202 Ct. Cl. 988, 485 F. 2d 660.

No. 73–556. FLORIDA POWER & LIGHT CO. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641 ET AL.; and

No. 73–795. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 414 U. S. 1156.] Motion of United States Chamber of Commerce for leave to file a brief as *amicus curiae* denied.

*For Court's order prescribing amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1003.

No. 73–631. HOWARD JOHNSON CO., INC. *v.* DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL–CIO. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1091.] Motion of respondent for leave to file supplemental brief after argument granted.

No. 73–690. AIR POLLUTION VARIANCE BOARD OF COLORADO *v.* WESTERN ALFALFA CORP. Ct. App. Colo. [Certiorari granted, 414 U. S. 1156.] Motion of Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 73–781. SCHERK *v.* ALBERTO-CULVER CO. C. A. 7th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of American Arbitration Assn. for leave to participate in oral argument as *amicus curiae* granted.

No. 73–1018. UNITED STATES *v.* MAZURIE ET AL. C. A. 10th Cir. [Certiorari granted, 415 U. S. 947.] Motion of Shoshone and Arapahoe Tribes of Wind River Indian Reservation, Wyoming, for leave to file a brief as *amici curiae* granted.

No. 73–1281. TONASKET ET AL. *v.* THOMPSON ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief expressing the views of the United States.

Probable Jurisdiction Noted

No. 73–711. CRYAN, SHERIFF, ET AL. *v.* HAMAR THEATRES, INC., ET AL. Appeal from D. C. N. J. Probable jurisdiction noted. Reported below: 365 F. Supp. 1312.

Certiorari Granted

No. 73–130. ELLIS ET AL. *v.* DYSON ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 475 F. 2d 1402.

No. 73–1424. SERFASS *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 492 F. 2d 388.

No. 73–1231. LINDEN LUMBER DIVISION, SUMMER & Co. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 73–1234. NATIONAL LABOR RELATIONS BOARD *v.* TRUCK DRIVERS UNION LOCAL No. 413 ET AL. C. A. D. C. Cir. Motion of the Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* and certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 159 U. S. App. D. C. 228, 487 F. 2d 1099.

No. 73–5677. SCHICK *v.* REED, CHAIRMAN, UNITED STATES BOARD OF PAROLE, ET AL. C. A. D. C. Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 157 U. S. App. D. C. 263, 483 F. 2d 1266.

Certiorari Denied

No. 73–977. JOBE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 487 F. 2d 268.

No. 73–978. BLAIR, MAYOR OF FALLS CHURCH, VIRGINIA, ET AL. *v.* JOSEPH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 482 F. 2d 575.

No. 73–1029. WEST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 468.

No. 73–1057. EDIN *v.* UNITED STATES; and

No. 73–1058. ASTALOS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 275.

No. 73–1078. ELROD ET AL. *v.* WESTERN CONFERENCE OF TEAMSTERS ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–1096. NOVELLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1402.

No. 73–1115. PRICE, DBA PRICE'S LIVESTOCK MARKETING CO. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied.

No. 73–1116. LA GIOIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1402.

No. 73–1135. SAHLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 1403.

No. 73–1205. MCGINNIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–1206. VALENTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–1212. DEANGELIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1004.

No. 73–1238. INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, INTERNATIONAL MARINE DIVISION, ILA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 11, 486 F. 2d 1271.

No. 73–1250. TANN ET AL. *v.* HUMPHREYS, ADMINISTRATOR. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 666.

No. 73–1277. RANDONO *v.* SHERIFF OF CLARK COUNTY. Sup. Ct. Nev. Certiorari denied. Reported below: 89 Nev. 521, 515 P. 2d 1267.

No. 73–1317. ROCHFORD ET AL. *v.* CONFEDERATION OF POLICE ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–1324. ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS, INC., ET AL. *v.* ALTSHULER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 490 F. 2d 9.

No. 73–1330. GLYNN *v.* DONNELLY. C. A. 1st Cir. Certiorari denied. Reported below: 485 F. 2d 692.

No. 73–1336. HARDY ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 36 Ohio St. 2d 108, 304 N. E. 2d 374.

No. 73–1344. MAY, ADMINISTRATRIX *v.* GOLDMAN ET AL. Sup. Ct. Va. Certiorari denied.

No. 73–1345. GABALDON ET AL. *v.* UNITED FARM WORKERS ORGANIZING COMMITTEE ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 35 Cal. App. 3d 757, 111 Cal. Rptr. 203.

No. 73–1350. HILLCREST PRESBYTERIAN CHURCH OF SEATTLE *v.* PRESBYTERY OF SEATTLE, INC., ET AL. Ct. App. Wash. Certiorari denied.

No. 73–1376. SPELLERS ET UX. *v.* STEUART MOTOR CO., T/A TRIANGLE MOTORS. Ct. App. D. C. Certiorari denied.

No. 73–1381. ATKINSON-DAUKSCH AGENCIES, INC. *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 488 F. 2d 179.

No. 73–1382. KLEMMER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 51 Ala. App. 383, 286 So. 2d 58.

No. 73–5841. REINGOLD *v.* CURTIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–5848. ROWLETTE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

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No. 73–5854. MONTOYA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 486 F. 2d 1351.

No. 73–5855. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 210.

No. 73–5857. HERNANDEZ-PADILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–5895. HUBBARD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 54 Ill. 2d 546, 301 N. E. 2d 290.

No. 73–5973. FARNSWORTH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–5989. ZOGBY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–5990. WALLACE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5991. KING ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–6008. MCGANN *v.* UNITED STATES BOARD OF PAROLE ET AL. C. A. 3d Cir. Certiorari denied.

No. 73–6012. FLETCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 22.

No. 73–6020. MCGANN ET AL. *v.* UNITED STATES BOARD OF PAROLE. C. A. 3d Cir. Certiorari denied.

No. 73–6035. KNOX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 486 F. 2d 1399.

No. 73–6074. GORE *v.* LEEKE, CORRECTIONS DIRECTOR. Sup. Ct. S. C. Certiorari denied. Reported below: 261 S. C. 308, 199 S. E. 2d 755.

No. 73–6077. STANLEY *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 486 F. 2d 48.

No. 73–6141. ZANE, AKA LOGAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 269.

No. 73–6149. SOKYRNYK *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied.

No. 73–6199. COGWELL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 823.

No. 73–6226. TATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–6227. KENNEDY *v.* GRAY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 101.

No. 73–6233. ALFORD *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6320. JOHN *v.* CASSCLES, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 20.

No. 73–6322. HAMM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 1407.

No. 73–6326. BARNARD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 490 F. 2d 907.

No. 73–6329. MORRISON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6330. SATTERFIELD *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 1311.

No. 73–6331. BUNN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 19 N. C. App. 582, 199 S. E. 2d 487.

No. 73–6334. ADAMS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 261 S. C. 517, 201 S. E. 2d 129.

No. 73–6337. WATSON ET AL. *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 73–6338. LAYTON *v.* COMMITTEE OF BAR EXAMINERS OF CALIFORNIA STATE BAR. Sup. Ct. Cal. Certiorari denied.

No. 73–6342. CODY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 290 N. E. 2d 38.

No. 73–6345. DAWSON *v.* BACON, JUDGE. Ct. App. D. C. Certiorari denied.

No. 73–6347. UMBAUGH *v.* HUTTO, CORRECTIONS COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 486 F. 2d 904.

No. 73–6408. TULIPANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–6477. COZZOLINO *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 73–819. LANDY ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP., RECEIVER, ET AL. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE WHITE would grant certiorari. Reported below: 486 F. 2d 139.

No. 73–1323. GENERAL MOTORS ACCEPTANCE CORP. ET AL. *v.* EASON ET AL. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE WHITE would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 490 F. 2d 654.

No. 73–6354. STICKNEY, EXECUTRIX *v.* E. R. SQUIBB & SONS, INC. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 274 So. 2d 898.

No. 73–873. HALPERIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 1403.

No. 73–1088. LIFE OF THE LAND ET AL. *v.* BRINEGAR, SECRETARY OF TRANSPORTATION, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 460.

No. 73–1111. QUINAULT ALLOTTEES ASSN. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 202 Ct. Cl. 625, 485 F. 2d 1391.

No. 73–1332. CHANEY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1362. WESTMINSTER PRESBYTERIAN CHURCH OF ENID ET AL. *v.* PRESBYTERY OF CIMARRON. Sup. Ct. Okla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 515 P. 2d 211.

No. 73–6056. TURNER ET AL. *v.* HAYNES, WARDEN. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 183.

No. 73–6360. WELLMAN ET UX. *v.* PACER OIL CO. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 504 S. W. 2d 55.

No. 73–1104. HOOPA VALLEY TRIBE *v.* SHORT ET AL.; and

No. 73–1244. UNITED STATES *v.* SHORT ET AL. Ct. Cl. Motions of the following for leave to file briefs as *amici*

curiae in Nos. 73–1104 granted: Salt River Pima-Maricopa Indian Community of the Salt River Indian Reservation, Arizona; National Tribal Chairmen's Assn.; National Congress of American Indians; Colorado River Indian Tribes; Colville Confederated Tribes of Colville Indian Reservation, Washington; Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Montana, et al.; Fort Mojave Indian Tribes of Arizona, California, and Nevada, et al.; and Quinault Tribe of Indians of Quinault Reservation, Washington. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would grant certiorari. Reported below: 202 Ct. Cl. 870, 486 F. 2d 561.

No. 73–1310. BOARD OF SCHOOL COMMISSIONERS OF INDIANAPOLIS ET AL. *v.* GARDNER ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 73–1338. NORTHCROSS ET AL. *v.* BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 489 F. 2d 15, 18, and 19.

No. 73–1342. SILVESTRI CORP. *v.* MARSHALL FIELD & CO. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 487 F. 2d 1404.

No. 73–6106. CANNON *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 486 F. 2d 263.

Rehearing Denied

No. 73–849. TUNNELL *v.* UNITED STATES, 415 U. S. 948;

No. 73–1009. HAYDEN, STONE INC. ET AL. *v.* PIANTES ET AL., 415 U. S. 995;

No. 73–1154. WOLF *v.* WOLF, 415 U. S. 958;

No. 73–6118. KEIL *v.* GLOVER, AKA EDGAR, 415 U. S. 959; and

No. 73–6186. SMILGUS *v.* KIMMEL ET AL., 415 U. S. 993. Petitions for rehearing denied.

No. 72–637. KENNECOTT COPPER CORP. *v.* FEDERAL TRADE COMMISSION, *ante*, p. 909. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

APRIL 25, 1974

Miscellaneous Order

No. A–986. HILL, ATTORNEY GENERAL OF TEXAS *v.* STONE ET AL. D. C. N. D. Tex. Application for partial stay, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted. It is ordered that the judgment be stayed to the extent that it prohibits the use of dual-box election procedure. Stay order is to remain in effect pending timely filing and disposition of an appeal in this Court. If the appeal is timely filed, this stay shall remain in effect pending issuance of judgment of this Court. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Reported below: 377 F. Supp. 1016.

APRIL 29, 1974

Dismissal Under Rule 60

No. 73–6430. BEKENY *v.* UNITED STATES. C. A. 2d Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

Affirmed on Appeal

No. 73–1077. BERRY TRANSPORT, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Ore.

