UNITED STATES REPORTS

VOLUME 420

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1974

JANUARY 27 THROUGH MARCH 31, 1975

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1976

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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

STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

WILLIAM B. SAXBE, Attorney General.[1]
EDWARD H. LEVI, Attorney General.[2]
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
EDWARD G. HUDON, Librarian.

[1] Attorney General Saxbe resigned effective February 3, 1975.

[2] Edward H. Levi, of Illinois, was nominated to be Attorney General by President Ford on January 15, 1975. The nomination was confirmed by the Senate on February 5, 1975; he was commissioned on February 6, 1975, and took the oath of office on the same date. He was presented to the Court on February 18, 1975 (see *post,* p. v).

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.)

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

TUESDAY, FEBRUARY 18, 1975

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

Mr. Solicitor General Bork presented the Honorable Edward H. Levi, Attorney General of the United States.

THE CHIEF JUSTICE said:

Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded by the Clerk.

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

WEDNESDAY, FEBRUARY 19, 1975

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

THE CHIEF JUSTICE said:

The Court is in special session this afternoon, to receive the Resolutions of the Bar of the Supreme Court in tribute to Mr. Justice Whittaker.

Mr. Solicitor General Bork addressed the Court as follows:

Mr. Chief Justice and may it please the Court:

At a meeting of the members of the Bar of the Supreme Court just concluded, resolutions expressing profound sorrow at the death of Mr. Justice Charles Evans Whittaker were offered by a committee, of which Mr. Samuel Molby was Chairman. Addresses were offered by Mr. Carl Enggas of the Missouri Bar, Judge Bruce Forrester of the United States Tax Court, and by Senator Roman Hruska of Nebraska.

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*Mr. Justice Whittaker, who retired from active service on the Court effective April 1, 1962 (369 U. S. IV, VII), and resigned effective September 30, 1965 (382 U. S. IV, XVII), died in Kansas City, Mo., on November 26, 1973. Services were held at the Central United Methodist Church, Kansas City, Mo., prior to his interment in Calvary Cemetery, Kansas City, Mo., on November 28, 1973.

The resolutions unanimously adopted are as follows:

We meet to record our respect and regard for Charles Evans Whittaker, Associate Justice of the Supreme Court of the United States from 1957 to 1962. His death on November 26, 1973, has saddened the members of the legal profession, his family, his friends, and those everywhere who admired and respected him.

Charles Evans Whittaker was born February 22, 1901, near Troy, Kansas. He spent his early years on his father's farm. In later life, in addition to recalling the hard work of farming, he also recounted that he ran a trapline on his way to school. He recalled that his most frequent quarry was skunks and that while their pelts brought three dollars each, he also recalled that his popularity at school was not enhanced, particularly in the winter when cold weather required the windows to be kept closed.

His formal education was interrupted after completion of the ninth grade, and he returned to farming and trapping. The interruption was only temporary, however, because as soon as he had accumulated $750, he set out for Kansas City to enroll in the University of Kansas City Law School.

A high school diploma was a requirement of admission, but Mr. Justice Whittaker convinced the Admissions Committee to accept him on condition that he complete his high school course simultaneously with his law studies, which he did.

Mr. Justice Whittaker once told an interviewer that he had loved the law since his earliest recollection, and he approached his law school studies in that spirit.

He was graduated from the University of Kansas City Law School in 1923 and was admitted to practice before the courts of Missouri in that year. He immediately joined the Kansas City firm of Watson, Ess & Gage, for whom he had worked as a messenger while in law school.

In 1928, he married Winifred Pugh. It was a long and

happy marriage, and they were to have three sons, Keith, Kent, and Gary, each of whom now resides in Kansas City.

He fashioned a successful career at the bar, becoming a partner of his firm in 1930, and he rose to become a leading trial lawyer in Kansas City, involved primarily in litigation on behalf of corporate clients. But he believed, with Mr. Justice Brandeis, that every man owes something to his profession and he was therefore active in the organized bar, serving as president of the Missouri Bar Association from 1953 to 1954.

In that year, 1954, he was appointed to the United States District Court for the Western District of Missouri, and served in that capacity until June 22, 1956, when he was appointed a judge of the United States Court of Appeals for the Eighth Circuit.

As a district judge, he continued the hard work and long hours that had been hallmarks of his practice of law, and he confessed that he was, from time to time, sorely tempted to descend from the bench and join in the fray.

Upon leaving the bar and taking his place as a district judge, he said:

"I now say farewell to the practice of law I have loved so well. It is a step that one does not contemplate lightly. Yet I do this willingly, and I hope that there will be no change in me. If you have liked me as a lawyer, then you should like me as a judge, for I shall not change. The law has been my life. I wish every man who devotes his life to it could love it as I do."

Mr. Justice Whittaker served on the Court of Appeals for only one year, until March 2, 1957, when he was nominated as an Associate Justice of this Court by President Eisenhower. His nomination was hailed by the public and the profession alike, and he was quickly confirmed by the Senate.

He served as an Associate Justice for five years, from 1957 through 1962. During his service on this Court, he

wrote 42 majority opinions and 50 concurring or dissenting opinions.

By training and inclination, his primary interest lay in the field of commercial law, as is shown by his opinions involving complex tax issues, such as *Turnbow* v. *Commissioner,* 368 U. S. 337 (1961), and *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522 (1959); and in difficult patent cases, such as *Aro Mfg. Co.* v. *Convertible Top Replacement Co.,* 365 U. S. 336 (1961).

His work was not, of course, limited to issues of commercial law or taxation, and his opinions concerning matters of constitutional law are found in such decisions as *Staub* v. *City of Baxley,* 355 U. S. 313 (1958), which held a local ordinance regulating permits for solicitation of membership in organizations violative of the First Amendment; and *Payne* v. *Arkansas,* 356 U. S. 560 (1958), which dealt with coerced confessions in criminal cases; and *McNeal* v. *Culver,* 365 U. S. 109 (1961), concerning the right to counsel.

Early in 1962, Mr. Justice Whittaker was advised by his physician that his health would be endangered if he continued to serve on this Court. Bowing to that advice, he submitted his retirement on March 29, 1962, which was acknowledged by the Chief Justice and his Associate Justices with deep regret.

After his retirement from the Court, he returned to Kansas City. And in the two years following his retirement, he worked actively for the American Bar Association and also served as a member of the American Medical Association's commission for the in-depth study of postgraduate medical education. He contributed his time and his efforts to several civic and charitable enterprises in the Kansas City area, including the Kansas City Hospital.

In 1965, he became an arbitrator on behalf of the General Motors Corporation and was engaged in deciding controversies between that firm and its dealers.

To the end of his life, Mr. Justice Whittaker continued a deep interest in the law and in the contribution that courts and lawyers can make to the resolution of social conflict by litigation or arbitration.

He frequently expressed his concern about what he perceived to be an increasing tendency in our society to resort to political or economic pressures, rather than to the methods of dispute settlements established by the legal system.

Wherefore, it is resolved that we, the Bar of the Supreme Court of the United States, express our profound sorrow at the death of Mr. Justice Charles Evans Whittaker, and our grateful appreciation for his long years of service in the judicial branch of his National Government, and in civil life, culminating with his work as an Associate Justice of the Supreme Court.

And it is further resolved that the Solicitor General be asked to present these resolutions to the Court with the prayer that they be embodied in its permanent records and that copies of these resolutions be forwarded to the widow and to the children of Mr. Justice Whittaker.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General, your motion will be granted. I recognize the Attorney General of the United States.

Mr. Attorney General Levi addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

The Bar of this Court met today to honor the memory of Charles Evans Whittaker, Associate Justice of the Supreme Court from 1957 to 1962.

Mr. Justice Whittaker's appointment to this Court on March 2, 1957, was the culmination of a distinguished professional career. He came to this Court with not

only an outstanding reputation at the bar gained as a leading trial lawyer in Kansas City, but also with prior judicial experience from his service both as a federal district judge in the Western District of Missouri and as a judge of the United States Court of Appeals for the Eighth Circuit. Indeed, he was one of the few members of this Court to have served at every level of the federal judiciary.

Although his opinions covered the full range of the subject-matter jurisdiction of this Court, Mr. Justice Whittaker's primary interest, due no doubt to his experience at the practicing bar, was in the area of commercial law. During his tenure as an Associate Justice, he authored many of this Court's decisions involving federal and state taxation. In *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U. S. 534 (1959), for example, he dealt with the subtleties and intricacies of state power of taxation, measured against the Import-Export Clause, reconciling their competing demands in an opinion for the Court that remains the leading exposition of that complex subject.

Mr. Justice Whittaker drew on his experience as a trial lawyer and as a district judge in dealing with several important questions of federal jurisdiction. In *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U. S. 73 (1960), he thoroughly canvassed the legislative history of statutory provisions and judicial precedent regarding three-judge courts, and in *Hoffman* v. *Blaski,* 363 U. S. 335 (1960), he provided authoritative guidance for federal trial judges concerning the transfer-of-venue provisions of 28 U. S. C. § 1404. His most significant opinion in this area, and perhaps his most significant opinion as a member of this Court, was *Leedom* v. *Kyne,* 358 U. S. 184 (1958), in which he carefully analyzed the relevant provisions of the National Labor Relations Act in Title 29 of the United States Code, in sustaining the jurisdiction of federal district courts to entertain suits

challenging *ultra vires* actions of the National Labor Relations Board.

He brought similar penetration, rigor, and respect for the rule of law to bear in his opinions involving the constitutional safeguards of liberties to challenged governmental action. In one of his most memorable opinions for the Court, *Staub* v. *City of Baxley,* 355 U. S. 313 (1958), he found constitutionally invalid a city ordinance requiring a permit for soliciting membership in any organization requiring fees or dues from its members, that gave the mayor and city council uncontrolled discretion to grant or deny such a permit. He wrote for the Court that in thus making "the enjoyment of speech contingent upon the will of the mayor and council of the city, such an ordinance imposes an unconstitutional prior restraint on the enjoyment of First Amendment freedoms."

Whatever the issue involved, Mr. Justice Whittaker's opinions were marked by a degree of care and precision that reflected his view that the law was a calling to hard work, and he once observed that justice cannot be produced through any system of procedures alone; in the main, it must always be the product of long hours of hard, diligent, painstaking labor by highly competent, experienced, careful and practical lawyers.

Throughout his career, as both a lawyer and a judge, Mr. Justice Whittaker adhered to those principles and combined them with a spirit of cooperation and good will. While always showing esteem for his Brethren on the Court, and sincere respect for their work, he did not hesitate to take telling issue on occasion with what he regarded as analytical shortcomings in the Court's opinions. Examples of this are his dissenting opinion in *James* v. *United States,* 366 U. S. 213, 248 (1961), analyzing powerfully and lucidly the tax consequences of embezzlement, illuminating the basic concept of taxable income, and his concurring opinion in *Gomillion* v. *Light-*

foot, 364 U. S. 339 (1960), dealing succinctly with the relationship between the Fourteenth and Fifteenth Amendment claims in that case.

On the occasion of his retirement from this Court, compelled by his physician's advice, his Brethren on this Court, in acknowledging his departure with regret, wrote to him:

"Our five years of association with you have been in the finest traditions of the Court. No Justice could have worked harder or in more complete harmony with his Brethren."

As a personal matter, I hope it is appropriate for me to note that over a two-year period I served with Mr. Justice Whittaker on a citizens' commission which explored in considerable depth the problems of graduate medical education. This was a matter of considerable interest to Mr. Justice Whittaker, and he brought to the work of the commission his extraordinary powers of analysis and his determination to think through the very difficult issues of policy. Working with Mr. Justice Whittaker during this period was a rare experience, which I greatly value.

I will close with the tribute paid to Mr. Justice Whittaker in the letter from Phineas Rosenberg of the Kansas City Bar to the Solicitor General. Mr. Rosenberg wrote:

"My close friendship with Mr. Justice Whittaker began in the early days of our respective lives and continued for years until his death. Thus, you can know and understand that my heart is full of fondest memories of him, which I shall always cherish, of a great love and admiration of him as a great lawyer, an outstanding jurist, and a man having the highest concept of honor and integrity, whose aim in life was to do justice fairly and impartially, and of respect for his high standards of patriotism. No man had a greater or more unrestrained love for his country."

May it please this honorable Court, in the name of the lawyers of this Nation and particularly for the Bar

of this Court, I respectfully request that the resolutions presented to you in memory of the late Mr. Justice Charles Evans Whittaker be accepted by you and that they, together with a chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Your motion is granted, Mr. Attorney General, and we thank you for these statements and tributes of the Supreme Court Bar to our late Brother, Charles Evans Whittaker.

The presentations made here today in his memory will be made a part of the permanent records of this Court, and we ask you to convey to the Chairman and the other members of the Committee on Resolutions our appreciation for their presentation today.

We accept these memorial tributes to Mr. Justice Whittaker made by you, Mr. Attorney General, and you, Mr. Solicitor General, on behalf of the Memorial Committee.

You have appropriately paid tribute to Mr. Justice Whittaker as a self-made lawyer who became one of the foremost advocates of his bar and whose talents were sought by many clients during his years of private practice.

His high standing as a lawyer was acknowledged by his peers, as you have already noted, by his election to various offices in the organized bar.

Of the 100 men who have come to this Court, including the nine who now hold office, Mr. Justice Whittaker was unique in the sense that his professional career covered the entire spectrum of the practice of law and, in addition, he sat as a judge in all three tiers of the federal bench.

Those who sat with him could understand readily why he achieved great success at the bar. He was a perfec-

tionist, with a passion for the facts of the case, both when he was an advocate and when he was a judge. And he was never content after he became a judge, until he had mastered the facts of the case and, in his appellate work, until he had mastered the record.

He drove himself unsparingly in his dedication to achieve that mastery, beginning with the petition or the jurisdictional statement and continuing on through to the consideration of the case on the merits.

Those who sat with him agree that he had few peers in terms of profound and conscientious application to his daily work. Indeed, he carried this to a point that was a source of concern to his friends and to his family, as the work of the Court mounted after he came here.

His cheerful aspect in the private exchanges with his colleagues and with members of the bar marked him as a man with a zest for life, and particularly for the day-to-day interchange and discussion of points of law.

His colleagues on each of the courts where he served held him in the highest regard. One of the Eighth Circuit judges said of him, "Charles Whittaker was a *good* man," and he used this in the sense of the innate decency and the firm adherence to high ideals both in his private life and in his public duties.

Few men ever worked more diligently to search out every phase of the questions which were brought to the Court, and his opinions on this Court reflect scrupulous attention to detail and comprehensive treatment of all the relevant authorities. He had a firm belief that the Court should not only reach a correct result, but that it had an obligation to demonstrate how that result was reached.

His colleagues at the bar, his colleagues on the United States District Court, his colleagues on the United States Court of Appeals, and the Justices of this Court, and of course his family and his close associates can appropriately take great pride in his splendid career as a lawyer and as a jurist.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1974

CHAPMAN ET AL. *v.* MEIER, SECRETARY OF STATE OF NORTH DAKOTA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

No. 73–1406. Argued November 13, 1974—
Decided January 27, 1975

This case involves the issue of the constitutionality of a federal-court-ordered reapportionment of the North Dakota Legislative Assembly. Following protracted state and federal litigation challenging various apportionment plans, statutes, and state constitutional provisions, including a federal action in which a three-judge District Court in 1965 approved a reapportionment plan that included five multimember senatorial districts, appellants brought the present federal action against appellee, the Secretary of State, alleging that substantial population shifts had occurred and that the 1965 plan no longer met equal protection requirements, and requesting the court to order apportionment based on the 1970 census figures, to provide for single-member districts, to declare the 1965 plan invalid, and to restrain appellee from administering the election laws under that plan. A three-judge District Court, holding that such plan failed to meet constitutional standards, approved another plan that called for five multimember senatorial districts and that contained a 20% population variance between the largest and smallest senatorial districts. *Held:*

1. This Court has jurisdiction of the appeal under 28 U. S. C. § 1253. Although the challenged reapportionment plan was court

ordered, its enforcement is based on the State's Constitution and statutes, its effectuation directly depends on the state election law machinery, and the plan itself is a court-imposed replacement of state constitutional provisions and reapportionment statutes. Pp. 13–14.

2. Absent persuasive justification, a federal district court in ordering state legislative reapportionment should refrain from imposing multimember districts upon a State. Here the District Court has failed to articulate a significant state interest supporting its departure from the general preference for single-member districts in court-ordered reapportionment plans that this Court recognized in *Connor* v. *Johnson,* 402 U. S. 690, and unless the District Court can articulate such a "singular combination of unique factors" as was found to exist in *Mahan* v. *Howell,* 410 U. S. 315, 333, or unless the 1975 Legislative Assembly appropriately acts, the court should proceed expeditiously to reinstate single-member senatorial districts. Pp. 14–21.

3. A population deviation of such magnitude in a court-ordered reapportionment plan as the 20% variance involved here is constitutionally impermissible absent significant state policies or other acceptable considerations requiring its adoption. The burden is on the District Court to elucidate the reasons necessitating any departure from approximate population equality and to articulate clearly the relationship between the variance and the state policy furthered. Here the District Court's allowance of the 20% variance is not justified, as the court claimed, by the absence of "electorally victimized minorities," by the sparseness of North Dakota's population, by the division of the State caused by the Missouri River, or by the asserted state policy of observing geographical boundaries and existing political subdivisions, especially when it appears that other, less statistically offensive, reapportionment plans already devised are feasible. Pp. 21–26.

372 F. Supp. 371, reversed and remanded.

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

John D. Kelly argued the cause and filed a brief for appellants.

Paul M. Sand, First Assistant Attorney General of North Dakota, argued the cause for appellee. With him on the brief was *Allen I. Olson,* Attorney General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality of a federal-court-ordered reapportionment of the North Dakota Legislature, called in that State the Legislative Assembly. That State, like many others, has struggled to satisfy constitutional requirements for legislative apportionment delineated in *Baker* v. *Carr,* 369 U. S. 186 (1962); *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633 (1964); *Maryland Committee* v. *Tawes,* 377 U. S. 656 (1964); *Davis* v. *Mann,* 377 U. S. 678 (1964); *Roman* v. *Sincock,* 377 U. S. 695 (1964); *Lucas* v. *Colorado General Assembly,* 377 U. S. 713 (1964), and other cases. This litigation is the culmination of that struggle, totally ineffectual on the legislative side, during the past decade.

I

The State's Constitution and Its Statutes

North Dakota's original Constitution, adopted at the State's admission into the Union in 1889, is still in effect. It has been amended, of course, from time to time. Since 1918, § 25 thereof has read: "The legislative power of this state shall be vested in a legislature consisting of a senate and a house of representatives." N. D. Const. Art. II, § 25. That legislative power for 70 years has been subject to the initiative and the referendum. *Ibid.* The Constitution has further provided that the State's senate "shall be composed of forty-nine members," § 26, elected for a four-year term, § 27, with one-half thereof elected every two years, § 30, and that no one shall be a senator unless he is a qualified elector of the senatorial district, has attained the age of 25 years, and has been a

resident of the State for the two years next preceding the election, § 28. Since 1960, § 29 has read:

> "Each existing senatorial district as provided by law at the effective date of this amendment shall permanently constitute a senatorial district. Each senatorial district shall be represented by one senator and no more." [1] Laws 1959, c. 438; Laws 1961, c. 405.

The document also states that the house of representatives "shall be composed of not less than sixty, nor more than one hundred forty members," § 32, elected for a two-year term, § 33, and that no one shall be a representative unless he is a qualified elector of the district, has attained the age of 21 years, and has been a resident of the State for the two years next preceding the election, § 34. Section 35 provides for at least one representative for each senatorial district and for as many representatives as there are counties in the district; states that the Legislative Assembly, after each federal decennial census, shall apportion "the balance of the members of the House of Representatives," and, if the Legislative Assembly fails in its apportionment duty, places the task of apportioning the house in a designated group of officials of the State.[2]

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[1] Prior to the 1960 amendment, § 29 read:

"The legislative assembly shall fix the number of senators, and divide the state into as many senatorial districts as there are senators, which districts, as nearly as may be, shall be equal to each other in the number of inhabitants entitled to representation. Each district shall be entitled to one senator and no more, and shall be composed of compact and contiguous territory; and no portion of any county shall be attached to any other county, or part thereof, so as to form a district. The districts as thus ascertained and determined shall continue until changed by law."

[2] Section 35 reads in full as follows:

"Each senatorial district shall be represented in the House of Representatives by at least one representative except that any

There have been complementary statutory provisions. An apportionment effected by Laws 1931, c. 7, N. D. Cent. Code § 54–03–01 (1960), was in effect for over 30 years despite the mandate of § 35 of the Constitution that apportionment be effected after each federal census.

II

Prior Litigation

A. Things began to stir in North Dakota even prior to this Court's decision in *Baker* v. *Carr* in 1962. The State's Legislative Assembly of 1961 had failed to apportion the house following the 1960 census. After *Baker*

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senatorial district comprised of more than one county shall be represented in the House of Representatives by at least as many representatives as there are counties in such senatorial district. In addition the Legislative Assembly shall, at the first regular session after each federal decennial census, proceed to apportion the balance of the members of the House of Representatives to be elected from the several senatorial districts, within the limits prescribed by this Constitution, according to the population of the several senatorial districts. If any Legislative Assembly whose duty it is to make an apportionment shall fail to make the same as herein provided it shall be the duty of the chief justice of the supreme court, attorney general, secretary of state, and the majority and minority leaders of the House of Representatives within ninety days after the adjournment of the legislature to make such apportionment and when so made a proclamation shall be issued by the chief justice announcing such apportionment which shall have the same force and effect as though made by the Legislative Assembly."

Prior to the 1960 amendment, § 35 called for the Legislative Assembly (seemingly at least every 10 years) "to fix by law" the number of senators and the number of representatives "within the limits prescribed by this constitution" and to "proceed to reapportion the state into senatorial districts as prescribed by this constitution, and to fix the number of members of the house of representatives to be elected from the several senatorial districts," with the proviso that at any regular session "the legislative assembly may . . . redistrict the state into senatorial districts, and apportion the senators and representatives respectively."

had been decided at the District Court level, 179 F. Supp. 824 (MD Tenn. 1959), and between the argument and reargument of the case here, the Supreme Court of North Dakota dismissed an original action for a prerogative writ to enjoin its Chief Justice from issuing the apportionment proclamation which would have announced the conclusions of the statutorily designated "apportionment group" that were then anticipated. The petition asserted that the group's plan would apportion the house in an unconstitutional manner and not according to population. The Supreme Court ruled that the function of the group was legislative; that it had not yet completed its work; that it was performing a function the Legislative Assembly should have performed; and that, until the proclamation was issued, the group's action was not subject to challenge in the courts. *State ex rel. Aamoth* v. *Sathre,* 110 N. W. 2d 228 (1961).

B. Citizens of North Dakota then sought declaratory and injunctive relief in federal court under the Civil Rights Acts, 42 U. S. C. §§ 1983 and 1988. By this time the State's Chief Justice had issued the proclamation. A three-judge District Court held that the presence of the proclamation eliminated the aspect of prematurity that had characterized the earlier challenge in the state court. But the "basic issues," the court concluded with one dissent, had not been presented to the Supreme Court of North Dakota. "We believe that court should have the opportunity of passing on all questions herein." The court, accordingly, abstained from passing upon those issues; it stayed further proceedings before it, but did not dismiss the action. *Lein* v. *Sathre,* 201 F. Supp. 535, 542 (ND 1962).

C. The plaintiffs in the federal case promptly took to the Supreme Court of North Dakota their attack upon the plan adopted by the apportionment group. That

court assumed jurisdiction. *State ex rel. Lein* v. *Sathre,* 113 N. W. 2d 679, 681 (1962). It noted that no question arising under the United States Constitution was presented, *id.,* at 681–682, and that it was not concerned with the validity of the allotment of one representative to each senatorial district, as prescribed by the first sentence of § 35 of the Constitution, *id.,* at 683. The court recognized that there was inherent in a constitutional direction to apportion according to population "a limited discretion to make the apportionment that will approach, as nearly as is reasonably possible, a mathematical equality." *Id.,* at 685. It then went on to hold that the apportionment made by the group "violates the constitutional mandate of apportionment according to the population of the several districts and is void," *id.,* at 687, and that the apportionment effected by the 1931 statute continued to be the law until superseded by an apportionment valid under § 35 or under a further amendment of the Constitution. *Id.,* at 687–688.