Appeals Dismissed

No. 73–1126. WILSON ET UX. *v.* DEPARTMENT OF REVENUE OF OREGON. Appeal from Sup. Ct. Ore. dismissed for want of substantial federal question. Reported below: 267 Ore. 103, 514 P. 2d 1334.

No. 73–6391. SCHEFFEL ET AL. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 82 Wash. 2d 872, 514 P. 2d 1052.

No. 73–6404. SMITH *v.* ASKINS. Appeal from Ct. App. Okla. dismissed for want of substantial federal question.

No. 73–6054. COLE ET AL. *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–6313. SIMPKINS, DBA COSMIC CULTURAL CO. *v.* UNITED STATES. Appeal from Ct. Cl. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–6099. WARD ET AL. *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from D. C. N. D. Ill. dismissed for want of jurisdiction.

No. 73–6459. WASHINGTON ET AL. *v.* WHITE, SECRETARY OF STATE OF TEXAS, ET AL. Appeal from D. C. N. D. Tex. dismissed for want of appealable order.

Certiorari Granted—Vacated and Remanded

No. 73–5694. ANDRADE-GAMIZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded with directions to dismiss cause as moot.

Miscellaneous Orders

No. A–928. OHMERT *v.* YOUNG ET AL. Sup. Ct. Cal. Application for stay presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. A–1026. BELLI *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Application for stay of judgment, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Reported below: 10 Cal. 3d 824, 519 P. 2d 575.

No. 27, Orig. OHIO *v.* KENTUCKY, 410 U. S. 641, 414 U. S. 989. Second motion of State of Ohio for reconsideration of order of March 5, 1973, denied.

No. 36, Orig. TEXAS *v.* LOUISIANA. Motion of City of Port Arthur, Texas, for leave to intervene granted, and motion for a more definite statement denied. [For earlier orders herein, see, *e. g.*, *ante*, p. 903.]

No. 73–187. KEWANEE OIL CO. *v.* BICRON CORP. ET AL. C. A. 6th Cir. [Certiorari granted, 414 U. S. 818.] Motion of SCM Corp. for leave to file supplemental brief as *amicus curiae* after argument denied.

No. 73–296. HUFFMAN ET AL. *v.* PURSUE, LTD. Appeal from D. C. N. D. Ohio. [Probable jurisdiction noted, 415 U. S. 974.] Motion of appellants for leave to utilize portions of record printed for use as an appendix to jurisdictional statement in preparing single appendix as required by Rule 17 of the Rules of this Court denied.

No. 73–362. MORTON, SECRETARY OF THE INTERIOR, ET AL. *v.* MANCARI ET AL. Appeal from D. C. N. M. [Probable jurisdiction noted, 414 U. S. 1142.] Motion of National Federation of Federal Employees for leave tc file a brief as *amicus curiae* denied.

No. 73–679. WOLFF, WARDEN, ET AL. *v.* MCDONNELL. C. A. 8th Cir. [Certiorari granted, 414 U. S. 1156.] Motion of Ohio State University College of Law Clinical Programs for leave to file an untimely brief as *amicus curiae* denied.

No. 73–1148. DECOTEAU *v.* DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT. Sup. Ct. S. D. The Solicitor General is invited to file a brief in this case expressing the views of the United States on or before May 14, 1974.

No. 73–5845. JACKSON *v.* METROPOLITAN EDISON CO. C. A. 3d Cir. [Certiorari granted, 415 U. S. 912.] Motion of Legal Aid Foundation of Long Beach et al. for leave to file a brief as *amici curiae* granted.

No. 73–1294. GOLDBERG *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 73–1406. CHAPMAN ET AL. *v.* MEIER, SECRETARY OF STATE OF NORTH DAKOTA. Appeal for D. C. N. D. Probable jurisdiction noted. Reported below: 372 F. Supp. 363 and 371.

No. 73–1055. BOWMAN TRANSPORTATION, INC. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.;

No. 73–1069. JOHNSON MOTOR LINES, INC. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.;

No. 73–1070. RED BALL MOTOR FREIGHT, INC. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.;

No. 73–1071. LORCH-WESTWAY CORP. ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.; and

No. 73–1072. UNITED STATES ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL. Appeals from D. C. W. D. Ark.

In No. 73–1055, probable jurisdiction is noted limited to Questions 2 and 4 presented by the jurisdictional statement which read as follows:

"2. Can a Three-Judge District Court lawfully set aside and enjoin an order of the Interstate Commerce Commission granting an extension of a motor carrier certificate on the ground the Court does not agree with the order or may consider the evidence would warrant a different conclusion?

"4. Whether Commission order issued following extensive hearings, involving a voluminous record, admittedly concluded within all time limitations and commission rules can be judicially determined to be so stale 'as a matter of law' to prohibit any required findings or further consideration. If so, when does such an administrative action reach that point?"

In No. 73–1069, probable jurisdiction is noted limited to Question 2 presented by the jurisdictional statement which reads as follows:

"2. Whether in reversing the Commission's decision awarding certificates of public convenience and necessity the District Court employed erroneous standards of judicial review and improperly substituted its judgment for that of the agency."

In No. 73–1070, probable jurisdiction is noted limited to subsections (3) and (5) of the question presented by the jurisdictional statement which read as follows:

"Whether the three-judge court, in setting aside the

administrative agency decision, abdicated or abandoned its judicial function by

"(3) failing to give independent judicial consideration and review to the separate grants of authority to the intervening defendant motor carriers;

"(5) rejecting Supreme Court precedent limiting the Court's scope of review and thereby substituting its judgment for that of the agency charged with the responsibility therefor."

In No. 73–1071, probable jurisdiction is noted limited to Question 2 presented by the jurisdictional statement which reads as follows:

"2. Whether the Three-Judge District Court improperly adopted a novel and unwarranted concept of *de novo* review of Commission decisions and changed the statutory relationship between hearing examiners and their agency with respect to recommended and final decisions."

In No. 73–1072, probable jurisdiction noted. Cases are consolidated and a total of one and one-half hours allotted for oral argument. Reported below: 364 F. Supp. 1239.

No. 73–1210. INTERSTATE COMMERCE COMMISSION *v.* OREGON PACIFIC INDUSTRIES, INC., ET AL. Appeal from D. C. Ore. Motion of Western Railroad Traffic Assn. for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. Reported below: 365 F. Supp. 609.

Certiorari Granted

No. 73–1290. UNITED STATES *v.* ITT CONTINENTAL BAKING CO. C. A. 10th Cir. Certiorari granted. Reported below: 485 F. 2d 16.

No. 73–765. INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL–

CIO *v.* QUALITY MANUFACTURING CO. ET AL. C. A. 4th Cir. Certiorari granted and case set for oral argument with No. 73–1363, immediately *infra*. Reported below: 481 F. 2d 1018.

No. 73–1363. NATIONAL LABOR RELATIONS BOARD *v.* J. WEINGARTEN, INC. C. A. 5th Cir. Certiorari granted and case set for oral argument with No. 73–765, immediately *supra*. Reported below: 485 F. 2d 1135.

No. 73–1377. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CITY OF NEW YORK ET AL. C. A. D. C. Cir.; and

No. 73–1378. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CAMPAIGN CLEAN WATER, INC. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 73–1377, 161 U. S. App. D. C. 114, 494 F. 2d 1033; No. 73–1378, 489 F. 2d 492.

Certiorari Denied. (See also Nos. 73–6054 and 73–6313.)

No. 73–989. DEMET *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 816.

No. 73–1038. APPALACHIAN POWER CO. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 158 U. S. App. D. C. 360, 486 F. 2d 427.

No. 73–1113. CHICOT LAND CO., INC. *v.* KELLY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 520 and 486 F. 2d 1403.

No. 73–1134. PBW STOCK EXCHANGE, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 485 F. 2d 718.

No. 73–1156. EVANGELINE PARISH SCHOOL BOARD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 649.

No. 73–1186. MOXEY *v.* SEELY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 485 F. 2d 680.

No. 73–1193. CONSIDINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–1197. FLANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 551.

No. 73–1207. BERKLEY, DBA BERKLEY ASSOCIATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–1214. BUXTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–1225. NATIONAL MARITIME UNION OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 907.

No. 73–1357. COOKE COUNTY ELECTRIC COOPERATIVE ASSN. *v.* TOWN OF LINDSAY. Sup. Ct. Tex. Certiorari denied. Reported below: 502 S. W. 2d 117.

No. 73–1358. PACIFIC HANDY CUTTER, INC., ET AL. *v.* CITY OF SOUTH EL MONTE ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–1368. NATIONAL CASH REGISTER CO. *v.* NCR EMPLOYEES' INDEPENDENT UNION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 716.

No. 73–5787. BUSTAMANTE-GAMEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 488 F. 2d 4.

No. 73–5859. VALDIVIESO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 545.

No. 73–5873. WEST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 1404.

No. 73–5876. LUFKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 471 F. 2d 656.

No. 73–5877. HOLLAND, AKA TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 487 F. 2d 1395.

No. 73–5896. TULIPANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1404.

No. 73–5909. STERN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1404.

No. 73–5914. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–5916. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 485 F. 2d 292.

No. 73–5923. TYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 828.

No. 73–5963. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6027. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 688.

No. 73–6040. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 1325.

No. 73–6043. KELLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6045. MACKAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 491 F. 2d 616.

No. 73–6055. COLE ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–6070. WATKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 1393.

No. 73–6076. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1402.

No. 73–6089. CAMPANELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6100. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 510.

No. 73–6103. RUTH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 752.

No. 73–6145. MORGAN *v.* CALIFORNIA PERSONNEL BOARD (SANTA BARBARA COUNTY WELFARE DEPARTMENT, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6148. PHILLIPS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 73–6169. CAIN *v.* BRITTON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 73–6183. BROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1398.

No. 73–6218. CAIN *v.* U. S. BOARD OF PAROLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 1406.

No. 73–6321. GREEN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–6367. CARTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 73–6370. PFEIFER *v.* BELL & HOWELL CO. C. A. 7th Cir. Certiorari denied.

No. 73–6371. EDGERTON *v.* LEWIS, INSTITUTION SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–6372. MCKINNEY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 28.

No. 73–6376. BROWN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 502 S. W. 2d 295.

No. 73–6378. GRIFFITH *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 191 Neb. 39, 213 N. W. 2d 735.

No. 73–6382. DAVIS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 221, 306 N. E. 2d 787.

No. 73–6383. DEDMON *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–6384. TERRY *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1404.

No. 73–6387. HILL *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 488 F. 2d 609.

No. 73–6390. TRESSLER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 503 S. W. 2d 13.

No. 73–6392. WILLIAMS *v.* GUNN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 73–6393. BROWN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

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No. 73–6395. TERRY *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1405.

No. 73–6396. F.R.W. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 61 Wis. 2d 193, 212 N. W. 2d 130.

No. 73–6401. CARBONE *v.* VUKCEVICH, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 73–550. TEXASGULF INC. *v.* FEDERAL POWER COMMISSION;

No. 73–867. LOUISIANA POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION;

No. 73–868. LOUISIANA GAS SERVICE CO. *v.* FEDERAL POWER COMMISSION;

No. 73–871. EXXON CORP. ET AL. *v.* FEDERAL POWER COMMISSION;

No. 73–872. LOUISIANA ET AL. *v.* FEDERAL POWER COMMISSION; and

No. 73–874. NEW ORLEANS PUBLIC SERVICE, INC. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 483 F. 2d 623 and 1404.

No. 73–1179. ENVIRONMENTAL DEFENSE FUND, INC., ET AL. *v.* STAMM, COMMISSIONER, BUREAU OF RECLAMATION, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 814.

No. 73–5870. WELDON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6158. GRAY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 285 So. 2d 199.

No. 73–6325. KING *v.* MARYLAND. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 270 Md. 76, 310 A. 2d 803.

No. 73–6373. FIELDS *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1271. COWAN, PENITENTIARY SUPERINTENDENT *v.* OLIVER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 487 F. 2d 895.

No. 73–1372. KENTNER *v.* SEABOARD COAST LINE RAILROAD CO. ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 278 So. 2d 637.

No. 73–6388. MCDONALD *v.* TENNESSEE ET AL. C. A. 6th Cir. Motion to amend petition granted. Certiorari denied.

Rehearing Denied

No. 73–924. SHELTON *v.* UNITED STATES, 415 U. S. 976;

No. 73–1139. FRANKS *v.* WILSON, JUDGE, ET AL., 415 U. S. 986;

No. 73–5959. FLETCHER *v.* UNITED STATES, 415 U. S. 981;

No. 73–6156. OLSEN *v.* UNITED STATES, 415 U. S. 993; and

No. 73–6248. WALLACE *v.* HOFFMAN ET AL., *ante,* p. 908. Petitions for rehearing denied.

MAY 13, 1974

Affirmed on Appeal

No. 73–90. SHELTON *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. Affirmed on appeal from D. C. W. D. Wash. Reported below: 357 F. Supp. 3.

No. 73–865. MORGAN DRIVE AWAY, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. N. D. Okla.

No. 73–1273. FLORIDA TEXAS FREIGHT, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. S. D. Fla. Reported below: 373 F. Supp. 479.

Appeals Dismissed

No. 72–1173. INTERNATIONAL BUSINESS MACHINES CORP. *v.* UNITED STATES. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction. MR. JUSTICE DOUGLAS would postpone jurisdiction to a hearing of case on the merits. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this case.

No. 73–1066. CRAVATH, SWAINE & MOORE *v.* UNITED STATES. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Motion to treat jurisdictional statement as a motion for leave to file petition for writ of mandamus and/or certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this case and motion.

No. 73–1130. LILLY *v.* LILLY. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 73–1419. STUART *v.* STUART. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 73–6182. JOHNSON *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. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 73–6207. POPE *v.* NEBRASKA. Appeal from Sup. Ct. Neb. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would dismiss appeal for want of jurisdiction, treat the papers submitted as a petition for writ of certiorari, and set case for oral argument on issue of double jeopardy in light of the dissents in which he joined in *Bartkus* v. *Illinois*, 359 U. S. 121, 150, 164. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 190 Neb. 689, 211 N. W. 2d 923.

Vacated and Remanded on Appeal

No. 72–1617. CIVIL SERVICE COMMISSION OF NEW YORK ET AL. *v.* SNEAD; and

No. 72–1691. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK ET AL. *v.* SNEAD. Appeals from D. C. S. D. N. Y. Judgment vacated and cases remanded for further consideration in light of *Arnett* v. *Kennedy, ante,* p. 134. Reported below: 355 F. Supp. 764.

No. 73–208. COLLINS ET AL. *v.* WILSON, GOVERNOR OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. Judgment vacated and case remanded for further consideration in light of *Arnett* v. *Kennedy, ante,* p. 134. Reported below: 32 N. Y. 2d 788, 298 N. E. 2d 681.

No. 73–219. SANFORD ET AL. *v.* WILSON, GOVERNOR OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. Judgment vacated and case remanded for further considera-

tion in light of *Arnett* v. *Kennedy, ante,* p. 134. Reported below: 32 N. Y. 2d 788, 298 N. E. 2d 681.

Miscellaneous Orders

No. A–925. In re M. A. C. Application for release pending trial in Superior Court of the District of Columbia presented to Mr. Justice Douglas, and by him referred to the Court, denied.

No. A–987. Walden *v.* McLucas, Under Secretary of the Air Force, et al. Reapplication for injunction pending appeal to the United States Court of Appeals for the Ninth Circuit presented to Mr. Justice Douglas, and by him referred to the Court, denied.

No. A–1058. Buck et al. *v.* Impeach Nixon Committee et al. Application for stay of mandate of the United States Court of Appeals for the Seventh Circuit presented to The Chief Justice, and by him referred to the Court, granted. Motion to vacate stay heretofore granted by The Chief Justice denied. Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice Marshall, and Mr. Justice Powell would discontinue the stay.

No. A–1065. Local 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America et al. *v.* Pilot Freight Carriers, Inc. Application for stay of mandate of the United States Court of Appeals for the Fourth Circuit presented to The Chief Justice, and by him referred to the Court, denied.

No. D–11. In re Disbarment of Hartzog. It having been reported to the Court that Benjamin Gerard Hartzog has been disbarred from the practice of law in all of the courts of the District of Columbia, and this Court by order of October 23, 1973 [414 U. S. 971], having sus-

pended the said Benjamin Gerard Hartzog 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 rule was duly issued and served upon the respondent, who has filed a return; now, upon consideration of the rule to show cause and return aforesaid;

It is ordered that the said Benjamin Gerard Hartzog 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. 73–203. EISEN *v.* CARLISLE & JACQUELIN ET AL. C. A. 2d Cir. [Certiorari granted, 414 U. S. 908.] Motion of petitioner for leave to file supplemental brief after argument granted.

No. 73–671. MAYER PAVING & ASPHALT CO. ET AL. *v.* GENERAL DYNAMICS CORP. ET AL., 414 U. S. 1146. Respondents are requested to file response to motion for leave to file petition for rehearing within 30 days.

No. 73–831. WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO. C. A. 3d Cir. [Certiorari granted, 414 U. S. 1128.] Motion of respondent for appointment of counsel *nunc pro tunc* granted. It is ordered that John J. Witmeyer III, Esquire, of New York, New York, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 73–5845. JACKSON *v.* METROPOLITAN EDISON CO. C. A. 3d Cir. [Certiorari granted, 415 U. S. 913.] Motion of National Consumer Law Center for leave to file a brief as *amicus curiae* granted.

No. 72–1662. INTERNATIONAL BUSINESS MACHINES CORP. *v.* EDELSTEIN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. C. A. 2d Cir. Motion for leave to file petition for

writ of certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this motion. Reported below: See 471 F. 2d 507 and 480 F. 2d 293.

No. 73–6534. BLACK *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 73–6304. HOFFMAN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS ET AL.; and

No. 73–6416. BRADY *v.* NIELSEN, U. S. DISTRICT JUDGE (STATE BAR OF CALIFORNIA ET AL., REAL PARTIES IN INTEREST). Motions for leave to file petitions for writs of mandamus denied.

No. 72–1661. INTERNATIONAL BUSINESS MACHINES CORP. *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition and/or certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this motion. Reported below: 471 F. 2d 507 and 480 F. 2d 293.

No. 73–1064. INTERNATIONAL BUSINESS MACHINES CORP. *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of mandamus and other relief denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 73–6296. THERIAULT *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 73–1046. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* DIAZ ET AL. Appeal from

D. C. S. D. Fla. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 361 F. Supp. 1.

Certiorari Granted

No. 73–1256. CONNELL CONSTRUCTION CO., INC. *v.* PLUMBERS & STEAMFITTERS LOCAL UNION NO. 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO. C. A. 5th Cir. Certiorari granted. Reported below: 483 F. 2d 1154.

No. 73–1313. INTERNATIONAL TELEPHONE & TELEGRAPH CORP., COMMUNICATIONS EQUIPMENT & SYSTEMS DIVISION *v.* LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 486 F. 2d 863.

No. 73–1162. UNITED STATES *v.* WILSON ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 488 F. 2d 1231.

No. 73–1288. ALFRED DUNHILL OF LONDON, INC. *v.* REPUBLIC OF CUBA ET AL. C. A. 2d Cir. Certiorari granted. Counsel in this case are directed to brief and argue the following questions:

1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an act of state?

2. If so, is an exception to the act of state doctrine created, under *First National City Bank* v. *Banco Nacional de Cuba,* 406 U. S. 759 (1972), where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's codefendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?

Reported below: 485 F. 2d 1355.

No. 73–6038. DROPE *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 498 S. W. 2d 838.

Certiorari Denied. (See also Nos. 73–1066, 73–6182, and 73–6207, *supra.*)

No. 73–221. ROBINSON *v.* BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 475 F. 2d 707.

No. 73–701. NATIONAL LABOR RELATIONS BOARD *v.* WICHITA EAGLE & BEACON PUBLISHING CO., INC., ET AL.; and

No. 73–708. THE NEWSPAPER GUILD *v.* WICHITA EAGLE & BEACON PUBLISHING CO., INC. C. A. 10th Cir. Certiorari denied. Reported below: 480 F. 2d 52.

No. 73–817. GAMBINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 483 F. 2d 1399.

No. 73–905. TALBERT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 485 F. 2d 684.

No. 73–925. ALLISON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 339.

No. 73–1033. VOYAGER 1000 ET AL. *v.* CIVIL AERONAUTICS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 792.

No. 73–1054. RAYMOND ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1404.

No. 73–1090. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 686.

No. 73–1145. TECHNICAL DEVELOPMENT CORP. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 237.

No. 73–1149. JOSSEFIDES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1401.

No. 73–1150. WEEDON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 501 S. W. 2d 336.

No. 73–1163. WALLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 1405.

No. 73–1165. FRIED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 201.

No. 73–1177. HENDERSON, WARDEN *v.* RECASNER. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1403.

No. 73–1181. DAVIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 73–1187. PARKMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1392.

No. 73–1189. CHURCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 490 F. 2d 353.

No. 73–1216. WALDEN ET VIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 372.

No. 73–1254. UNITED STATES STEEL CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied.

No. 73–1303. ROSENTHAL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 73–1307. RANGEL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 871.

No. 73–1318. STANLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1399.

No. 73–1319. VILLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–1325. MONTELLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–1327. HAMILTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–1340. GERSTENSLAGER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 1332.

No. 73–1341. DI VOSTA RENTALS, INC. *v.* LEE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 674.

No. 73–1343. BROBECK *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 751.

No. 73–1352. WALDEN ET UX. *v.* SMALL BUSINESS ADMINISTRATION. C. A. 9th Cir. Certiorari denied.

No. 73–1354. BUSINESS ROUNDTABLE *v.* CONSUMERS UNION OF UNITED STATES, INC., ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 491 F. 2d 1396.

No. 73–1359. HENRY I. SIEGEL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 518.

No. 73–1388. MEAD ET AL. *v.* HORVITZ PUBLISHING CO. ET AL. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 73–1389. TRADEWELL *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 9 Wash. App. 821, 515 P. 2d 172.

No. 73–1401. BECKER ET AL. *v.* LEVITT, COMPTROLLER OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 1087.

No. 73–1408. BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT No. 131 OF KANE COUNTY, ILLINOIS, ET AL. *v.* AURORA EDUCATION ASSOCIATION EAST ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 490 F. 2d 431.

No. 73–1411. PADEREWSKI FOUNDATION, INC., ET AL. *v.* SUSKI ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 40 App. Div. 2d 663, 336 N. Y. S. 2d 994.

No. 73–1421. SMITH *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 943.