D. The same plaintiffs then turned again to the federal court. The three-judge court, with one judge dissenting, denied the request for injunctive relief on the ground that the only challenge before it was to the apportionment group's plan, and that the 1931 apportionment was not challenged. *Lein* v. *Sathre,* 205 F. Supp. 536 (ND 1962). It noted that the Legislative Assembly would meet the following January, that it had "the mandatory duty" to apportion the house, and that the court would not presume that it would not perform that duty. Jurisdiction was retained, with the observation that if the Legislative Assembly failed to act, the plaintiffs, upon appropriate amendment of their complaint, might further petition the court for relief. *Id.,* at 540.

E. The 1963 Legislative Assembly did reapportion. Laws 1963, c. 345.

F. *Reynolds* v. *Sims,* 377 U. S. 533, and its companion cases were decided in June 1964. A new suit then was instituted in federal court to invalidate North Dakota's entire apportionment system on federal constitutional grounds. Sections 26, 29, and 35 of the Constitution and the 1963 statute were challenged. The three-judge court held that these constitutional and statutory provisions were violative of the Equal Protection Clause. *Paulson* v. *Meier,* 232 F. Supp. 183 (ND 1964). It went on to hold that the 1931 apportionment, being "the last valid apportionment," as described by the North Dakota Supreme Court, and by which the 1963 legislators had been elected, was also invalid. Thus, "there is no constitutionally valid legislative apportionment law in existence in the State of North Dakota at this time." *Id.,* at 187. The court encountered difficulty as to an appropriate remedy. It concluded, one judge dissenting, that adequate time was not available within which to formulate a proper plan for the then forthcoming 1964 elections, *id.,* at 188; that the 1965 Legislative Assembly would have a *de facto* status; and that that Assembly should promptly devise a constitutional system. Injunctive relief was denied. *Id.,* at 190.

G. The 1965 Legislative Assembly produced a reapportionment act although it was not approved or disapproved by the Governor. Laws 1965, c. 338.

H. The North Dakota Secretary of State, defendant in the federal court, then moved to dismiss the federal action on the ground that the 1965 act met constitutional requirements. The three-judge court, however, ruled otherwise. *Paulson* v. *Meier,* 246 F. Supp. 36, 43 (ND 1965). It turned to the question of remedy and concluded that the Legislative Assembly had had its opportunity and that the court now had the duty itself to take affirmative action. *Id.,* at 43–44. It considered

several plans that had been introduced in the Assembly and centered its attention on the Smith plan. Although the court found the plan "not perfect" (five multimember senatorial districts,[3] and county lines violated in 12 instances), it concluded that the plan, if "slightly" modified, would meet constitutional standards ("impressive mathematical exactness," namely, 25 of 39 districts within 5% of the average population, four slightly over 5%, and only two exceeding 9%). *Id.*, at 44–45. The "slight" modification was made and reapportionment, really the first to be finally effected since 1931, was therefore accomplished in North Dakota by federal-court intervention.

I. Still another original proceeding in the State's Supreme Court was instituted. This one challenged the right of senators from the multimember districts to hold office. It was claimed that this multiple membership violated § 29 of the North Dakota Constitution which provided that each senatorial district "shall be represented by one senator and no more." The state court held that the 1965 judgment of the federal court was not res judicata as to the then plaintiffs; that the initial or "freezing" portion of § 29 was clearly invalid; that the concluding portion, restricting representation of a district to one senator, would not have been desired by the people without the "balance" of the freezing portion; and that § 29 as a unit must fall as violative of equal protection. *State ex rel. Stockman* v. *Anderson,* 184 N. W. 2d 53 (1971). The result was that multimember senatorial districts were not held illegal by the state court.

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[3] This feature was later described as "a radical departure from state precedent." *Chapman* v. *Meier,* 372 F. Supp. 371, 382 (ND 1974) (dissenting opinion).

III

The Present Litigation

The 1970 federal census was taken in due course. The 1971 Legislative Assembly failed to reapportion. The present federal action was instituted the following November. The plaintiffs alleged that substantial shifts in population had taken place, and that the court-ordered plan of 1965 no longer complied with the requirements of the Equal Protection Clause. The relief requested was that the court order apportionment upon the 1970 census figures and also provide for single-member districts; that the 1965 plan be declared invalid; and that the Secretary of State be restrained from administering the election laws under that plan.

On May 22, 1972, the three-judge court entered an order to the effect that the existing North Dakota apportionment failed to meet federal constitutional standards and that the court would attempt to reapportion. Jurisdictional Statement A–54. It appointed a commission to formulate and present a plan within 30 days, and it submitted guidelines to the commission. With respect to multimember districts, the order provided:

> "We have considered the matter of 'multi-member' districts and conclude there is insufficient time prior to the 1972 elections to fully explore and resolve the issues involved. The matter of 'multi-member' districts will be studied in depth by the Commission, and the results of that study be made available to us." *Id.*, at A–55.

An opinion was filed on June 30. 372 F. Supp. 363 (ND). This recited that the commission had presented eight separate plans to the court; that shifts in population since 1960 had resulted in constitutionally impermissible population variations among existing districts;

that a plan submitted by Commissioner Dobson substantially reduced the disproportionate representation, although it decreased the number of districts by one and increased the number of senators by two and the number of representatives by four.[4] "[C]ertain weaknesses" in the plan were recognized, including "some variance in population . . . which, in a few instances, seems substantial," and a continuation of multimember districts. *Id.*, at 366. These districts included the State's five largest cities. The court noted that the districts had been created, not by enactment of the Legislative Assembly, but by the federal court in the 1965 *Paulson* decision, and observed, *ibid.*: "In light of subsequent [United States] Supreme Court pronouncements, we believe it would be improper for this Court to permit their continuation in a court-fashioned plan." *Connor* v. *Johnson,* 402 U. S. 690 (1971), and *Connor* v. *Williams,* 404 U. S. 549, 551 (1972), were cited. The court, however, felt

> "constrained to permit multi-member districts to continue during the 1972 elections . . . to avoid extreme disruptions in the elective processes. . . . We feel that the electorate will be better served by minimizing the confusion surrounding the impending elections, than it would be by the abolition of multi-member districts at this eleventh hour." 372 F. Supp., at 366.

The Dobson plan was therefore approved "for the 1972 election only." *Id.*, at 367. An alternative, the Ostenson plan, was commended to the commission for "further study," with a direction to modify it "so as to eliminate the existing multi-member senate districts." *Id.*, at 367–368. Chief District Judge Benson dissented as to the limitation of the Dobson plan to the 1972 election; for

[4] Cf. *Minnesota State Senate* v. *Beens,* 406 U. S. 187 (1972).

him, the *Connor* litigation was distinguishable on racial grounds and the desirability of multimember districts was a question for the Legislative Assembly and not for the court. *Id.*, at 368–369. Jurisdiction was retained.

On November 8, 1972, immediately after the election that year, the three-judge court suspended its June 30 order until further notice and directed the State's Attorney General promptly to report any action taken by the 1973 Legislative Assembly.

That Assembly not only passed an apportionment Act but overrode its veto by the Governor.[5] Laws 1973, c. 411, and Note, at 1178. The Act provided for 37 legislative districts, each having one senator and two representatives, except for five multimember senatorial districts. Section 3 thereof specifically recited the population of each district and the population variance (plus 3.3% to minus 3.5%, a total of 6.8%; or plus 408 persons to minus 432 persons, a total of 840 persons) from the average of 12,355 per senator.

The effectiveness of the legislative plan, however, promptly was suspended by a referendum petition. See Laws 1973, p. 1549. By a companion initiative petition, an amendment to the State's Constitution was proposed; this would have created a commission to reapportion the State and, in addition, would have mandated single-member senatorial districts. A special election on these took place December 4, 1973. *Both* were defeated. The Legislative Assembly's work to reapportion was thus nullified by the people. It could be suggested, and apparently was, that the people also reacted against the elimination of the five multimember districts. In any

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[5] The Governor's principal objection, as announced in his veto message, was the failure of the Legislative Assembly to eliminate the multimember senatorial districts. Return to and Compliance with Order, filed March 30, 1973.

event, the defendant thereupon moved the federal court to readopt the plan temporarily approved by its order of June 1972. The plaintiffs resisted.

The three-judge District Court, with Circuit Judge Bright dissenting, then made "permanent" the 1972 Dobson plan, with its five multimember districts providing 18 senators out of a statewide total of 51. 372 F. Supp. 371, 379 (ND 1974). We noted probable jurisdiction. 416 U. S. 966 (1974).

IV

Jurisdiction

We are met at the threshold with a mild question of jurisdiction not pressed by the parties. We have jurisdiction under 28 U. S. C. § 1253 [6] only if a three-judge court was required by 28 U. S. C. § 2281.[7]

It might be suggested that the three-judge court here did not restrain the enforcement of a statute but, instead, the enforcement of the court-ordered plan of 1965 which had become unconstitutional in the circumstances of 1972, and, hence, that the provisions of § 2281 were not satisfied. The argument is less than persuasive and we

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[6] 28 U. S. C. § 1253:

"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."

[7] 28 U. S. C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title."

conclude that it is without merit. Although the reapportionment now under attack was indeed court ordered, its enforcement is doubly based on the State's Constitution and statutes. Its effectuation directly depends on the state election law machinery and, in addition, the plan itself is a court-imposed replacement of the North Dakota constitutional provisions and the 1931, 1963, and 1965 reapportionment statutes. It is these that are, and have been, the primary objects of attack. It would be highly anomalous if jurisdiction were not here, for then it would follow that a single judge could invalidate a reapportionment plan that had been evolved or approved, and was required so to be, by a three-judge court some time before. Subject matter of this kind is regular grist for the three-judge court, and that route typically has been employed under conditions similar to those present here. See, *e. g., Skolnick* v. *State Electoral Board of Illinois,* 336 F. Supp. 839 (ND Ill. 1971). We think this is correct procedure and we conclude that we have jurisdiction.

V

The Multimember Districts

From the above review of the North Dakota constitutional and statutory provisions and of the litigation of the past 12 years, two significant facts emerge: The first is that some multimembership on the house side of the Legislative Assembly traditionally has existed. This plainly qualifies as established state policy.[8] The second is that, in contrast, multimembership on the senate side, even as to the five districts, has never existed except as imposed (a) by the three-judge federal court by its 1965 *Paulson* decision; (b) by a majority of the three-judge

[8] Indeed, at oral argument, the appellants did not oppose the allocation of two house members to each senatorial district. Tr. of Oral Arg. 16–17.

court as a temporary expedient for the 1972 election only; (c) by the provisions of the 1973 act immediately nullified by referendum; and (d) by a different majority of the three-judge court as a "permanent" solution in the judgment under review. Thus only once has the Legislative Assembly provided for multimember senate representation and that effort was promptly aborted. Every other such provision in North Dakota's history has been court imposed. Multimember senate representation, therefore, obviously does not qualify as established state policy.

This Court has refrained from holding that multimember districts in apportionment plans adopted by States for their legislatures are *per se* unconstitutional. *White* v. *Regester,* 412 U. S. 755, 765 (1973), and cases cited therein. On the contrary, the Court has upheld numerous state-initiated apportionment schemes utilizing multimember districts. See, *e. g., Kilgarlin* v. *Hill,* 386 U. S. 120 (1967); *Burns* v. *Richardson,* 384 U. S. 73 (1966); *Fortson* v. *Dorsey,* 379 U. S. 433 (1965). And, beginning with *Reynolds* v. *Sims,* 377 U. S., at 577, the Court has indicated that a State might devise an apportionment plan for a bicameral legislature with one body composed of at least some multimember districts, as long as substantial equality of population per representative is maintained.

Notwithstanding this past acceptance of multimember districting plans, we recognize that there are practical weaknesses inherent in such schemes. First, as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also increases. See *Lucas* v. *Colorado General Assembly,* 377 U. S., at 731. Ballots tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration. Second, when candidates are

elected at large, residents of particular areas within the district may feel that they have no representative specially responsible to them. *Ibid.*[9] Third, it is possible that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in single-member districts. This possibility, however, was rejected, absent concrete proof, in *Whitcomb* v. *Chavis,* 403 U. S. 124, 147 (1971). Criticism of multimember districts has been frequent and widespread. *Id.,* at 157–160,[10] and articles cited therein. See generally Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U. Pa. L. Rev. 666 (1972); Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309 (1966).