No. 73–1426. UNITED TRANSPORTATION UNION ET AL. *v.* SOUTHERN PACIFIC TRANSPORTATION CO. C. A. 9th Cir. Certiorari denied. Reported below: 491 F. 2d 830.

No. 73–1434. CARY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 269 So. 2d 374.

No. 73–1438. SOLITRON DEVICES, INC. *v.* ISLAND TERRITORY OF CURACAO. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 1313.

No. 73–1453. AD HOC COMMITTEE ON JUDICIAL ADMINISTRATION ET AL. *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 488 F. 2d 1241.

No. 73–1467. AMERICAN BASKETBALL ASSN. *v.* AMF VOIT, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 1393.

No. 73–1479. JEFFRESS *v.* KRAMER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 490 F. 2d 611.

No. 73–1489. CHARM PROMOTIONS, LTD. *v.* TRAVELERS INDEMNITY CO. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 1092.

No. 73–1505. BALLENGER ET AL. *v.* MOBIL OIL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 707.

No. 73–1506. HARLAN #4 COAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 490 F. 2d 117.

No. 73–1519. CROSBY & CO., INC. *v.* COMPAGNIE NATIONALE AIR FRANCE, AKA AIR FRANCE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 42 App. Div. 2d 1050, 348 N. Y. S. 2d 957.

No. 73–5732. SHRIVER *v.* UNITED STATES; and
No. 73–5893. MARX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 485 F. 2d 1179.

No. 73–5789. MCGONAGLE *v.* UNITED STATES; and
No. 73–5996. FERREIRA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 73–5807. OGDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 484 F. 2d 1274.

No. 73–5889. BANKS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 545.

No. 73–5918. WESTBROOK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 486 F. 2d 1399.

No. 73–5948. DA SILVA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 1363.

No. 73–5960. HARGRAVES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 73–5970. OGDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 485 F. 2d 536.

No. 73–5995. SHARPE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1399.

No. 73–6005. CARTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6017. CAVENAUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6018. GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6021. TYLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1405.

No. 73–6023. KOPACSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 900.

No. 73–6037. BROWN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 55, 486 F. 2d 1315.

No. 73–6041. MERCER *v.* WINSTON. Sup. Ct. Va. Certiorari denied. Reported below: 214 Va. 281, 199 S. E. 2d 724.

No. 73–6052. TORRES *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6059. RALSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6062. SCHWARTZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 1393.

No. 73–6088. INMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 2d 738.

No. 73–6093. NAVARETTE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 73–6096. COLWELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 1393.

No. 73–6107. GRIGGS *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 73–6108. STOCKER, AKA LANCE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 751.

No. 73–6114. HUFFMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 490 F. 2d 412.

No. 73–6121. REYNOLDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 4.

No. 73–6126. ECKLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 1403.

No. 73–6128. SCHULTZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 9.

No. 73–6129. BURTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1398.

No. 73–6150. VERSE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 490 F. 2d 280.

No. 73–6152. FRANCIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 1403.

No. 73–6157. GRILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 484 F. 2d 990.

No. 73–6162. DAULTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 524.

No. 73–6167. PARKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 491 F. 2d 517.

No. 73–6171. SMITH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 329.

No. 73–6176. BRADBY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 748.

No. 73–6180. MORGAN *v.* WILLINGHAM ET AL. C. A. 10th Cir. Certiorari denied.

No. 73–6181. WILSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 400.

No. 73–6185. RODDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 757.

No. 73–6194. ROGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 1403.

No. 73–6196. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 490 F. 2d 207.

No. 73–6204. PLEASANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 489 F. 2d 1028.

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No. 73–6222. WAGNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 211.

No. 73–6234. LOPEZ *v.* UNITED STATES; and
No. 73–6246. OREYANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 753.

No. 73–6238. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 F. 2d 275; 486 F. 2d 305.

No. 73–6241. THORPE *v.* CITY OF KANSAS CITY. Sup. Ct. Mo. Certiorari denied: Reported below: 499 S. W. 2d 454.

No. 73–6247. WALKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 489 F. 2d 714.

No. 73–6258. DORMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 756.

No. 73–6259. BREWER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 751.

No. 73–6263. RIZZO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 215.

No. 73–6264. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 491 F. 2d 236.

No. 73–6285. WHITLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 491 F. 2d 1248.

No. 73–6292. EDWARDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6298. FRAZIER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied.

No. 73–6303. BURCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 490 F. 2d 1300.

No. 73–6309. GRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 756.

No. 73–6343. RESNICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1165.

No. 73–6369. DOE, AKA JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 93.

No. 73–6386. DAVIS *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 752.

No. 73–6389. COHRAN *v.* DEYTON, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1056.

No. 73–6410. GONZALEZ *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 73–6412. COLLINS *v.* WARDEN, NEVADA STATE PRISON. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 950.

No. 73–6417. BURNS *v.* DECKER ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 298 Minn. 7, 212 N. W. 2d 886.

No. 73–6420. BLUM *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 35 Cal. App. 3d 515, 110 Cal. Rptr. 833.

No. 73–6422. PINEDO *v.* CALIFORNIA. Super. Ct. Cal., County of Orange. Certiorari denied.

No. 73–6424. CADOGAN *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 73–6436. HUGHES *v.* CARSON, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 73–6437. NELSON *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Wake County. Certiorari denied.

No. 73–6438. COLLINS *v.* MARYLAND. Ct. Spec. App. Md. Certiorari denied.

No. 73–6441. DEAVERS *v.* VAN NESS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 492 F. 2d 1238.

No. 73–6442. DANIELS *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–6444. BRADLEY *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 73–6448. STARKEY *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 73–6455. GAINEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 73–6465. GUAJARDO *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 417.

No. 73–6473. BENNETT *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 30 Utah 2d 343, 517 P. 2d 1029.

No. 73–793. CHALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 686.

No. 73–824. BECKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 51.

No. 73–840. Riely *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 484 F. 2d 661.

No. 73–853. Forbicetta *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 486 F. 2d 1403.

No. 73–870. Marks et al. *v.* City of Newport. Ct. App. Ky. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 73–1120. National Helium Corp. et al. *v.* Morton, Secretary of the Interior, et al. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 486 F. 2d 995.

No. 73–1138. Weisberg *v.* United States Department of Justice. C. A. D. C. Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 160 U. S. App. D. C. 71, 489 F. 2d 1195.

No. 73–1173. Horton *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 488 F. 2d 552.

No. 73–1220. Fort Sill Apache Tribe of Oklahoma et al. *v.* United States. Ct. Cl. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 201 Ct. Cl. 630, 477 F. 2d 1360.

No. 73–1229. Israel, Attorney General of Rhode Island, et al. *v.* Doe et al. C. A. 1st Cir. Certiorari denied. Mr. Justice Douglas would grant certiorari.

No. 73–1240. Air Line Stewards & Stewardesses Assn., Local No. 550, TWU, AFL–CIO *v.* Zipes et al.; and

No. 73–1416. Trans World Airlines, Inc., et al. *v.* Zipes et al. C. A. 7th Cir. Certiorari denied. Mr.

JUSTICE DOUGLAS would grant certiorari. Reported below: 490 F. 2d 636.

No. 73–1409. WASNOWIC ET AL. *v.* CHICAGO BOARD OF TRADE ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6010. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 489 F. 2d 1330.

No. 73–6115. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6122. MORALES-JARAMILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6221. WANSLEY *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 90.

No. 73–6243. STRONG *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 231 Ga. 514, 202 S. E. 2d 428.

No. 73–6250. SMITH *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 736.

No. 73–6406. KRAFT *v.* MARYLAND. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: See 269 Md. 583, 307 A. 2d 683.

No. 73–6421. LANGS, GUARDIAN *v.* HARDER, COMMISSIONER OF WELFARE. Sup. Ct. Conn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–1065. INTERNATIONAL BUSINESS MACHINES CORP. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 493 F. 2d 112.

No. 73–1144. FORTUNE ET AL. *v.* BAZAAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 570 and 489 F. 2d 225.

THE CHIEF JUSTICE, concurring.

I join in the denial of certiorari on my reading of the temporary restraining order of the District Court as not requiring the University to continue to make available to the respondents, at public expense, facilities of the University for the production of any future publication. Those attending a state university have a right to be free from official censorship in their speech and writings, but this right does not require the University to commit its faculty or financial resources to any activity which it considers to be of substandard or marginal quality.

No. 73–1394. SMITH ET AL. *v.* CURTIS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 489 F. 2d 516.

No. 73–1403. GRAZIANI *v.* COMMITTEE ON LEGAL ETHICS OF WEST VIRGINIA STATE BAR. Sup. Ct. App. W. Va. Certiorari denied. MR. JUSTICE DOUGLAS adheres to his dissent in *Ullmann* v. *United States,* 350 U. S. 422, 440, and would reverse judgment of lower court. Reported below: —— W. Va. ——, 200 S. E. 2d 353.

No. 73–5842. CIUZIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 492.

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

Successive prosecutions of petitioner and one Cioffi

resulted from an alleged agreement to sell an undercover agent $500,000 worth of counterfeit 6-cent stamps and an alleged delivery to the agent of a sample sheet of four hundred of the stamps. The first prosecution was upon a two-count indictment that charged the pair in the first count with having attempted to sell stamps known to be falsely made, forged, and counterfeited, in violation of 18 U. S. C. § 472, and, in the second count, with conspiracy to violate the same section. The trial on that indictment ended with a directed verdict of acquittal on the first count as to Cioffi, a dismissal of the first count as to petitioner and a mistrial on the second count when the jury could not agree upon a verdict.

Instead of proceeding to a retrial on the second count, the Government abandoned its efforts under § 472 and procured a second indictment under 18 U. S. C. § 501 based upon the very same course of conduct. The second indictment was also a two-count indictment, the first count charging that the pair "knowingly did possess with intent to use and sell, approximately four hundred forged and counterfeited postage stamps," in violation of § 501, and the second count charging conspiracy to violate that section. The overt acts alleged were the same as in the first indictment and the evidence at the trials was much the same.

I

Petitioner and Cioffi unsuccessfully claimed that, since the second prosecution grew out of the same transaction, the Double Jeopardy Clause of the Fifth Amendment barred the second prosecution. In my view the rejection of this claim was error. I adhere to the position that the Double Jeopardy Clause 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,

448, 453–454 (1970) (BRENNAN, J., concurring); see *Mullin* v. *Wyoming,* 414 U. S. 940 (1973) (BRENNAN, J., dissenting); *Grubb* v. *Oklahoma,* 409 U. S. 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) (DOUGLAS, J., concurring).

II

I would grant certiorari in any event to decide another Double Jeopardy claim argued by petitioner based upon the action of the Court of Appeals for the Second Circuit in remanding for a new trial after reversing the conviction of petitioner and Cioffi under the second indictment, 487 F. 2d 492 (1973).

The substantive § 501 first count alleged possession of the stamps "with intent to use and sell." Shortly before submission of the case to the jury, the indictment was redacted to delete all references to "sell." The redaction was acquiesced in by the prosecution when sought by the defense, apparently because the Government's evidence was insufficient to support the charge of possession with intent to "sell." The case thus went to the jury under instructions limited to the charge of possession with intent to "use." The Court of Appeals held, however, that the instructions defining "use" were erroneous because not confined to use for postal purposes. Instead of remanding for a new trial limited to the "use" charge, as was proper, although the Government's evidence at the § 472 trial may have been insufficient, *Bryan* v. *United States,* 338 U. S. 552 (1950), the Court of Appeals remanded for a trial on the "sell" charge, finding that the Government's evidence on that charge was sufficient to present a jury question of possession with intent to "sell." The Court of Appeals stated:

> "There was no evidence in this case that defendants had any intention to use the counterfeited

> stamps for large scale mailing of letters; the evidence was rather that they were intent on a sale. In short, when the judge redacted the indictment, he cut out the wrong word; the case should have been submitted to the jury on the basis of possession with intent to sell rather than possession with intent to use. If the judge's action was based on a belief of insufficiency of the evidence to show possession with intent to sell, he was mistaken. From the evidence presented at trial, the jury could permissibly infer that defendants intended to sell the sheet of 400 counterfeit stamps . . . ." 487 F. 2d, at 500.

The Court of Appeals recognized that a double jeopardy question was raised by the remand for a trial of the "sell" charge:

> "There remains the question whether defendants can be tried again under the same indictment, with the jury this time instructed that it can convict on proof of intent to sell, a charge which the judge erroneously removed from the indictment at the defendants' request and which we direct him to restore. Plainly they can be. It is settled that when a defendant has his conviction reversed on appeal, the double jeopardy clause does not prevent his retrial for the same offense. . . . We see no tenable distinction between a case like this where defendants have procured a reversal because the judge submitted the indictment to the jury on a wrong theory and one where they procured reversal because the judge submitted a defective indictment." *Id.*, at 501.

The question, however, is whether the trial judge's redaction of the "sell" charge was a directed verdict of acquittal on that charge. The lack of a formal direction

of acquittal is not determinative. *United States* v. *Sisson,* 399 U. S. 267, 279 n. 7 (1970). "[T]he trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . . .' " *United States* v. *Jorn,* 400 U. S. 470, 478 n. 7 (1971); cf. *United States* v. *Oppenheimer,* 242 U. S. 85 (1916); *Downum* v. *United States,* 372 U. S. 734 (1963). If it was an acquittal, petitioner did not forgo his constitutional defense of former jeopardy on that charge by successfully appealing his erroneous conviction on the "use" charge. "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." *Green* v. *United States,* 355 U. S. 184, 193–194 (1957). See also *Price* v. *Georgia,* 398 U. S. 323 (1970); *Benton* v. *Maryland,* 395 U. S. 784, 796–797 (1969).

The Court of Appeals held this principle inapplicable in denying a petition for rehearing. It based its decision on a reading of § 501 as establishing a single offense, 487 F. 2d, at 501. This conclusion itself presents an important question even under Justice Gray's formulation in *Morey* v. *Commonwealth,* 108 Mass. 433, 434 (1871), that the test of a single offense is whether "the evidence required to support a conviction upon one of [the charges] would have been sufficient to warrant conviction upon the other." See, *e. g., Gavieres* v. *United States,* 220 U. S. 338, 342 (1911); *Blockburger* v. *United States,* 284 U. S. 299, 304 (1932). Under that test, there is clearly a question whether the evidence required to support a conviction upon one of the charges would have been sufficient to warrant conviction upon the other, since proof of possession with intent to sell seems to require

proof of a different element from possession with intent to use.

I would grant the petition for certiorari and set the case for oral argument.

No. 73–6494. JACKSON *v.* NORTON-CHILDREN'S HOSPITAL, INC., ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari denied. Reported below: 487 F. 2d 502.

Rehearing Denied

No. 72–887. AMERICAN PARTY OF TEXAS ET AL. *v.* WHITE, SECRETARY OF STATE OF TEXAS, 415 U. S. 767;

No. 72–1410. EDELMAN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* JORDAN, 415 U. S. 651;

No. 73–1032. SLUTSKY ET AL., DBA "THE NEVELE" *v.* UNITED STATES, *ante,* p. 937;

No. 73–1063. HANNERS *v.* UNITED STATES, *ante,* p. 951;

No. 73–6084. NORTHERN *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL., *ante,* p. 943;

No. 73–6119. SAYLES *v.* SIRICA, U. S. DISTRICT JUDGE, 415 U. S. 988;

No. 73–6231. SMILGUS *v.* KENT, JUDGE, *ante,* p. 908;

No. 73–6252. JIMENEZ *v.* UNITED STATES, *ante,* p. 916; and

No. 73–6327. WALLACE ET VIR *v.* SCHULIMSON, DIRECTOR, DIVISION OF WELFARE OF MISSOURI, ET AL., *ante,* p. 945. Petitions for rehearing denied.

No. 73–809. ROSSI ET AL. *v.* UNITED STATES, 415 U. S. 994. Motion for leave to file petition for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

EFFECTIVE DECEMBER 1, 1975

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 22, 1974, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post,* p. 1002. The Judicial Conference Report referred to in that letter is not reproduced herein.

The amendments were to have become effective on August 1, 1974, as provided in paragraph 2 of the Court's order, *post,* p. 1003, but the effective date was postponed by Congress until August 1, 1975. Pub. Law 93–361, 88 Stat. 397. Congress, however, on July 31, 1975, while approving certain of the amendments proposed by the Court on April 22, 1974, to be effective December 1, 1975, made further amendments. Pub. L. 94–64, 89 Stat. 370.

For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, and 415 U. S. 1056.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 22, 1974

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress proposed amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Title 18, United States Code, Sections 3771 and 3772. MR. JUSTICE DOUGLAS dissents from the adoption of these rules.

Accompanying these rules is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes which were submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER,
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 22, 1974

ORDERED:

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 12.1, 12.2, and 29.1 and amendments to Rules 4, 9 (a), 11, 12, 15, 16, 17 (f), 20, 32 (a), 32 (c), 32 (e) and 43 as hereinafter set forth: [1]

2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on August 1, 1974,[2] and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of title 18, United States Code, sections 3771 and 3772.

MR. JUSTICE DOUGLAS is opposed to the Court's being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution.

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[1] [REPORTER'S NOTE. Only those amendments approved by Congress in Pub. L. 94–64, 89 Stat. 370, are set forth *post*, pp. 1005–1016. For the full text of the Court's proposed amendments, see H. R. Doc. No. 93–292, pp. 1–22 (1974).]

[2] [REPORTER'S NOTE. This effective date was postponed to August 1, 1975, and with respect to those amendments approved by Congress in Pub. L. 94–64, 89 Stat. 370, was again postponed to December 1, 1975. See *ante*, p. 1001.]

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

Section 2 of the Act of July 31, 1975, Pub. L. 94–64, 89 Stat. 370 (Federal Rules of Criminal Procedure Amendments Act of 1975), provides in part as follows:

> "SEC. 2. The amendments proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure which are embraced in the order of that Court on April 22, 1974, are approved except as otherwise provided in this Act [3] and shall take effect on December 1, 1975."

The following are those amendments prescribed by the Court in its order of April 22, 1974, that were approved by Congress:

Rule 4. Arrest warrant or summons upon complaint.

(*d*)[4] *Form.*

(*1*) *Warrant.*—The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

(*2*) *Summons.*—The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

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[3] [REPORTER'S NOTE. Section 3 of the Act provides a number of amendments to the Rules as proposed by the Court.]

[4] [REPORTER'S NOTE. Redesignated (c) by § 3 (2), Pub. L. 94–64, 89 Stat. 370.]

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(*e*)[5] *Execution or service; and return.*

(*1*) *By whom.*—The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(*2*) *Territorial limits.*—The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(*4*) *Return.*—The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to the marshal or other authorized person for execution or service.

Rule 11. Pleas.

(*a*) *Alternatives.*—A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(*b*) *Nolo contendere.*—A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

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[5] [REPORTER'S NOTE. Redesignated (d) by § 3 (3), Pub. L. 94–64, 89 Stat. 370.]

(*d*) *Insuring that the plea is voluntary.*—The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(*e*) *Plea agreement procedure.*

(*5*) *Time of plea agreement procedure.*—Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(*f*) *Determining accuracy of plea.*—Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(*g*) *Record of proceedings.*—A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Rule 12. Pleadings and motions before trial; defenses and objections.

(*a*) *Pleadings and motions.*—Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial

which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(*b*) *Pretrial motions.*—Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(*c*) *Motion date.*—Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(*d*) *Notice by the government of the intention to use evidence.*

(*1*) *At the discretion of the government.*—At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(*2*) *At the request of the defendant.*—At the arraignment or as soon thereafter as is practicable the defendant

may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(*f*) *Effect of failure to raise defenses or objections.*—Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(*g*) *Records.*—A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

Rule 12.2. Notice of defense based upon mental condition.

(*a*) *Defense of insanity.*—If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(*b*) *Mental disease or defect inconsistent with the mental element required for the offense charged.*—If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the

time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(*d*) *Failure to comply.*—If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

Rule 15. Depositions.

(*d*) *How taken.*—Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(*e*) *Use.*—At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as defined in subdivision (g) of this rule,[6] or the witness gives testimony

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[6] [REPORTER'S NOTE. The words "as defined in subdivision (g) of this rule" were struck out by § 3 (18), Pub. L. 94–64, 89 Stat. 374, and the words "as unavailability is defined in Rule 804 (a) of the Federal Rules of Evidence" were inserted in lieu thereof.]

at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(*f*) *Objections to deposition testimony.*—Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(*h*)[7] *Deposition by agreement not precluded.*—Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

Rule 16. Discovery and inspection.

(*a*) *Disclosure of evidence by the government.*

(*1*) *Information subject to disclosure.*

(*C*) *Documents and tangible objects.*—Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(*2*) *Information not subject to disclosure.*—Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the

[7] [REPORTER'S NOTE. Redesignated (g) by § 3 (19), Pub. L. 94–64, 89 Stat. 374.]

government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U. S. C. § 3500.

(3) *Grand jury transcripts.*—Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(4) *Failure to call witness.*—The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.

(b) *Disclosure of evidence by the defendant.*

(1) *Information subject to disclosure.*[8]

(2) *Information not subject to disclosure.*—Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(3) *Failure to call witness.*—The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.

(d) *Regulation of discovery.*

(2) *Failure to comply with a request.*—If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place

[8] [REPORTER'S NOTE. All subdivisions under this heading were amended or deleted by §§ 3 (24)–(26), Pub. L. 94–64, 89 Stat. 375.]

and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(*e*) *Alibi witnesses.*—Discovery of alibi witnesses is governed by Rule 12.1.

Rule 20. Transfer from the district for plea and sentence.

(*a*) *Indictment or information pending.*—A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which he was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.

(*b*) *Indictment or information not pending.*—A defendant arrested, held, or present in a district other than the district in which a complaint is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which he was arrested, held, or present subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys and upon filing of an information or the return of an indictment, the clerk of the court for the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which

the defendant was arrested, held, or present, and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued, he may at that time waive indictment as provided in Rule 7, and the prosecution may continue based upon the information originally filed.

(c) *Effect of not guilty plea.*—If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him.

Rule 29.1. Closing argument.

After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.

Rule 32. Sentence and judgment.

(a) *Sentence.*

(2) *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(c) *Presentence investigation.*

(2) *Report.*—The report of the presentence investigation shall contain any prior criminal record of the defend-

ant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(*3*) *Disclosure.*

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U. S. C. §§ 4208 (b), 4252, 5010 (e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(*d*) *Withdrawal of plea of guilty.*—A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(*e*) *Probation.*—After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(*f*) *Revocation of probation.*—The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on

which such action is proposed. The defendant may be admitted to bail pending such hearing.