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[9] Cf., however, *Fortson* v. *Dorsey,* 379 U. S. 433, 438 (1965), for the suggestion that the at-large representative serves all residents in the subdistricts. Furthermore, while we mentioned these potential weaknesses of multimember districts in *Lucas* v. *Colorado General Assembly,* 377 U. S., at 731 n. 21, we noted that we

"do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects . . . that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties."

[10] In *Whitcomb* v. *Chavis,* 403 U. S., at 158–159, we acknowledged that

"[c]riticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests."

Such criticism did not amount to a showing that the use of multimember districts was "inherently invidious" or violative of the Fourteenth Amendment. *Id.,* at 160.

In *Fortson* v. *Dorsey, supra,* we held that the mere assertion of such possible weaknesses in a legislature's multimember districting plan was insufficient to establish a denial of equal protection. Rather, it must be shown that

> "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U. S., at 439.

Further, there must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political process equal to the access of other groups. *White* v. *Regester,* 412 U. S., at 765–766. Such evidence may be more easily developed where the multimember districts compose a large part of the legislature, where both bodies in a bicameral legislature utilize multimember districts, or where the members' residences are concentrated in one part of the district. *Burns* v. *Richardson,* 384 U. S., at 88.[11] Whether such factors are present or not, proof of lessening or cancellation of voting strength must be offered.

This requirement that one challenging a multimember districting plan must prove that the plan minimizes or cancels out the voting power of a racial or political group has been applied in cases involving apportionment schemes adopted by state legislatures. In *Connor* v. *Johnson,* 402 U. S. 690 (1971), however, which came to

[11] These factors have been criticized as not being particularly helpful. See Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U. Pa. L. Rev. 666, 694–695 (1972).

us on an application for a stay, we were presented with a *court-ordered* reapportionment scheme having some multimember districts in both bodies of the state legislature. We stated explicitly that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Id.*, at 692. Exercising our supervisory power, we directed the District Court to devise a single-member districting plan, "absent insurmountable difficulties." *Ibid.* This preference for and emphasis upon single-member districts in court-ordered plans was reaffirmed in *Connor* v. *Williams*, 404 U. S., at 551, and again in *Mahan* v. *Howell*, 410 U. S. 315, 333 (1973). In the latter case a District Court was held to have acted within its discretion in forming a multimember district as an interim remedy in order to alleviate substantial underrepresentation of military personnel in an impending election.[12]

The standards for evaluating the use of multimember districts thus clearly differ depending on whether a federal court or a state legislature has initiated the use. The

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[12] In *Mahan* v. *Howell*, 410 U. S., at 333, we stated that the District Court

"was confronted with plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible, *Davis* v. *Mann*, [377 U. S. 678,] 691–692 [(1964)], and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of unique factors, we cannot say that the District Court abused its discretion in fashioning the interim remedy of combining the three districts into one multimember district."

North Dakota, too, has its military personnel apportionment problem with respect to the bases near Grand Forks and Minot. The appellants recognize the existence of that problem and acknowledge that, conceivably, it could result in some type of multimember districting. Tr. of Oral Arg. 10.

practical simultaneity of decision in *Connor* v. *Johnson* and in *Whitcomb* v. *Chavis, supra,* so demonstrates. When the plan is court ordered, there often is no state policy of multimember districting which might deserve respect or deference. Indeed, if the court is imposing multimember districts upon a State which always has employed single-member districts, there is special reason to follow the *Connor* rule favoring the latter type of districting.

Appellants do not contend that any racial or political group [13] has been discriminated against by the multimember districting ordered by the District Court. They only suggest that the District Court has not followed our mandate in *Connor* v. *Johnson,* and that the court has failed to articulate any reasons for this departure. We agree. Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State.

The District Court cannot avoid the multimember issue by labeling it, see 372 F. Supp., at 377, a political issue to be resolved by the State. The District Court itself created multimember districting in North Dakota, and it might be said to be disingenuous to suggest that the judicial creation became a political question simply by the passage of nine years. The District Court's treatment of this issue directly conflicts with its prior opinion in this case, where it allowed continuation of the multimember districts first established in the *Paulson* decision in 1965 only as an interim remedy. 372 F. Supp., at 367. The court there noted that in the largest multimember district, a voter would be asked to evaluate the qualifications of at least 30 candidates for the state

[13] The only minority group of significant size in North Dakota is Indians, and the court-ordered reapportionment plan affects them no differently from any other group.

legislature, a "most formidable" task. *Id.*, at 366. Taking note of *Connor* v. *Johnson,* the court held in 1972 that it would be improper to permit multimember districts to remain permanently, and allowed continued use only for the impending election because of the great confusion that otherwise would result. The court appears now to have abandoned that position, with no suggestion of reasons for the abrupt change. It is especially anomalous that the court would continue with the multimember districting plan, when the Special Master who initially proposed it has disavowed use of permanent multimember districts. Dobson, Reapportionment Problems, 48 N. D. L. Rev. 281, 289 (1972).

In contrast, the dissent in the District Court suggests a wide range of attributes of single-member districts. 372 F. Supp., at 391. One advantage is obvious: confusion engendered by multiple offices will be removed. Other advantages perhaps are more speculative: single-member districts may prevent domination of an entire slate by a narrow majority, may ease direct communication with one's senator, may reduce campaign costs, and may avoid bloc voting. Of course, these are general virtues of single-member districts, and there is no guarantee that any particular feature will be found in a specific plan. Neither the District Court majority nor appellee, however, has provided us with any suggestion of a legitimate state interest supporting the abandonment of the general preference for single-member districts in court-ordered plans which we recognized in *Connor* v. *Johnson.*[14] The fact that no allegation of minority group discrimination is raised by appellants here does not make *Connor* inapplicable.

[14] For an example of a conceivable rationale supporting multimember districts, see Carpeneti, *supra,* n. 11, at 695–696, where it is suggested that multimember districts may insure that certain interests such as city- or region-wide views are represented.

It is true that in 1973 the voters of North Dakota voted down a proposed constitutional amendment which would have re-established the State's tradition of single-member senatorial districts. At the same time the voters also rejected by referendum the Legislative Assembly's 1973 Act which would have continued the multimember format for five districts. We are unable to infer from these simultaneous actions of the electorate any particular attitude toward multimember districts. It simply appears that North Dakota's voters have not been satisfied with any reapportionment proposal, and that they are frustrated by the years of confusion since the obviously impermissible apportionment provisions of the State's Constitution were invalidated.

We are confident that the District Court, with perhaps the aid of its Special Masters, will be able to reinstitute the use of single-member districts while also attaining the necessary goal of substantial population equality. Special Master Ostenson had indicated that it " 'would not be terribly difficult to adopt single-member districts.' " See 372 F. Supp., at 392.[15] Unless the District Court can articulate such a "singular combination of unique factors" as was found to exist in *Mahan* v. *Howell,* 410 U. S., at 333, or unless the 1975 Legislative Assembly appropriately acts, the court should proceed expeditiously to reinstate single-member senatorial districts in North Dakota.

VI

The Population Variance

The second aspect of the court-ordered reapportionment plan that is challenged by the appellants is the population divergence in the various senatorial districts. Since the population of the State under the 1970 census

[15] See also the views of the late Special Master Smith, 372 F. Supp., at 392.

was 617,761, and the number of senators provided for by the court's plan was 51, each senatorial district would contain 12,112 persons if population equality were achieved. In fact, however, one district under the plan has 13,176 persons, and thus is underrepresented by 8.71%, while another district has 10,728 persons, and is overrepresented by 11.43%. The total variance between the largest and smallest districts consequently is 20.14%, and the ratio of the population of the largest to the smallest is 1.23 to 1.

Reynolds v. *Sims, supra,* established that both houses of a state legislature must be apportioned so that districts are "as nearly of equal population as is practicable." 377 U. S., at 577. While "[m]athematical exactness or precision" is not required, there must be substantial compliance with the goal of population equality. *Ibid.* *Reynolds* v. *Sims,* of course, involved gross population disparity among districts.

Since *Reynolds,* we have had the opportunity to observe attempts in many state legislative reapportionment plans to achieve the goal of population equality. Although each case must be evaluated on its own facts, and a particular population deviation from the ideal may be permissible in some cases but not in others, *Swann* v. *Adams,* 385 U. S. 440, 445 (1967), certain guidelines have been developed for determining compliance with the basic goal of one person, one vote. In *Swann* we held that a variance of 25.65% in one house and 33.55% in the other was impermissible absent "a satisfactory explanation grounded on acceptable state policy." *Id.,* at 444. See also *Kilgarlin* v. *Hill,* 386 U. S., at 123–124. In *Swann,* no justification of the divergences had been attempted. Possible justifications, each requiring adequate proof, were suggested by the Court. Among these were "such state policy considerations as the in-

tegrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines." 385 U. S., at 444. See also *Reynolds* v. *Sims,* 377 U. S., at 578–581.

On the other hand, we have acknowledged that some leeway in the equal-population requirement should be afforded States in devising their legislative reapportionment plans. As contrasted with congressional districting, where population equality appears now to be the preeminent, if not the sole, criterion on which to adjudge constitutionality, *Wesberry* v. *Sanders,* 376 U. S. 1 (1964); *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969); *Wells* v. *Rockefeller,* 394 U. S. 542 (1969); *White* v. *Weiser,* 412 U. S. 783 (1973), when state legislative districts are at issue we have held that minor population deviations do not establish a prima facie constitutional violation. For example, in *Gaffney* v. *Cummings,* 412 U. S. 735 (1973), we permitted a deviation of 7.83% with no showing of invidious discrimination. In *White* v. *Regester, supra,* a variation of 9.9% was likewise permitted.

The treatment of the reapportionment plan in *Mahan* v. *Howell, supra,* is illustrative of our approach in this area. There the Virginia Legislature had fashioned a plan providing a total population variance of 16.4% among house districts. This disparity was of sufficient magnitude to require an analysis of the state policies asserted in justification. We found that the deviations from the average were caused by the attempt of the legislature to fulfill the rational state policy of refraining from splitting political subdivisions between house districts, and we accepted the policy as legitimate notwithstanding the fact that subdivision splits were permitted in senatorial districts. Since the population divergences

in the Virginia plan were "based on legitimate considerations incident to the effectuation of a rational state policy," *Reynolds* v. *Sims*, 377 U. S., at 579, we held that the plan met constitutional standards.

It is to be observed that this measure of acceptable deviation from population equality has been developed in cases that concerned apportionment plans enacted by state legislatures. In the present North Dakota case, however, the 20% variance is in the plan formulated by the federal court. We believe that a population deviation of that magnitude in a court-ordered plan is constitutionally impermissible in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance. The burden is on the District Court to elucidate the reasons necessitating any departure from the goal of population equality, and to articulate clearly the relationship between the variance and the state policy furthered.

The basis for the District Court's allowance of the 20% variance is claimed to lie in the absence of "electorally victimized minorities," in the fact that North Dakota is sparsely populated, in the division of the State caused by the Missouri River, and in the goal of observing geographical boundaries and existing political subdivisions. We find none of these factors persuasive here, and none of them has been explicitly shown to necessitate the substantial population deviation embraced by the plan.

First, a variance of this degree cannot be justified simply because there is no particular racial or political group whose voting power is minimized or canceled. All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group.

Second, sparse population is not a legitimate basis for a departure from the goal of equality. A State with a

sparse population may face problems different from those faced by one with a concentrated population, but that, without more, does not permit a substantial deviation from the average. Indeed, in a State with a small population, each individual vote may be more important to the result of an election than in a highly populated State. Thus, particular emphasis should be placed on establishing districts with as exact population equality as possible. The District Court's bare statement that North Dakota's sparse population permitted or perhaps caused the 20% deviation is inadequate justification.[16]

Third, the suggestion that the division of the State caused by the Missouri River and the asserted state policy of observing existing geographical and political subdivision boundaries warrant departure from population equality is also not persuasive. It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines. As the dissenting judge in this case noted, appellee's counsel acknowledged that reapportionment proposed by the Legislative Assembly broke county lines, 372 F. Supp., at 393 n. 22, and the District Court indicated as long as a decade ago that the legislature had abandoned the strict policy. *Paulson* v. *Meier*, 246 F. Supp., at 42–43. Furthermore, a plan devised by Special Master Ostenson demonstrates that neither the Missouri River nor the policy of maintaining township lines prevents attaining a significantly lower population variance.[17] We do not imply that the

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[16] As early as *Reynolds* v. *Sims*, 377 U. S. 533 (1964), the Court indicated that suggestions that population deviation was necessary "to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large [geographically] that the availability of access of citizens to their representatives is impaired" were unconvincing. *Id.*, at 580.