Rule 43. Presence of the defendant.

(*a*) *Presence required.*—The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(*b*) *Continued presence not required.*—The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(*c*) *Presence not required.*—A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

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FOREIGN BANKS. See **Constitutional Law**, II, 2; V; VII, 1–3; **Pleading**; **Procedure**, 3.

FOREIGN COMMERCE. See **Constitutional Law**, II, 2; V; VII, 1–3; **Pleading**; **Procedure**, 3.

FORFEITURE OF VESSELS. See **Appeals**, 2; **Constitutional Law**, II, 4, 7.

FOURTEENTH AMENDMENT. See **Constitutional Law**, I, 3; II, 5; IV, 2–3; VI; VII, 4; **Injunctions**; **Procedure**, 6.

FOURTH AMENDMENT. See **Constitutional Law**, VII; **Standing to Sue.**

FREEDOM OF ASSOCIATION. See **Constitutional Law**, IV, 1; **Pleading**; **Procedure**, 1.

FREEDOM OF SPEECH. See **Constitutional Law**, II, 3; VI; **Procedure**, 1.

GOVERNMENTAL INTERESTS. See **Constitutional Law**, VI, 1.

GOVERNMENT EMPLOYEES. See **Constitutional Law**, II, 3.

HEALTH INSPECTORS. See **Constitutional Law**, VII, 4.

HEARINGS. See **Appeals**, 2; **Constitutional Law**, II, 4–5, 7; **Procedure**, 6.

IMMUNITY. See **Constitutional Law**, III; **Executive Immunity.**

IMPROPER REMARKS BY PROSECUTOR. See **Constitutional Law**, II, 6.

INCINERATORS. See **Internal Revenue Code**, 9.

INCOME TAXES. See **Constitutional Law**, II, 8; **Internal Revenue Code.**

"IN CONNECTION WITH" TRADE OR BUSINESS. See **Internal Revenue Code**, 9.

INJUNCTIONS. See also **Constitutional Law**, II, 8; **Internal Revenue Code**, 1–8, 10; **Mootness**, 3; **Procedure**, 5.

Court's equitable powers—Police intimidation.—In civil rights action attacking constitutionality of certain Texas statutes and alleg-

INJUNCTIONS—Continued.

ing that appellants and other law enforcement officers conspired to deprive appellees of their First and Fourteenth Amendment rights in their attempt to unionize farmworkers, portion of three-judge District Court's decree enjoining police intimidation of appellees was an appropriate exercise of court's equitable powers, since court could properly consider question of police harassment under concededly constitutional statutes and grant relief in exercise of jurisdiction ancillary to that conferred by constitutional attack on statutes that plainly required three-judge court. Allee v. Medrano, p. 802.

INMATE CORRESPONDENCE. See **Abstention; Constitutional Law,** VI.

IN REM JURISDICTION. See **Constitutional Law,** II, 7.

INSIDER INFORMATION. See **Procedure,** 4.

INSTALLMENT SALES. See **Constitutional Law,** II, 5.

INSTRUCTIONS TO JURY. See **Constitutional Law,** II, 6.

INTERCEPTED COMMUNICATIONS. See **Omnibus Crime Control and Safe Streets Act of 1968.**

INTERNAL REVENUE CODE. See also **Constitutional Law,** II, 8.

1. *Anti-Injunction Act—Failure to meet standards for exception.*—Petitioner private university in suit to prevent revocation of its tax-exempt status has not met standards of *Enochs* v. *Williams Packing & Navigation Co.,* 370 U. S. 1, with respect to granting of pre-enforcement injunction against tax assessment or collection despite § 7421 (a) of Code, since its contentions are sufficiently debatable to foreclose any notion that "under no circumstances could the Government ultimately prevail." Bob Jones University v. Simon, p. 725.

2. *Anti-Injunction Act—Injunction against third person's taxes.*—That respondent nonprofit corporation, whose tax-exempt status had been revoked by Internal Revenue Service, was not seeking, in action for injunctive relief requiring reinstatement of such status, to enjoin assessment or collection of its own taxes is irrelevant, for § 7421 (a) of Code bars a suit to enjoin the assessment or collection of anyone's taxes. Commissioner v. "Americans United" Inc., p. 752.

3. *Anti-Injunction Act—Judicially created exceptions.*—Petitioner's contention that § 7421 (a) of Code is subject to judicially created exceptions other than test of *Enochs* v. *Williams Packing & Navigation Co.,* 370 U. S. 1, is without merit. That decision constitutes an all-encompassing reading of § 7421 (a), and it rejected contention,

INTERNAL REVENUE CODE—Continued.

relied upon by petitioner, that irreparable injury alone is sufficient to lift statutory bar. Bob Jones University v. Simon, p. 725.

4. *Anti-Injunction Act—"Purpose" of action for reinstatement of tax-exempt status.*—Under any reasonable construction of statutory term "purpose," as used in § 7421 (a) of Code prohibiting suits for "purpose" of restraining assessment or collection of any tax, objective of action by respondent nonprofit corporation seeking reinstatement of tax-exempt status was to restrain assessment and collection of taxes from respondent's contributors, purpose being to restore advance assurance that donations to respondent would qualify as charitable deductions for respondent's donors. Commissioner v. "Americans United" Inc., p. 752.

5. *Anti-Injunction Act—Suit for declaratory judgment and reinstatement of tax-exempt status.*—Action by respondent nonprofit corporation, whose tax-exempt status had been revoked by Internal Revenue Service for violation of lobbying proscriptions of §§ 501 (c)(3) and 170 of Code, seeking declaratory judgment that IRS' administration of such proscriptions was erroneous or unconstitutional and injunctive relief requiring reinstatement of its § 501 (c)(3) tax-exempt status, is barred by § 7421 (a) of Code prohibiting suits "for the purpose of restraining the assessment or collection of any tax." Commissioner v. "Americans United" Inc., p. 752.

6. *Anti-Injunction Act—Suit to prevent revocation of tax-exempt status.*—Petitioner private university's suit to prevent Internal Revenue Service's revocation of petitioner's tax-exempt status was one "for the purpose of restraining the assessment or collection of any tax" within meaning of § 7421 (a) of Code, which provides that no suit for such purpose shall be maintained in any court, since petitioner's allegation that revocation would subject it to "substantial" income tax liability demonstrates that primary purpose of suit is to prevent IRS from assessing and collecting income taxes. But even if no income tax liability resulted, suit would still be one to restrain assessment and collection of federal social security and unemployment taxes, as well as to restrain collection of taxes from petitioner's donors. Bob Jones University v. Simon, p. 725.

7. *Anti-Injunction Act—Taxpayer's constitutional claim.*—Constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under § 7421 (a) of Code prohibiting suits for purposes of restraining assessment or collection of any tax. Commissioner v. "Americans United" Inc., p. 752.

8. *Anti-Injunction Act—Tax refund action—Tax-exempt status—Irreparable injury.*—An action for refund of unemployment taxes,

INTERNAL REVENUE CODE—Continued.
even if successful, will not lead to recovery of contributions lost in interim between withdrawal of ruling letter assuring respondent nonprofit corporation of tax-exempt status under § 501 (c)(3) of Code and final adjudication of entitlement to such status. This is, however, merely a form of irreparable injury, which in itself is insufficient to avoid bar of § 7421 (a) of Code prohibiting suits for purpose of restraining assessment or collection of any tax. Commissioner v. "Americans United" Inc., p. 752.

9. *Deduction for experimental expenditures—"In connection with" trade or business.*—It was error to disallow petitioner, who had advanced part of capital in partnership formed in 1966 to develop special-purpose incinerator and had become limited partner, deduction on his individual income tax return for 1966 for his pro rata share of partnership's operating loss, since such deduction was "in connection" with petitioner's trade or business within meaning of § 174 (a)(1) of Code providing for a deduction for "experimental expenditures which are paid or incurred by [the taxpayer] during the taxable year in connection with his trade or business as expenses which are not chargeable to capital account," and since disallowance was contrary to broad legislative objective of Congress when it enacted § 174 to provide an economic incentive, especially for small and growing businesses, to engage in search for new products and new inventions. Snow v. Commissioner, p. 500.

10. *Tax refund action—Legality of tax-exempt status withdrawal.*—An action for refund of unemployment taxes will afford respondent nonprofit corporation a full opportunity to litigate legality of Internal Revenue Service's withdrawal of its ruling letter assuring respondent of tax-exempt status under § 501 (c)(3) of Code, since respondent's liability for such taxes hinges on precisely same legal issue as does its eligibility for tax-deductible contributions under § 170 of Code, *i. e.*, its entitlement to § 501 (c)(3) status. Commissioner v. "Americans United" Inc., p. 752.

INTERNAL REVENUE SERVICE. See **Constitutional Law,** II, 2; **Internal Revenue Code,** 1–8, 10.

IRREPARABLE INJURIES. See **Constitutional Law,** II, 8; **Injunctions; Internal Revenue Code,** 3, 8.

JURISDICTION. See **Injunctions.**

JURY INSTRUCTIONS. See **Constitutional Law,** II, 6.

JURY TRIALS. See **Constitutional Law,** VIII.

JUSTICIABILITY. See **Constitutional Law**, I; **Declaratory Judgments**; **Injunctions**; **Mootness.**

KENT STATE UNIVERSITY. See **Constitutional Law**, III; **Executive Immunity.**

LABOR. See **Constitutional Law**, I, 1; **Declaratory Judgments**; **Injunctions**; **Mootness**, 3; **National Labor Relations Act**; **National Labor Relations Board**; **Procedure**, 5.

LABOR MANAGEMENT RELATIONS ACT. See **Constitutional Law**, I, 1; **Declaratory Judgments.**

LABOR UNIONS. See **Injunctions**; **Mootness**, 3; **National Labor Relations Act**; **National Labor Relations Board**; **Procedure**, 5.

LANDLORD AND TENANT. See **Constitutional Law**, VIII.

LAND-USE RESTRICTIONS. See **Constitutional Law**, I, 2; IV, 1.

LAW SCHOOLS. See **Constitutional Law**, I, 3; **Mootness**, 2.

LAW STUDENTS. See **Constitutional Law**, I, 3; II, 1; **Mootness**, 2.

LEASED VESSELS. See **Appeals**, 2; **Constitutional Law**, II, 4, 7.

LEGAL PARAPROFESSIONALS. See **Constitutional Law**, II, 1.

LIENS. See **Constitutional Law**, II, 5.

LIMITED PARTNERS. See **Internal Revenue Code**, 9.

LLOYD-LA FOLLETTE ACT. See **Constitutional Law**, II, 3.

LOBBYING. See **Internal Revenue Code**, 5.

LOUISIANA. See **Constitutional Law**, II, 5.

MAIL CENSORSHIP. See **Abstention**; **Constitutional Law**, VI.

MANAGERIAL EMPLOYEES. See **National Labor Relations Act**, 2; **National Labor Relations Board.**

MARIHUANA. See **Appeals**, 2; **Constitutional Law**, II, 4, 7.

MEAT PACKERS. See **Bankruptcy.**

MEXICAN-AMERICAN FARMWORKERS. See **Injunctions**; **Mootness**, 3; **Procedure**, 5.

MISAPPROPRIATION OF TRADE SECRETS. See **Federal-State Relations**, 2; **Trade Secrets.**

MISIDENTIFICATION OF OFFICER AUTHORIZING WIRETAP APPLICATION. See **Omnibus Crime Control and Safe Streets Act of 1968**, 6.