[17] See Appendix B to memorandum opinion and order of June 30, 1972, by Judges Bright and Van Sickle (the Ostenson plan),

Ostenson plan should be adopted by the District Court, or that its 5.95% population variance necessarily would be permissible in a court-ordered plan. What we intend by our reference to the Ostenson plan is to show that the factors cited by the District Court cannot be viewed as controlling and persuasive when other, less statistically offensive, plans already devised are feasible.[18] The District Court has provided no rationale for its rejection of the Ostenson plan.

Examination of the asserted justifications of the court-ordered plan thus plainly demonstrates that it fails to meet the standards established for evaluating variances in plans formulated by state legislatures or other state bodies. The plan, hence, would fail even under the criteria enunciated in *Mahan* v. *Howell* and *Swann* v. *Adams*. A court-ordered plan, however, must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features. We have felt it necessary in this case to clarify the greater responsibility of the District Court, when devising its own reapportionment plan, because of the severe problems occasioned for the citizens of North Dakota during the several years of redistricting confusion.

VII

We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state

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App. 12–22. The Ostenson plan would allow a total population deviation of only 5.95%.

[18] Another plan appearing to be more acceptable with respect to population variance than that adopted by the District Court is the one suggested by the State's Special Committee on Reapportionment, referred to in Judge Bright's dissenting opinion, 372 F. Supp., at 394 n. 23.

legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation.[19] Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court. *Reynolds* v. *Sims,* 377 U. S., at 586; *Maryland Committee* v. *Tawes,* 377 U. S., at 676. It is to be hoped that the 1975 North Dakota Legislative Assembly will perform that duty and enact a constitutionally acceptable plan. If it fails in that task, the responsibility falls on the District Court and it should proceed with dispatch to resolve this seemingly interminable problem.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[19] This is not to say, however, that court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting under *Wesberry* v. *Sanders,* 376 U. S. 1 (1964); *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969); *Wells* v. *Rockefeller,* 394 U. S. 542 (1969); and *White* v. *Weiser,* 412 U. S. 783 (1973).

TEST *v.* UNITED STATES

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

No. 73-5993. Argued December 11, 1974—
Decided January 27, 1975

An unqualified right of a litigant to inspect jury lists *held* required not only by the plain text of the provisions of the Jury Selection and Service Act of 1968, 28 U. S. C. § 1867 (f), allowing the parties in a case "to inspect" such lists at all reasonable times during the "preparation" of a motion challenging compliance with jury-selection procedures, but also by the Act's overall purpose of insuring "grand and petit juries selected at random from a fair cross section of the community," 28 U. S. C. § 1861. Hence, where the District Court denied petitioner's motion, prior to his trial and conviction on a federal drug charge, to inspect the jury lists in connection with his challenge to the grand and petit juries-selection procedures, the Court of Appeals' judgment affirming his conviction is vacated, and the case is remanded so that he may attempt to support his challenge.

486 F. 2d 922, vacated and remanded.

Walter L. Gerash argued the cause for petitioner. With him on the brief was *Louis M. Fischer.*

William L. Patton argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger,* and *Deputy Solicitor General Wallace.**

PER CURIAM.

Petitioner was convicted under 21 U. S. C. § 841 (a)(1) for distribution of a hallucinogenic drug commonly known as LSD. Prior to trial he filed a motion to dismiss his

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**Sanford Jay Rosen* filed a brief for the Mexican American Legal Defense and Educational Fund as *amicus curiae.*

indictment claiming that the master lists [1] from which his grand jury had been, and petit jury would be, selected systematically excluded disproportionate numbers of people with Spanish surnames, students, and blacks. These exclusions, petitioner alleged, violated both his Sixth Amendment right to an impartial jury and the provisions of the Jury Selection and Service Act of 1968, 28 U. S. C. § 1861 *et seq.* Attached to this motion was an affidavit by petitioner's counsel stating facts that had been disclosed by testimony at a jury challenge in another case, and which petitioner claimed supported his challenge. Also accompanying the motion was another motion requesting permission to inspect and copy the jury lists "pertaining to the grand and petit juries in the instant indictment." Petitioner asserted that inspection was necessary for discovering evidence to buttress his claims.

The District Court rejected the jury challenge and denied the motion to inspect the lists. Petitioner renewed his claims before the Court of Appeals for the Tenth Circuit, but that court affirmed his conviction without discussing these issues. We granted certiorari to decide whether the Jury Selection and Service Act required that petitioner be permitted to inspect the jury lists. 417 U. S. 967.

In its brief and oral argument before this Court, the United States has agreed that petitioner was erroneously denied access to the lists and urges us to remand the case. We also agree with petitioner.[2] Section 1867 (f) of the Act, in relevant part, provides:

> "The contents of records or papers used by the jury commission or clerk in connection with the jury

[1] These lists were based on Colorado voter-registration records.

[2] Petitioner further argues that the affidavit accompanying his motion to inspect established a prima facie case of jury exclusion

> selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation of a motion [challenging compliance with selection procedures] under . . . this section . . . . *The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. . . .*" (Emphasis supplied.)

This provision makes clear that a litigant [3] has essentially an *unqualified* right to inspect jury lists.[4] It grants access in order to aid parties in the "preparation" of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose of insuring "grand and petit juries selected at random from a fair cross section of the community." 28 U. S. C. § 1861.

Since petitioner was denied an opportunity to inspect the jury lists, we vacate the judgment of the Court of Appeals and remand the case to that court with instructions to remand to the District Court so that petitioner may attempt to support his challenge to the jury-selection procedures. We express no views on the merits of that challenge.

It is so ordered.

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thereby entitling him to inspection under 28 U. S. C. § 1867 (d). Since we conclude that petitioner had an unqualified right to inspection under § 1867 (f) we do not decide whether his counsel's affidavit was sufficient to establish a prima facie case.

[3] The statute grants the rights to challenge selection procedures and inspect lists to the United States and the defendant in a criminal case, and to any party in a civil case.

[4] The statute does limit inspection to "reasonable times." No issue of timeliness has been raised in this Court.

DANIEL *v.* LOUISIANA

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 74–5369. Decided January 27, 1975

The decision in *Taylor* v. *Louisiana*, 419 U. S. 522, wherein it was held that the Sixth and Fourteenth Amendments require petit juries to be selected from a source fairly representative of the community and that such requirement is violated by the systematic exclusion of women from jury panels, is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empaneled prior to the date of that decision. *DeStefano* v. *Woods*, 392 U. S. 631.

297 So. 2d 417, affirmed.

PER CURIAM.

Appellant Daniel was tried before a jury of the Twenty-second Judicial District Court of Louisiana and convicted of armed robbery on November 20, 1973. The jury that tried appellant was selected from a venire chosen in accordance with the procedures then provided for in La. Const., Art. VII, § 41, and La. Code Crim. Proc., Art. 402. Appellant raised a timely motion to quash the petit jury venire, contending that these procedures violated the Fourteenth Amendment because they resulted in the systematic exclusion of women from the petit jury venire from which his jury was chosen. His motion to quash was denied and this denial was affirmed on appeal to the Louisiana Supreme Court. 297 So. 2d 417 (1974).

In *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), we held that the Sixth and Fourteenth Amendments command that petit juries must be selected from a source fairly representative of the community. In this case, it is not disputed that the jury venire from which appellant's petit jury was chosen did not constitute a fair cross sec-

tion of the community. The question is whether our decision in *Taylor* v. *Louisiana* is to be applied retroactively to other defendants whose opportunity to raise a timely objection to the jury-selection procedures had passed as of the date of our decision in *Taylor*. We hold that *Taylor* is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empaneled prior to the date of that decision.

As we stated in *Taylor* v. *Louisiana, supra,* at 535–536, "until today no case had squarely held that the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." Given this statement, as well as the doctrinal underpinnings of the decision in *Taylor,* the question of the retroactive application of *Taylor* is clearly controlled by our decision in *DeStefano* v. *Woods,* 392 U. S. 631 (1968), where we held *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), to be applicable only prospectively. The three relevant factors, as identified in *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967), are

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

In *Taylor,* as in *Duncan,* we were concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression. In *Taylor,* as in *Duncan,* our decision did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In *Taylor,* as in *Duncan,* the reli-

ance of law enforcement officials and state legislatures on prior decisions of this Court, such as *Hoyt* v. *Florida,* 368 U. S. 57 (1961), in structuring their criminal justice systems is clear. Here, as in *Duncan,* the requirement of retrying a significant number of persons were *Taylor* to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in *Taylor.*

The judgment is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

The decision in *Taylor* v. *Louisiana* was applied retroactively to the trial and conviction in that case, not prospectively. I see no equities that permit retroactivity of the new ruling in *Taylor* and that disallow it here. My view has been that we should make our constitutional ruling retroactive in all cases if we make it retroactive in one. We can never know what differences, if any, would have resulted if a trial had been held pursuant to constitutional standards of procedural due process. I have recorded my dissents in other like situations, *e. g., Stovall* v. *Denno,* 388 U. S. 293, 302–303; *Linkletter* v. *Walker,* 381 U. S. 618, 640; *Johnson* v. *New Jersey,* 384 U. S. 719, 736; *Whisman* v. *Georgia,* 384 U. S. 895.* When *Miranda* v. *Arizona,* 384 U. S. 436, was decided we applied its ruling to three other cases in which

*See also *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 419; *DeStefano* v. *Woods,* 392 U. S. 631, 635; *Fuller* v. *Alaska,* 393 U. S. 80, 82; *Desist* v. *United States,* 394 U. S. 244, 255; *Jenkins* v. *Delaware,* 395 U. S. 213, 222; *Mackey* v. *United States,* 401 U. S. 667, 713; *Adams* v. *Illinois,* 405 U. S. 278, 286; *Michigan* v. *Payne,* 412 U. S. 47, 58; *Michigan* v. *Tucker,* 417 U. S. 433, 464.

we also granted certiorari, *id.*, at 499. We had held 40 additional cases raising the same point; and when *Miranda* was decided we denied certiorari in each of them, 384 U. S. 1020–1025. I dissented from these denials saying:

> "MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted in these cases and the judgments below reversed. He would remand the cases for a new trial, it being clear from the records that the principles announced in *Miranda* v. *Arizona, ante,* p. 436, were not applied. He sees no reason for discriminating against these petitioners, all of these cases having come here on direct review and being of the same vintage as *Miranda* v. *Arizona.*" *Id.,* at 1020–1021.

Here, as in the case of *Miranda,* it is largely chance that we take for review one of several or many cases presenting the same issue. It is, I think, highly unfair to make the opinion in the case we take retroactive in that appellant's case but not retroactive in others of the same vintage and pending here. If we sought equal justice for all we would either make all of our constitutional decisions retroactive or all of them prospective only.

Syllabus

TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CITY OF NEW YORK ET AL.

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

No. 73–1377. Argued November 12, 1974—
Decided February 18, 1975

The Federal Water Pollution Control Act Amendments of 1972 provide a comprehensive program for controlling and abating water pollution. Title II of these Amendments makes available federal financial assistance for municipal sewers and sewage treatment works. Section 207 of Title II authorizes the appropriation of "not to exceed" specified amounts for each of three fiscal years, and § 205 (a) provides that the "[s]ums authorized to be appropriated pursuant to [§ 207] . . . shall be allotted by the Administrator" of the Environmental Protection Agency. The President directed the Administrator not to allot among the States § 207's maximum amounts but instead to allot no more than $2 billion of the $5 billion authorized for fiscal year 1973 and no more than $3 billion of the $6 billion authorized for fiscal year 1974; and the Administrator complied with this directive. Thereupon respondent city of New York brought this class action seeking a declaratory judgment that the Administrator was obligated to allot to the States the full amounts authorized by § 207 for fiscal years 1973 and 1974, and an order directing him to make those allotments. The District Court granted the respondents' motion for summary judgment, and the Court of Appeals affirmed, holding that "the Act requires the Administrator to allot the full sums authorized to be appropriated in § 207." *Held:* The 1972 Amendments do not permit the Administrator to allot to the States under § 205 (a) less than the entire amounts authorized to be appropriated by § 207. Pp. 42–49.

(a) That § 205 (a) directs the allotment of only "sums"—not "all sums" as originally provided when the legislation went to Conference—and that the Conference Committee added the "not to exceed" qualifying language to § 207, which authorized the appropriation of specific amounts for the three fiscal years, show no congressional intention of giving the Executive discretionary con-

trol over the rate of allotments under the Title II programs. The "not to exceed" qualifying language in § 207 has meaning of its own, apart from § 205 (a), and reflects the realistic possibility that approved applications for grants from funds already allotted would not total the maximum amount authorized to be appropriated. And the word "sums" has no different meaning and can be ascribed no different function in the context of § 205 (a) than would the words "all sums." Pp. 42–46.

(b) The modified position taken by petitioner in this Court that §§ 205 (a) and 207 merely give the Administrator discretion as to the timing of expenditures, not as to the ultimate amounts to be allotted and obligated, as was urged in the lower courts, does not alter this Court's conclusion. The Administrator's power to allot under § 205 (a) extends only to "sums" authorized to be appropriated under § 207, since, even assuming some sort of power in the Executive to control outlays under the Act, the legislative history indicates that the power to control was to be exercised at the obligation phase, rather than the allotment stage, of the process. Pp. 46–49.

161 U. S. App. D. C. 114, 494 F. 2d 1033, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., concurred in the result.

Solicitor General Bork argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Hills, Deputy Solicitor General Friedman, Edmund W. Kitch, William L. Patton, Robert E. Kopp, Eloise E. Davies,* and *David M. Cohen.*

John R. Thompson argued the cause for respondent city of New York. With him on the briefs were *Adrian P. Burke, Gary Mailman,* and *Alexander Gigante, Jr.**

*Briefs of *amici curiae* were filed by *Evelle J. Younger,* Attorney General, *pro se, Robert H. O'Brien,* Senior Assistant Attorney General, and *Nicholas C. Yost,* Deputy Attorney General, for the Attorney General of California; by *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman* and *Charles Alpert,* Assistant Attorneys General, for the State of Michigan; by *Warren Spannaus,* Attorney General, *Byron E. Starns,*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case poses certain questions concerning the proper construction of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U. S. C. § 1251 *et seq.* (1970 ed., Supp III) (1972 Act), which provide a comprehensive program for controlling and abating water pollution. Section 2 of the 1972 Act, 86 Stat. 833, in adding Title II, §§ 201–212, to the Federal Water Pollution Control Act, 62 Stat. 1155, 33 U. S. C. §§ 1281–1292 (1970 ed., Supp. III),[1] makes available federal finan-

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Deputy Attorney General, *Peter W. Sipkins,* Solicitor General, and *Eldon G. Kaul,* Special Assistant Attorney General, for the State of Minnesota; by *William F. Hyland,* Attorney General, *pro se, Stephen Skillman,* Assistant Attorney General, and *John M. Van Dalen,* Deputy Attorney General, for the Attorney General of New Jersey; by *William J. Brown,* Attorney General, and *Richard P. Fahey* and *David E. Northrop,* Assistant Attorneys General, for the State of Ohio; by *John L. Hill,* Attorney General, *Larry F. York,* First Assistant Attorney General, and *Philip K. Maxwell,* Assistant Attorney General of Texas, *Robert W. Warren,* Attorney General, and *Theodore L. Priebe,* Assistant Attorney General of Wisconsin, *John C. Danforth,* Attorney General, and *Robert M. Lindholm,* Assistant Attorney General of Missouri, *Larry Derryberry,* Attorney General, and *Paul C. Duncan,* Assistant Attorney General of Oklahoma, and *Vern Miller,* Attorney General, and *Curt T. Schneider,* Assistant Attorney General of Kansas, for the States of Texas, Wisconsin, Missouri, Oklahoma, and Kansas; by *Andrew P. Miller,* Attorney General, *Gerald L. Baliles,* Deputy Attorney General, and *James E. Ryan, Jr.,* Assistant Attorney General, for the Commonwealth of Virginia; by *Slade Gorton,* Attorney General, *Charles B. Roe, Jr.,* Senior Assistant Attorney General, and *Martin J. Durkan* and *James B. McCabe,* Special Assistant Attorneys General of Washington, and *Israel Packel,* Attorney General, and *James R. Adams,* Deputy Attorney General of Pennsylvania, for the State of Washington and the Commonwealth of Pennsylvania; and by *Fletcher N. Baldwin, Jr.,* for the Center for Governmental Responsibility.

[1] The provisions of Title II, as added by the 1972 Amendments chiefly involved in this case are, in pertinent part, as follows:

cial assistance in the amount of 75% of the cost of municipal sewers and sewage treatment works. Under § 207, there is "authorized to be appropriated" for these purposes

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Section 205 (a), 33 U. S. C. § 1285 (a) (1970 ed., Supp. III):

"Sums authorized to be appropriated pursuant to section 1287 of this title for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after October 18, 1972. . . ."

Section 207, 33 U. S. C. § 1287 (1970 ed., Supp. III):

"There is authorized to be appropriated to carry out this subchapter . . . for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000."

Section 203, 33 U. S. C. § 1283 (1970 ed., Supp. III):

"(a) Each applicant for a grant shall submit to the Administrator for his approval, plans, specifications, and estimates for each proposed project for the construction of treatment works for which a grant is applied for [*sic*] under section 1281 (g)(1) of this title from funds allotted to the State under section 1285 of this title and which otherwise meets the requirements of this chapter. The Administrator shall act upon such plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such plans, specifications, and estimates shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project.

"(b) The Administrator shall, from time to time as the work progresses, make payments to the recipient of a grant for costs of construction incurred on a project. These payments shall at no time exceed the Federal share of the cost of construction incurred to the date of the voucher covering such payment plus the Federal share of the value of the materials which have been stockpiled in the vicinity of such construction in conformity to plans and specifications for the project.

"(c) After completion of a project and approval of the final voucher by the Administrator, he shall pay out of the appropriate sums the unpaid balance of the Federal share payable on account of such project."

"not to exceed" $5 billion for fiscal year 1973, "not to exceed" $6 billion for fiscal year 1974, and "not to exceed" $7 billion for fiscal year 1975. Section 205 (a) directs that "[s]ums authorized to be appropriated pursuant to [§ 207]" for fiscal year 1973 be allotted "not later than 30 days after October 18, 1972." The "[s]ums authorized" for the later fiscal years 1974 and 1975 "shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized . . . ." From these allotted sums, § 201 (g)(1) authorizes the Administrator "to make grants to any . . . municipality . . . for the construction of publicly owned treatment works . . . ," pursuant to plans and specifications as required by § 203 and meeting the other requirements of the Act, including those of § 204. Section 203 (a) specifies that the Administrator's approval of plans for a project "shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project." [2]

[2] The Act thus established a funding method differing in important respects from the normal system of program approval and authorization of appropriation followed by separate annual appropriation acts. Under that approach, it is not until the actual appropriation that the Government funds can be deemed firmly committed. Under the contract-authority scheme incorporated in the legislation before us now, there are authorizations for future appropriations but also initial and continuing authority in the Executive Branch contractually to commit funds of the United States up to the amount of the authorization. The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations. The issue in this case is the extent of the authority of the Executive to control expenditures for a program that Congress has funded in the manner and under the circumstances present here.

The water pollution bill that became the 1972 Act was passed by Congress on October 4, 1972, but was vetoed by the President on October 17. Congress promptly overrode the veto. Thereupon the President, by letter dated November 22, 1972,[3] directed the Administrator "not [to] allot among the States the maximum amounts provided by section 207" and, instead, to allot "[n]o more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 . . . ."[4] On December 8, the Administrator announced by regulation[5] that in accordance with the President's letter he was allotting for fiscal years 1973 and 1974 "sums not to exceed $2 billion and $3 billion, respectively."

This litigation, brought by the city of New York and similarly situated municipalities in the State of New York, followed immediately.[6] The complaint sought judgment against the Administrator of the Environmental Protection Agency declaring that he was obligated to allot to the States the full amounts authorized by § 207 for fiscal years 1973 and 1974, as well as an order directing him to make those allotments. In May 1973, the District Court denied the Administrator's motion to dismiss and granted the cities' motion for summary judgment. The Court of Appeals affirmed, holding that "the Act requires the Administrator to allot the full sums authorized to be ap-

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[3] Letter from President Nixon to William D. Ruckelshaus, Administrator, Environmental Protection Agency, Nov. 22, 1972, App. 15–16.

[4] Although the allotment for fiscal year 1975 is not directly at issue in this case, on January 15, 1974, the Administrator allotted $4 billion out of the $7 billion authorized for allotment for that fiscal year. Brief for Petitioner 6.

[5] 37 Fed. Reg. 26282 (1972).

[6] The District Court ordered the action to proceed as a class action under Fed. Rules Civ. Proc. 23 (b)(1) and (2) and also allowed the city of Detroit to intervene as a plaintiff.

propriated in § 207." 161 U. S. App. D. C. 114, 131, 494 F. 2d 1033, 1050 (1974).

Because of the differing views with respect to the proper construction of the Act between the federal courts in the District of Columbia in this case and those of the Fourth Circuit in *Train* v. *Campaign Clean Water, post,* p. 136, we granted certiorari in both cases, 416 U. S. 969 (1974), and heard them together. The sole issue [7] before us is whether the 1972 Act permits the Administrator to allot to the States under § 205 (a) less than the entire amounts authorized to be appropriated by § 207. We hold that the Act does not permit such action and affirm the Court of Appeals.[8]

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[7] The petition for a writ of certiorari also presented the question whether a suit to compel the allotment of the sums in issue here is barred by the doctrine of sovereign immunity, but that issue was not briefed and apparently has been abandoned. The Administrator concedes that, if § 205 (a) requires allotment of the full amounts authorized by § 207, then "allotment is a ministerial act and the district courts have jurisdiction to order that it be done." Brief for Petitioner 14.

[8] On July 12, 1974, while this case was pending in this Court the Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93–344, 88 Stat. 297, 31 U. S. C. § 1301 *et seq.* (1970 ed., Supp. IV), became effective. Title X of that Act imposes certain requirements on the President in postponing or withholding the use of authorized funds. If he determines that certain budget authority will not be required to carry out a particular program and is of the view that such authority should be rescinded, he must submit a special message to Congress explaining the basis therefor. For the rescission to be effective, Congress must approve it within 45 days. Should the President desire to withhold or delay the obligation or expenditure of budget authority, he must submit a similar special message to Congress. His recommendation may be rejected by either House adopting a resolution disapproving the proposed deferral.

These provisions do not render this case moot or make its decision unnecessary, for § 1001, note following 31 U. S. C. § 1401 (1970 ed., Supp. IV), provides that:

Section 205 (a) provides that the "[s]ums authorized to be appropriated pursuant to [§ 207] . . . shall be allotted by the Administrator." Section 207 authorizes the appropriation of "not to exceed" specified amounts for each of three fiscal years. The dispute in this case turns principally on the meaning of the foregoing language from the indicated sections of the Act.

The Administrator contends that § 205 (a) directs the allotment of only "sums"—not "all sums"—authorized by § 207 to be appropriated and that the sums that must be allotted are merely sums that do not exceed the

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"Nothing contained in this Act, or in any amendments made by this Act, shall be construed as—

. . . . . .

"(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment."

The Act would thus not appear to affect cases such as this one, pending on the date of enactment of the statute. The Solicitor General, on behalf of the Administrator, has submitted a supplemental brief to this effect. The city of New York agrees that the case has not been mooted by the Impoundment Act and no contrary views have been filed.

Although asserting on the foregoing ground and on other grounds that the Impoundment Act has no application here, the Executive Branch included among the deferrals of budget authority reported to Congress pursuant to the new Act:

"Grants for waste treatment plant construction ($9 billion). Release of all these funds would be highly inflationary, particularly in view of the rapid rise in non-Federal spending for pollution control. Some of the funds now deferred will be allotted on or prior to February 1, 1975."