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MOOTNESS. See also **Constitutional Law,** I, 1; **Declaratory Judgments; Procedure,** 5.

1. *Constitutionality of land-use ordinance—One-family dwelling restriction.*—Fact that named tenant appellees have vacated house, appellee owners of which were cited for violating ordinance restricting land use to one-family dwellings, does not moot appellees' case challenging constitutionality of ordinance, as ordinance continues to affect value of property. Village of Belle Terre v. Boraas, p. 1.

2. *Constitutionality of state law school's admissions policy—Equal protection of the laws.*—Because petitioner, who after being denied admission to state-operated law school brought suit for injunctive relief, claiming that school's admissions policy racially discriminated against him in violation of Equal Protection Clause of Fourteenth Amendment, was, as a result of a stay of judgment against him, admitted and thus will complete law school at end of term for which he has registered regardless of any decision this Court might reach on merits, the Court cannot, consistently with limitations of Art. III of Constitution, consider substantive constitutional issues, and case is moot. DeFunis v. Odegaard, p. 312.

3. *Injunction against picketing—End of strike—Mootness.*—State court injunction against appellees, proscribing picketing on or near property of one of major employers in area, did not moot controversy involving appellants' and other law enforcement officers' harassment of appellees' attempt to unionize farmworkers and persuade them to join strike, since it was appellants' and other officers' conduct that ended strike, not the injunction. Nor has case become moot because appellees abandoned their unionization efforts as result of harassment, for appellee union still is a live organization with a continuing goal of unionizing farmworkers. Allee v. Medrano, p. 802.

MORTGAGES. See **Constitutional Law,** II, 5.

MURDER. See **Constitutional Law,** II, 6.

NARCOTICS. See **Appeals,** 2; **Constitutional Law,** II, 4, 7; **Omnibus Crime Control and Safe Streets Act of 1968; Searches and Seizures.**

NATIONAL GUARD. See **Constitutional Law,** III; **Executive Immunity.**

NATIONAL LABOR RELATIONS ACT. See also **National Labor Relations Board.**

1. *Discharge of supervisors for union membership—Bar to enforcement of state right-to-work law.*—The second clause of § 14 (a) of

NATIONAL LABOR RELATIONS ACT—Continued.

NLRA ("no employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining") applies to any law requiring an employer to accord to supervisors like petitioners, who because of their union membership were discharged as meat department managers in respondent's stores and who are "the front line of management," the "anomalous status of employees," and enforcement of North Carolina's Right-to-Work law would thus flout national policy against compulsion upon employers from either federal or state authorities to treat supervisors as employees. Beasley v. Food Fair of North Carolina, p. 653.

2. *Exclusion of "managerial employees"—Congressional intent.*—Congress intended to exclude from protections of NLRA all employees properly classified as "managerial," not just those in positions susceptible to conflicts of interest in labor relations. This is unmistakably indicated by National Labor Relations Board's early decisions, purpose and legislative history of Taft-Hartley amendments to NLRA in 1947, NLRB's subsequent construction of Act for more than two decades, and decisions of courts of appeals. NLRB v. Bell Aerospace Co., p. 267.

NATIONAL LABOR RELATIONS BOARD. See also **National Labor Relations Act**, 2.

Adjudication vis-à-vis rulemaking—Buyers as "managerial employees."—NLRB is not required to proceed by rulemaking, rather than by adjudication, in determining whether buyers or some types of buyers are "managerial employees" for purposes of collective bargaining under National Labor Relations Act. NLRB v. Bell Aerospace Co., p. 267.

NEGOTIABLE INSTRUMENTS. See **Constitutional Law**, II, 2; V; VII, 1–3.

NEGROES. See **Appeals**, 1; **Education Amendments of 1972.**

NEW JERSEY. See **Constitutional Law**, I, 1; **Declaratory Judgments.**

NEW YORK. See **Constitutional Law**, I, 2; IV, 1; **Procedure**, 4.

NIGHTTIME SEARCHES. See **Searches and Seizures.**

NONPROBATIONARY FEDERAL EMPLOYEES. See **Constitutional Law**, II, 3.

NONPROFIT CORPORATIONS. See **Internal Revenue Code**, 2, 4–5, 7–8, 10.

NORTH CAROLINA. See **National Labor Relations Act**, 1.

NOTICE. See **Appeals**, 2; **Constitutional Law**, II, 4–5, 7; **Procedure**, 6.

OFFICE OF ECONOMIC OPPORTUNITY. See **Constitutional Law**, II, 3.

OHIO. See **Constitutional Law**, III; **Executive Immunity.**

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968.

1. *Title III—Improperly authorized wiretap application—Suppression of evidence.*—Primary or derivative evidence secured by wire interceptions pursuant to a court order issued in response to an application which was, in fact, not authorized by Attorney General or a specially designated Assistant Attorney General must be suppressed under 18 U. S. C. § 2515 upon a motion properly made under 18 U. S. C. § 2518 (10) (a), and hence evidence obtained from interceptions pursuant to initial court order issued in response to an application purportedly authorized by a specially designated Assistant Attorney General but in fact authorized by Attorney General's Executive Assistant, was properly suppressed. United States v. Giordano, p. 505.

2. *Title III—Intercepted communications—Inadmissibility.*—Communications intercepted pursuant to District Court's extension order were inadmissible, since they were evidence derived from communications invalidly intercepted pursuant to initial order which was issued in response to application purportedly authorized by specially designated Assistant Attorney General but in fact authorized by Attorney General's Executive Assistant. United States v. Giordano, p. 505.

3. *Title III—Interception order—Facial sufficiency.*—Interception order was not "insufficient on its face" within meaning of 18 U. S. C. § 2518 (10) (a) (ii), which provides that contents of intercepted communications, or evidence derived therefrom, may be suppressed on ground that interception order was "insufficient on its face," since order clearly identified "on its face" Assistant Attorney General as person authorizing application, he being a person who under 18 U. S. C. § 2516 (1) could properly give such approval if specially designated to do so as order recited, notwithstanding this was subsequently shown to be incorrect. United States v. Chavez, p. 562.

4. *Title III—Unlawful interceptions—Suppression of evidence.*—Under 18 U. S. C. § 2518 (10) (a) (i), which provides that contents of intercepted communications, or evidence derived therefrom, may be suppressed on ground that communication was "unlawfully inter-

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968—Continued.

cepted," words "unlawfully intercepted" are not limited to constitutional violations, but statute was intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement congressional intention to limit use of intercept procedures to those situations clearly calling for employment of this extraordinary investigative device. United States v. Giordano, p. 505.

5. *Title III—Wiretap application—Improper authorization—Suppression of evidence.*—Because application for interception order on respondent Fernandez' phone was authorized by Attorney General's Executive Assistant, rather than by Attorney General or any specially designated Assistant Attorney General, on whom alone 18 U. S. C. § 2516 (1) confers such power, evidence secured under that order was properly suppressed. United States v. Chavez, p. 562.

6. *Title III—Wiretap application—Misidentification of authorizing officer—Suppression of evidence.*—Misidentifying Assistant Attorney General as official authorizing wiretap of respondent Chavez, when Attorney General himself actually gave approval, was in no sense omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III, and hence does not require suppression of wiretap evidence. United States v. Chavez, p. 562.

7. *Title III—Wiretap applications—Authorization.*—Congress, under 18 U. S. C. § 2516 (1), did not intend power to authorize wiretap applications to be exercised by any individuals other than Attorney General or an Assistant Attorney General specially designated by him, notwithstanding 28 U. S. C. § 510, which authorizes Attorney General to delegate any of his functions to any other officer, employee, or agency of Justice Department. United States v. Giordano, p. 505.

ONE-FAMILY DWELLINGS. See **Constitutional Law**, I, 2; IV, 1.

OPACITY TESTS. See **Constitutional Law**, VII, 4.

"OPEN FIELDS." See **Constitutional Law**, VII, 4.

OPPORTUNITY TO BE HEARD. See **Appeals**, 2; **Constitutional Law**, II, 4–5, 7; **Procedure**, 6.

OVERBREADTH. See **Constitutional Law**, II, 3.

PACKERS AND STOCKYARDS ACT. See **Bankruptcy.**

PARTNERSHIPS. See **Internal Revenue Code**, 9.

PATENTS. See **Federal-State Relations**, 2; **Trade Secrets.**

PENAL INSTITUTIONS. See **Abstention**; **Constitutional Law**, II, 1; VI.

PERMISSIBLE STATE OBJECTIVE. See **Constitutional Law**, IV, 1.

PERSONAL PROPERTY. See **Constitutional Law**, II, 5.

PLEADING.

Speculative and hypothetical contentions—Constitutionality—Bank Secrecy Act of 1970.—American Civil Liberty Union's contentions that Act's reporting requirements with respect to foreign and domestic transactions invade its First Amendment associational interests are too speculative and hypothetical to warrant consideration, in view of fact that ACLU alleged only that it maintains accounts at San Francisco bank but not that it regularly engages in abnormally large domestic currency transactions, transports or receives monetary instruments from foreign commercial channels, or maintains foreign bank accounts. California Bankers Assn. v. Shultz, p. 21.

PLEASURE YACHTS. See **Appeals**, 2; **Constitutional Law**, II, 4, 7.

POLICE MISCONDUCT. See **Injunctions**; **Mootness**, 3; **Procedure**, 5.

POLLUTION. See **Constitutional Law**, VII, 4.

POSSESSORY ACTIONS. See **Constitutional Law**, VIII.

PRE-EMPTION. See **Federal-State Relations**, 2; **Trade Secrets.**

PREJUDICIAL ERROR. See **Constitutional Law**, II, 6.

PRESEIZURE NOTICE AND HEARING. See **Appeals**, 2; **Constitutional Law**, II, 4, 7.

PRIMARY EVIDENCE. See **Omnibus Crime Control and Safe Streets Act of 1968**, 1.

PRIOR HEARINGS. See **Appeals**, 2; **Constitutional Law**, II, 4–5, 7; **Procedure**, 6.

PRIORITIES IN BANKRUPTCY. See **Bankruptcy.**

PRIOR NOTICE. See **Appeals**, 2; **Constitutional Law**, II, 4–5, 7; **Procedure**, 6.

PRISONER MAIL CENSORSHIP. See **Abstention**; **Constitutional Law**, VI.

PRIVACY. See **Constitutional Law**, IV, 1.

PRIVATE ATTORNEYS GENERAL. See **Appeals**, 1; **Education Amendments of 1972.**

PRIVATE UNIVERSITIES. See **Constitutional Law**, II, 8; **Internal Revenue Code**, 1, 3, 6.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law**, V.

PROCEDURAL DUE PROCESS. See **Constitutional Law**, II, 3.

PROCEDURE. See also **Injunctions.**

1. *Bank Secrecy Act of 1970—American Civil Liberties Union—Premature constitutional claim.*—ACLU's claim that recordkeeping requirements of Title I of Act violate its members' First Amendment rights since challenged provisions could possibly be used to identify its members and contributors, is premature, Government having sought no such disclosure here. California Bankers Assn. v. Shultz, p. 21.

2. *Bank Secrecy Act of 1970—Bank plaintiffs—Vicarious constitutional claims.*—Bank plaintiffs cannot vicariously assert Fifth Amendment claims on behalf of their depositors under circumstances present here, since depositors cannot assert those claims themselves at this time. California Bankers Assn. v. Shultz, p. 21.