In connection with that submission, the President asserted that the Act "applies only to determinations to withhold budget authority which have been made since the law was approved," but nevertheless thought it appropriate to include in the report actions which were concluded before the effective date of the Act. 120 Cong. Rec. S17195 (Sept. 23, 1974). Other than as they bear on the possible mootness in the litigation before us, no issues as to the reach or coverage of the Impoundment Act are before us.

amounts specified in § 207 for each of the three fiscal years. In other words, it is argued that there is a maximum, but no minimum, on the amounts that must be allotted under § 205 (a). This is necessarily the case, he insists, because the legislation, after initially passing the House and Senate in somewhat different form, was amended in Conference and the changes, which were adopted by both Houses, were intended to provide wide discretion in the Executive to control the rate of spending under the Act.

The changes relied on by the Administrator, the so-called Harsha amendments, were two. First, § 205 of the House and Senate bills as they passed those Houses and went to Conference, directed that there be allotted "all sums" authorized to be appropriated by § 207.[9] The word "all" was struck in Conference. Second, § 207 of the House bill authorized the appropriation of specific amounts for the three fiscal years. The Conference Committee inserted the qualifying words "not to exceed" before each of the sums so specified.

The Administrator's arguments based on the statutory language and its legislative history are unpersuasive. Section 207 authorized appropriation of "not to exceed" a specified sum for each of the three fiscal years. If the States failed to submit projects sufficient to require obligation, and hence the appropriation, of the entire amounts authorized, or if the Administrator, exercising whatever authority the Act might have given him to deny grants, refused to obligate these total amounts, § 207 would obviously permit appropriation of the lesser amounts. But if, for example, the full amount provided for 1973 was obligated by the Administrator in the course of

[9] Section 205 as it appeared in the Senate bill directed the Administrator to "allocate" rather than to "allot." The difference appears to be without significance.

approving plans and making grants for municipal contracts, § 207 plainly "authorized" the appropriation of the entire $5 billion. If a sum of money is "authorized" to be appropriated in the future by § 207, then § 205 (a) directs that an amount equal to that sum be allotted. Section 207 speaks of sums authorized to be appropriated, not of sums that are required to be appropriated; and as far as § 205 (a)'s requirement to allot is concerned, we see no difference between the $2 billion the President directed to be allotted for fiscal year 1973 and the $3 billion he ordered withheld. The latter sum is as much authorized to be appropriated by § 207 as is the former. Both must be allotted.

It is insisted that this reading of the Act fails to give any effect to the Conference Committee's changes in the bill. But, as already indicated, the "not to exceed" qualifying language of § 207 has meaning of its own, quite apart from § 205 (a), and reflects the realistic possibility that approved applications for grants from funds already allotted would not total the maximum amount authorized to be appropriated. Surely there is nothing inconsistent between authorizing "not to exceed" $5 billion for 1973 and requiring the full allotment of the $5 billion among the States. Indeed, if the entire amount authorized is *ever* to be appropriated, there must be approved municipal projects in that amount, and grants for those projects may *only* be made from allotted funds.

As for striking the word "all" from § 205, if Congress intended to confer any discretion on the Executive to withhold funds from this program at the allotment stage, it chose quite inadequate means to do so. It appears to us that the word "sums" has no different meaning and can be ascribed no different function in the context of § 205 than would the words "all sums." It is said that

the changes were made to give the Executive the discretionary control over the outlay of funds for Title II programs at either stage of the process. But legislative intention, without more, is not legislation. Without something in addition to what is now before us, we cannot accept the addition of the few words to § 207 and the deletion of the one word from § 205 (a) as altering the entire complexion and thrust of the Act. As conceived and passed in both Houses, the legislation was intended to provide a firm commitment of substantial sums within a relatively limited period of time in an effort to achieve an early solution of what was deemed an urgent problem.[10] We cannot believe that Congress at the last

[10] The Act declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985," § 101 (a)(1), 33 U. S. C. § 1251 (a)(1) (1970 ed., Supp. III). Congress intended also to apply to publicly owned sewage treatment works "the best practicable waste treatment technology over the life of the works consistent with the purposes of this subchapter." § 201 (g)(2)(A), 33 U. S. C. § 1281 (g)(2)(A) (1970 ed., Supp. III). See § 301 (b)(1)(B), 33 U. S. C. § 1311 (b)(1)(B) (1970 ed., Supp. III). The congressional determination to commit $18 billion during the fiscal years 1973–1975 is reflected in the following remarks of Senator Muskie, the Chairman of the Senate Subcommittee concerned with the legislation and the manager of the bill on the Senate floor:

"[T]hose who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis.

"The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75-percent grants to municipalities during fiscal years 1973–75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation.

. . . . . .

". . . [T]here were two strong imperatives which worked together to convince the members of the conference that this much money was

minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation. Yet such was the Government's position in the lower courts—combined with the argument that the discretion conferred is unreviewable.

The Administrator has now had second thoughts. He does not now claim that the Harsha amendments should be given such far-reaching effect. In this Court, he views §§ 205 (a) and 207 as merely conferring discretion on the Administrator as to the timing of expenditures, not as to the ultimate amounts to be allotted and obligated. He asserts that although he may limit initial allotments in the three specified years, "the power to allot continues" and must be exercised, "until the full $18 billion has

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needed: first, the conviction that only a national commitment of this magnitude would produce the necessary technology; and second, the knowledge that a Federal commitment of $18 billion in 75-percent grants to the municipalities was the minimum amount needed to finance the construction of waste treatment facilities which will meet the standards imposed by this legislation.

. . . . . .

"Mr. President, to achieve the deadlines we are talking about in this bill we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. And the conferees are convinced that the level of investment that is authorized is the minimum dose of medicine that will solve the problems we face." 118 Cong. Rec. 33693–33694 (1972).

Both Houses rejected authorization-appropriation funding in favor of the contract-authority system, which was deemed to involve a more binding and reliable commitment of funds. See 117 Cong. Rec. 38799, 38846–38853 (1971); 118 Cong. Rec. 10751–10761 (1972). Congressman Harsha, the House floor manager of the bill, explained the preference for the contract-authority approach and indicated that it was essential for orderly and continuous planning. *Id.*, at 10757–10758.

been exhausted." [11] Brief for Petitioner 13; Tr. of Oral Arg. 16–17. It is true that this represents a major modification of the Administrator's legal posture,[12] but our conclusion that § 205 (a) requires the allotment of sums equal to the total amounts authorized to be appropriated under § 207 is not affected. In the first place, under § 205 (a) the Administrator's power to allot extends only to "sums" that are authorized to be appropriated under § 207. If he later has power to allot, and must allot, the balance of the $18 billion not initially allotted in the specified years, it is only because these additional amounts are "sums" authorized by § 207 to be appropriated. But if they are "sums" within the meaning of § 205 (a), then that section requires that they be allotted by November 17, 1972, in the case of 1973 funds, and for 1974 and 1975 "not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized." [13] The November 22 letter of the President and the Administrator's consequent withholding of authorized funds cannot be squared with the statute.

Second, even assuming an intention on the part of

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[11] The Administrator goes on to argue that under his present view of the Act, there is little if any difference between discretion to withhold allotments and discretion to refuse to obligate, for under either approach the full amounts authorized will eventually be available for obligation. The city of New York contends otherwise. Our view of the Act makes it unnecessary to reach the question.

[12] The Administrator now indicates that the Act is presently being administered in accordance with his view of the Act asserted here. Brief for Petitioner 13.

[13] Under § 205 (b), any funds allotted to a State that remain unobligated at the end of a one-year period after the close of the fiscal year for which funds are authorized become available for reallotment by the Administrator in accordance with a formula to be determined by the Administrator. These provisions for reallotment, as well as the reallotment formula, plainly apply only to funds that have already been allotted.

Congress, in the hope of forestalling a veto, to imply a power of some sort in the Executive to control outlays under the Act, there is nothing in the legislative history of the Act indicating that such discretion arguably granted was to be exercised at the allotment stage rather than or in addition to the obligation phase of the process. On the contrary, as we view the legislative history, the indications are that the power to control, such as it was, was to be exercised at the point where funds were obligated and not in connection with the threshold function of allotting funds to the States.[14] The Court of Appeals carefully examined the legislative history in this respect and arrived at the same conclusion, as have most of the other courts that have dealt with the issue.[15] We thus

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[14] Senator Muskie, who was the senior majority conferee from the Senate, gave his view of the meaning of the Harsha amendments on the floor of the Senate:

"Under the amendments proposed by Congressman William Harsha and others, the authorizations for obligational authority are 'not to exceed' $18 billion over the next 3 years. Also, 'all' sums authorized to be obligated need not be committed, though they must be allocated. These two provisions were suggested to give the Administration some flexibility concerning the obligation of construction grant funds." 118 Cong. Rec. 33694 (1972).

He repeated his views in the course of Senate proceedings to override the President's veto. *Id.*, at 36871. Nothing was said in the Senate challenging the Senator's view that executive discretion did not extend to allotments.

In the House, the power to make allotments under § 205 was not mentioned in terms. The impact of the Harsha amendments was repeatedly explained by reference to discretion to obligate or to expend. Typical was Representative Harsha's remarks that the amendments were intended to "emphasize the President's flexibility to control the rate of spending . . . ," and that "the pacing item" in the expenditure of funds was the Administrator's power to approve plans, specifications, and estimates. *Id.*, at 33754. See also *id.*, at 33693, 33704, 33715–33716, 33754–33755, 36873–36874, 37056–37060.

[15] 161 U. S. App. D. C. 114, 494 F. 2d 1033 (1974), aff'g 358 F. Supp. 669 (DC 1973). Other District Courts have reached this

reject the suggestion that the conclusion we have arrived at is inconsistent with the legislative history of §§ 205 (a) and 207.

Accordingly, the judgment of the Court of Appeals is affirmed.

So ordered.

MR. JUSTICE DOUGLAS concurs in the result.

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same result: *Ohio ex rel. Brown* v. *Administrator, EPA,* Nos. C. 73–1061 & C. 74–104 (ND Ohio June 26, 1974); *Maine* v. *Fri,* Civ. No. 14–51 (Me. June 21, 1974); *Florida* v. *Train,* Civ. No. 73–156 (ND Fla. Feb. 25, 1974); *Texas* v. *Ruckelshaus,* No. A–73–CA–38 (WD Tex. Oct. 2, 1973); *Martin-Trigona* v. *Ruckelshaus,* No. 72–C–3044 (ND Ill. June 29, 1973); *Minnesota* v. *EPA,* No. 4–73, Civ. 133 (Minn. June 25, 1974). The only District Court case in which the issue was actively litigated and which held to the contrary was *Brown* v. *Ruckelshaus,* 364 F. Supp. 258 (CD Cal. 1973).

EMPORIUM CAPWELL CO. *v.* WESTERN ADDITION COMMUNITY ORGANIZATION ET AL.

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

No. 73–696. Argued October 22, 1974—Decided February 18, 1975*

A union, after investigating complaints that the company with which it had a collective-bargaining agreement was racially discriminating against employees, invoked the contract grievance procedure by demanding that the joint union-management Adjustment Board be convened "to hear the entire case." Certain employees who felt that procedure inadequate refused to participate and, against the union's advice, picketed the company's store. The company, after warning the employees, fired them on their resumption of picketing, whereupon a local civil rights association to which the fired employees belonged (hereinafter respondent) filed charges against the company with the National Labor Relations Board (NLRB) under § 8 (a)(1) of the National Labor Relations Act (NLRA), which makes it an unfair labor practice for an employer to interfere with an employee's right under § 7 to engage in concerted action "for the purpose of collective bargaining or other mutual aid or protection." The NLRB found that the employees were discharged for attempting to bargain with the company over the terms and conditions of employment as they affected racial minorities and held that they could not circumvent their elected representative's efforts to engage in such bargaining. On respondent's petition for review the Court of Appeals reversed and remanded, concluding that concerted activity against racial discrimination enjoys a "unique status" under the NLRA and Title VII of the Civil Rights Act of 1964; that the NLRB "should inquire, in cases such as this, whether the union was actually remedying the discrimination to the *fullest extent possible, by the most expedient and efficacious means*"; and that "[w]here the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose [their] section 7 protection." *Held:* Though national labor policy accords the highest priority to nondiscriminatory em-

*Together with No. 73–830, *National Labor Relations Board* v. *Western Addition Community Organization et al.*, also on certiorari to the same court.

ployment practices, the NLRA does not protect concerted activity by minority employees to bargain with their employer over issues of employment discrimination, thus bypassing their exclusive bargaining representative. Pp. 60–70.