3. *Bank Secrecy Act of 1970—Depositor plaintiffs—Premature constitutional claim.*—Depositor plaintiffs who are parties in this litigation are premature in challenging Act's foreign and domestic reporting provisions under Fifth Amendment, since they merely allege that they intend to engage in foreign currency transactions with foreign banks and do not allege that any of the information required by Secretary of Treasury will tend to incriminate them, and since there is no allegation that any depositor engaged in a $10,000 domestic transaction with a bank that the latter was required to report and no allegation that any bank report would contain information incriminating any depositor. California Bankers Assn. v. Shultz, p. 21.

4. *Certification procedure—Doubt as to local law—Florida.*—While resort to an available certification procedure, such as is available in Florida, is not obligatory where there is doubt as to local law, and its use in a given case is discretionary, resort to such procedure seems particularly appropriate here in shareholders' derivative diversity suits brought in federal court in New York, alleging that president of Florida corporation as fiduciary, with others, used inside information about projected corporate earnings for profit and hence

PROCEDURE—Continued.

was liable to corporation for unlawful profits, in view of novelty of question, unsettled state of Florida law, and fact that when federal judges in New York attempt to predict uncertain Florida law, they act as "outsiders" not exposed to local law. Hence, case is remanded to Court of Appeals to reconsider whether controlling issue of state law should be certified to Florida Supreme Court. Lehman Brothers v. Schein, p. 386.

5. *Modification of decree—Remand—Unconstitutional state statutes.*—In civil rights action attacking constitutionality of certain Texas statutes, portion of District Court's decree holding five of such statutes unconstitutional with accompanying injunctive relief, must be modified, because where three of the statutes have been repealed and replaced by more narrowly drawn provisions since District Court's decision and there are no pending prosecutions under them, judgment relating to these statutes will have become moot. Since it cannot be definitely determined from District Court's opinion or record whether there are pending prosecutions or even whether District Court intended to enjoin them if there were, case is remanded for further findings. Case is also remanded for determination as to whether there are pending prosecutions under two remaining statutes, and for further findings and reconsideration in light of *Steffel* v. *Thompson*, 415 U. S. 452. Allee v. Medrano, p. 802.

6. *Workmen's compensation benefits—Reinstatement—State law—Federal constitutional question.*—If, as indicated in briefs and oral arguments in this Court, state law permits a claimant whose workmen's compensation benefits have been suspended to have them reinstated by state trial courts, which act in a purely ministerial capacity, pending a full administrative hearing before State Industrial Commission on merits of his claim, it was probably unnecessary for District Court to address question whether Due Process Clause of Fourteenth Amendment prevented State from permitting suspension of benefits as result of claimed change in condition without notice to claimant and prior adversary hearing. Accordingly, case must be remanded to District Court for reconsideration. Dillard v. Virginia Industrial Comm'n, p. 783.

PROPERTY RIGHTS. See **Constitutional Law**, II, 5.

PROPERTY TAX EXEMPTIONS. See **Constitutional Law**, IV, 2–3.

PROSECUTOR'S IMPROPER REMARKS. See **Constitutional Law**, II, 6.

PUBLIC ASSISTANCE. See **Constitutional Law**, I, 1; **Declaratory Judgments.**

PUERTO RICO. See **Appeals**, 2; **Constitutional Law**, II, 4, 7.

RACIAL DISCRIMINATION. See **Appeals**, 1; **Constitutional Law**, 1, 3; II, 8; **Education Amendments of 1972**; **Internal Revenue Code**, 1, 3, 6.

RATIONAL RELATIONSHIP. See **Constitutional Law**, IV, 1.

REAL PROPERTY. See **Constitutional Law**, VIII.

REASONABLENESS. See **Constitutional Law**, IV, 1.

RECORDKEEPING BY BANKS. See **Constitutional Law**, II, 2; V; VII, 1; **Pleading**; **Procedure**, 1.

RECOVERY OF POSSESSION OF REAL PROPERTY. See **Constitutional Law**, VIII.

REFUND ACTIONS. See **Internal Revenue Code**, 8, 10.

REINSTATEMENT OF WORKMEN'S COMPENSATION BENEFITS. See **Procedure**, 6.

REMAND. See **Bankruptcy**; **Procedure**, 4–5.

REMEDIES AT LAW. See **Injunctions.**

REMOVAL OF NONPROBATIONARY FEDERAL EMPLOYEES. See **Constitutional Law**, II, 3.

REPORTING BY BANKS. See **Constitutional Law**, VII, 2–3; **Pleading**; **Procedure**, 3; **Standing to Sue.**

RESTRICTIONS ON LAND USE. See **Constitutional Law**, I, 2; IV, 1.

RETROACTIVITY. See **Appeals**, 1; **Education Amendments of 1972.**

RIGHT OF ACCESS TO COURTS. See **Constitutional Law**, II, 1.

RIGHT OF ASSOCIATION. See **Constitutional Law**, IV, 1; **Pleading**; **Procedure**, 1.

RIGHT OF PRIVACY. See **Constitutional Law**, IV, 1.

RIGHT OF TRAVEL. See **Constitutional Law**, IV, 1.

RIGHT TO JURY TRIAL. See **Constitutional Law**, VIII.

RIGHT-TO-WORK LAWS. See **National Labor Relations Act**, 1.

RINGELMANN TEST. See **Constitutional Law**, VII, 4.

RULEMAKING. See **National Labor Relations Board.**

RULING LETTERS. See **Constitutional Law,** II, 8; **Internal Revenue Code,** 1–8, 10.

SCHOOL DESEGREGATION. See **Appeals,** 1; **Education Amendments of 1972.**

SEARCHES AND SEIZURES. See also **Constitutional Law,** VII; **Standing to Sue.**

1. *Narcotics offense—Nighttime search—Warrant—Required showing.*—Title 21 U. S. C. § 879 (a), as was true of its predecessor statute, requires no special showing for a nighttime search, other than a showing, such as was made here, that contraband is likely to be on property or person to be searched at that time. Gooding v. United States, p. 430.

2. *Narcotics offense—Warrant for nighttime search—Standards for issuance—Federal legislation.*—Title 21 U. S. C. § 879 (a), which relates only to searches for "controlled substances" and provides that a warrant may be served "at any time of the day or night" as long as issuing authority is satisfied that probable cause exists to believe that there are grounds for warrant "and for its service at such time," and which is part of a comprehensive federal scheme for control of drug abuse, applies, rather than local District of Columbia laws, to case wherein petitioner, charged with illegal possession of drugs, moved to suppress physical evidence seized in his apartment in nighttime by D. C. police officers pursuant to Federal Magistrate's search warrant. Gooding v. United States, p. 430.

SEARCH WARRANTS. See **Searches and Seizures.**

SECRETARY OF THE TREASURY. See **Constitutional Law,** II, 2; V; VII, 1–3; **Procedure,** 1–3.

SEIZURE OF VESSELS. See **Appeals,** 2; **Constitutional Law,** II, 4, 7.

SELF-INCRIMINATION. See **Constitutional Law,** V.

SELLERS. See **Constitutional Law,** II, 5.

SEQUESTRATION OF PROPERTY. See **Constitutional Law,** II, 5.

SEVENTH AMENDMENT. See **Constitutional Law,** VIII.

SEX DISCRIMINATION. See **Constitutional Law,** IV, 2–3.

SHAREHOLDERS' DERIVATIVE SUITS. See **Procedure,** 4.

SIGHTS SEEN IN "OPEN FIELDS." See **Constitutional Law,** VII, 4.

SINGLE HOUSEKEEPING UNITS. See **Constitutional Law**, I, 2; IV, 1.

SMOKE EMISSIONS. See **Constitutional Law**, VII, 4.

SOCIAL LEGISLATION. See **Constitutional Law**, IV, 1.

SOCIAL SECURITY ACT. See **Constitutional Law**, I, 1; **Declaratory Judgments**; **Federal-State Relations**, 2.

SOCIAL SECURITY TAXES. See **Constitutional Law**, II, 8; **Internal Revenue Code**, 6.

SPECIALLY DESIGNATED ASSISTANT ATTORNEY GENERAL. See **Omnibus Crime Control and Safe Streets Act of 1968.**

STANDARDIZED WORK-EXPENSE ALLOWANCE. See **Federal-State Relations**, 1.

STANDARDS OF REVIEW. See **Constitutional Law**, VI.

STANDING TO SUE.

Bank depositors—Bank Secrecy Act of 1970—Constitutionality of domestic reporting regulations.—Depositor plaintiffs, who do not allege engaging in type of $10,000 domestic currency transaction requiring reporting, lack standing to challenge domestic reporting regulations under Act. It is therefore unnecessary to consider contentions made by bank and depositor plaintiffs that regulations are constitutionally defective because they do not require financial institutions to notify customer that a report will be filed concerning domestic currency transaction. California Bankers Assn. v. Shultz, p. 21.

STATE LAW SCHOOLS. See **Constitutional Law**, I, 3; **Mootness**, 2.

STATE OFFICIALS. See **Constitutional Law**, III; **Executive Immunity.**

STATES. See **Constitutional Law**, III; **Executive Immunity.**

STATE STATUTES. See **Appeals**, 2; **Constitutional Law**, II, 4, 7.

STATE UNIVERSITIES. See **Constitutional Law**, I, 3; III; **Executive Immunity.**

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1. Tribute to MR. JUSTICE DOUGLAS, p. III.
2. Amendments to Federal Rules of Criminal Procedure, p. 1001.

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TAXES. See **Constitutional Law**, II, 8; IV, 2–3; **Internal Revenue Code.**

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TEXAS BUSINESS AND COMMERCIAL CODE. See **Bankruptcy.**

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TRADE SECRETS.

State trade secret law—Federal patent laws—No pre-emption.—Ohio's trade secret law is not pre-empted by federal patent laws. States are not forbidden to protect kinds of intellectual property that may make up subject matter of trade secrets; just as States may exercise regulatory power over writings, so may they regulate with respect to discoveries, only limitation being that regulation in

TRADE SECRETS—Continued.
area of patents and copyrights must not conflict with operation of federal laws in this area. Kewanee Oil Co. v. Bicron Corp., p. 470.

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1. *"In connection with [taxpayer's] trade or business."* § 174 (a)(1), Internal Revenue Code of 1954, 26 U. S. C. § 174 (a)(1). Snow v. Commissioner, p. 500.

2. *"Insufficient on its face."* 18 U. S. C. §§ 2518 (10)(a)(ii). United States v. Chavez, p. 562.

3. *"Purpose."* § 7421 (a), Internal Revenue Code of 1954, 26 U. S. C. § 7421 (a). Commissioner v. "Americans United" Inc., p. 752.

4. *"State statute."* Three-Judge Court Act, 28 U. S. C. § 2281. Calero-Toledo v. Pearson Yacht Leasing Co., p. 663.

5. *"Suit for the purpose of restraining the assessment or collection of any tax."* § 7421 (a), Internal Revenue Code of 1954, 26 U. S. C. § 7421 (a). Bob Jones University v. Simon, p. 725.

6. *"Unlawfully intercepted."* 18 U. S. C. § 2518 (10)(a)(i). United States v. Giordano, p. 505.

WORKMEN'S COMPENSATION. See **Procedure**, 6.

WORK-RELATED EXPENSES. See **Federal-State Relations**, 1.

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