(a) The NLRA in § 9 (a) recognizes the principle of exclusive representation, which is tempered by safeguards for the protection of minority interests, and in establishing this regime of majority rule, Congress sought to secure to all members of the collective-bargaining unit the benefits of their collective strength in full awareness that the superior strength of some individuals or groups might be subordinated to the majority interest. Pp. 61–65.

(b) Separate bargaining is not essential to eliminate discriminatory employment practices, and may well have the opposite effect. Here the grievance procedure of the collective-bargaining agreement was directed precisely at determining whether such practices had occurred. Pp. 65–70.

(c) If the discharges here involved violate Title VII, its remedial provisions are available to the discharged employees, but it does not follow that the discharges also violated § 8 (a) (1) of the NLRA. Pp. 70–72.

158 U. S. App. D. C. 138, 485 F. 2d 917, reversed.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 73.

George O. Bahrs argued the cause and filed briefs for petitioner in No. 73–696. *Deputy Solicitor General Wallace* argued the cause for petitioner in No. 73–830. With him on the briefs were *Solicitor General Bork, Keith A. Jones, Peter G. Nash, John S. Irving, Patrick Hardin, Norton J. Come,* and *Linda Sher.*

Kenneth Hecht argued the cause for respondent Western Addition Community Organization in both cases. With him on the brief were *Edward H. Steinman* and *Lee M. Modjeska.*†

†Briefs of *amici curiae* urging reversal in both cases were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the Ameri-

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. CHIEF JUSTICE BURGER.

This litigation presents the question whether, in light of the national policy against racial discrimination in employment, the National Labor Relations Act protects concerted activity by a group of minority employees to bargain with their employer over issues of employment discrimination. The National Labor Relations Board held that the employees could not circumvent their elected representative to engage in such bargaining. The Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that in certain circumstances the activity would be protected. 158 U. S. App. D. C. 138, 485 F. 2d 917. Because of the importance of the issue to the administration of the Act, we granted certiorari. 415 U. S. 913. We now reverse.

I

The Emporium Capwell Co. (Company) operates a department store in San Francisco. At all times relevant to this litigation it was a party to the collective-bargaining agreement negotiated by the San Francisco Retailer's Council, of which it was a member, and the

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can Federation of Labor and Congress of Industrial Organizations; by *Gerard C. Smetana, Lawrence M. Cohen, Jeffrey S. Goldman,* and *Milton A. Smith* for the Chamber of Commerce of the United States; and by *Ira M. Millstein* for the National Retail Merchants Assn., Inc.

Fletcher Farrington and *Nathaniel R. Jones* filed a brief for the National Association for the Advancement of Colored People as *amicus curiae* urging affirmance in both cases.

Briefs of *amici curiae* in both cases were filed by *Dennis G. Lyons, David Bonderman,* and *J. Harold Flannery* for the National Urban League et al.; by *Lutz Alexander Prager* for the Wayne State University Clinical Law Program in Employment Discrimination; and by the Department Store Employees Union, Local 1100.

Department Store Employees Union (Union) which represented all stock and marking area employees of the Company. The agreement, in which the Union was recognized as the sole collective-bargaining agency for all covered employees, prohibited employment discrimination by reason of race, color, creed, national origin, age, or sex, as well as union activity. It had a no-strike or lockout clause, and it established grievance and arbitration machinery for processing any claimed violation of the contract, including a violation of the antidiscrimination clause.[1]

On April 3, 1968, a group of Company employees covered by the agreement met with the secretary-treasurer of the Union, Walter Johnson, to present a list of grievances including a claim that the Company was discriminating on the basis of race in making assignments and promotions. The Union official agreed to take certain of the grievances and to investigate the charge of racial discrimination. He appointed an investigating committee and prepared a report on the employees' grievances, which he submitted to the Retailer's Council and which the Council in turn referred to the Company. The report described "the possibility of racial discrimination" as perhaps the most important issue raised by the employees and termed the situation at the Company as

[1] Section 5B provided:

"Any act of any employer, representative of the Union, or any employe that is interfering with the faithful performance of this agreement, or a harmonious relationship between the employers and the UNION, may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement." App. 100–101.

Section 36B established an Adjustment Board consisting of three Union and three management members. Section 36C provided that if any matter referred to the Adjustment Board remained unsettled after seven days, either party could insist that the dispute be submitted to final and binding arbitration. App. 101–102.

potentially explosive if corrective action were not taken. It offered as an example of the problem the Company's failure to promote a Negro stock employee regarded by other employees as an outstanding candidate but a victim of racial discrimination.

Shortly after receiving the report, the Company's labor relations director met with Union representatives and agreed to "look into the matter" of discrimination and see what needed to be done. Apparently unsatisfied with these representations, the Union held a meeting in September attended by Union officials, Company employees, and representatives of the California Fair Employment Practices Committee (FEPC) and the local antipoverty agency. The secretary-treasurer of the Union announced that the Union had concluded that the Company was discriminating, and that it would process every such grievance through to arbitration if necessary. Testimony about the Company's practices was taken and transcribed by a court reporter, and the next day the Union notified the Company of its formal charge and demanded that the joint union-management Adjustment Board be convened "to hear the entire case."

At the September meeting some of the Company's employees had expressed their view that the contract procedures were inadequate to handle a systemic grievance of this sort; they suggested that the Union instead begin picketing the store in protest. Johnson explained that the collective agreement bound the Union to its processes and expressed his view that successful grievants would be helping not only themselves but all others who might be the victims of invidious discrimination as well. The FEPC and antipoverty agency representatives offered the same advice. Nonetheless, when the Adjustment Board meeting convened on October 16, James Joseph Hollins, Tom Hawkins, and two other employees whose

testimony the Union had intended to elicit refused to participate in the grievance procedure. Instead, Hollins read a statement objecting to reliance on correction of individual inequities as an approach to the problem of discrimination at the store and demanding that the president of the Company meet with the four protestants to work out a broader agreement for dealing with the issue as they saw it. The four employees then walked out of the hearing.

Hollins attempted to discuss the question of racial discrimination with the Company president shortly after the incidents of October 16. The president refused to be drawn into such a discussion but suggested to Hollins that he see the personnel director about the matter. Hollins, who had spoken to the personnel director before, made no effort to do so again. Rather, he and Hawkins and several other dissident employees held a press conference on October 22 at which they denounced the store's employment policy as racist, reiterated their desire to deal directly with "the top management" of the Company over minority employment conditions, and announced their intention to picket and institute a boycott of the store. On Saturday, November 2, Hollins, Hawkins, and at least two other employees picketed the store throughout the day and distributed at the entrance handbills urging consumers not to patronize the store.[2] Johnson

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[2] The full text of the handbill read:

"* * BEWARE * * * * BEWARE * * * * BEWARE * *

"EMPORIUM SHOPPERS

" 'Boycott Is On' 'Boycott Is On' 'Boycott Is On'

"For years at The Emporium black, brown, yellow and red people have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent, hard working brothers and sisters denied promotions and respect.

"The Emporium is a 20th Century colonial plantation. The

encountered the picketing employees, again urged them to rely on the grievance process, and warned that they might be fired for their activities. The pickets, however, were not dissuaded, and they continued to press their demand to deal directly with the Company president.[3]

On November 7, Hollins and Hawkins were given written warnings that a repetition of the picketing or public statements about the Company could lead to their discharge.[4] When the conduct was repeated the following Saturday, the two employees were fired.

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brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of Africa.

"Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. THE EMPORIUM MUST PAY FOR THESE INSULTS. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly through out The Emporium.

"We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W. A. C. O. and the Poor Peoples Institute." App. 107.

[3] Johnson testified that Hollins "informed me that the only one they wanted to talk to was Mr. Batchelder [the Company president] and I informed him that we had concluded negotiations in 1967 and I was a spokesman for the union and represented a few thousand clerks and I have never met Mr. Batchelder . . . ." App. 76.

[4] The warning given to Hollins read:

"On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.

"On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

"These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

"There are ample legal remedies to correct any discrimination you

Western Addition Community Organization (hereinafter respondent), a local civil rights association of which Hollins and Hawkins were members, filed a charge against the Company with the National Labor Relations Board. The Board's General Counsel subsequently issued a complaint alleging that in discharging the two the Company had violated § 8 (a)(1) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 158 (a)(1). After a hearing, the NLRB Trial Examiner found that the discharged employees had believed in good faith that the Company was discriminating against minority employees, and that they had resorted to concerted activity on the basis of that belief. He concluded, however, that their activity was not protected by § 7 of the Act and that their discharges did not, therefore, violate § 8 (a)(1).

The Board, after oral argument, adopted the findings and conclusions of its Trial Examiner and dismissed the complaint. 192 N. L. R. B. 173. Among the findings adopted by the Board was that the discharged employees' course of conduct

> "was no mere presentation of a grievance but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees." [5]

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may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

"This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement."

That given to Hawkins was the same except that the first paragraph was not included. *Id.*, at 106.

[5] 192 N. L. R. B., at 185. The evidence marshaled in support of this finding consisted of Hollins' meeting with the Company president in which he said that he wanted to discuss the problem perceived by minority employees; his statement that the pickets would not desist until the president treated with them; Hawkins' testimony that their purpose in picketing was to "talk to the top management to get better conditions"; and his statement that they wanted to

The Board concluded that protection of such an attempt to bargain would undermine the statutory system of bargaining through an exclusive, elected representative, impede elected unions' efforts at bettering the working conditions of minority employees, "and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement." [6]

On respondent's petition for review the Court of Appeals reversed and remanded. The court was of the view that concerted activity directed against racial discrimination enjoys a "unique status" by virtue of the national labor policy against discrimination, as expressed in both the NLRA, see *United Packinghouse Workers* v. *NLRB,* 135 U. S. App. D. C. 111, 416 F. 2d 1126, cert. denied, 396 U. S. 903 (1969), and in Title VII of the

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achieve their purpose through "group talk and through the president if we could talk to him," as opposed to use of the grievance-arbitration machinery.

[6] The Board considered but stopped short of resolving the question of whether the employees' invective and call for a boycott of the Company bespoke so malicious an attempt to harm their employer as to deprive them of the protection of the Act. The Board decision is therefore grounded squarely on the view that a minority group member may not bypass the Union and bargain directly over matters affecting minority employees, and not at all on the tactics used in this particular attempt to obtain such bargaining.

Member Jenkins dissented on the ground that the employees' activity was protected by § 7 because it concerned the terms and conditions of their employment. Member Brown agreed but expressly relied upon his view that the facts revealed no attempt to bargain "but simply to urge [the Company] to take action to correct conditions of racial discrimination which the employees reasonably believed existed at the Emporium." 192 N. L. R. B., at 179.

Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and that the Board had not adequately taken account of the necessity to accommodate the exclusive bargaining principle of the NLRA to the national policy of protecting action taken in opposition to discrimination from employer retaliation.[7] The court recognized that protection of the minority-group concerted activity involved in this case would interfere to some extent with the orderly collective-bargaining process, but it considered the disruptive effect on that process to be outweighed where protection of minority activity is necessary to full and immediate realization of the policy against discrimination. In formulating a standard for distinguishing between protected and unprotected activity, the majority held that the "Board should inquire, in cases such as this, whether the union was actually remedying the discrimination to the *fullest extent possible, by the most expedi-*

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[7] Section 9 (a) of the NLRA, 29 U. S. C. § 159 (a), provides in part:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

Section 704 (a) of Title VII, 42 U. S. C. § 2000e–3 (a) (1970 ed., Supp. III), provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual; or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

ent and efficacious means. Where the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose [their] section 7 protection." [8] Accordingly, the court remanded the case for the Board to make this determination and, if it found in favor of the employees, to consider whether their particular tactics were so disloyal to their employer as to deprive them of § 7 protection under our decision in *NLRB* v. *Electrical Workers,* 346 U. S. 464 (1953).[9]

II

Before turning to the central questions of labor policy raised by these cases, it is important to have firmly in mind the character of the underlying conduct to which we apply them. As stated, the Trial Examiner and the Board found that the employees were discharged for attempting to bargain with the Company over the terms and conditions of employment as they affected racial minorities. Although the Court of Appeals expressly declined to set aside this finding,[10] respondent has de-

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[8] 158 U. S. App. D. C., at 152, 485 F. 2d, at 931 (emphasis in original). We hasten to point out that it had never been determined in any forum, at least as of the time that Hollins and Hawkins engaged in the activity for which they were discharged, that the Company had engaged in any discriminatory conduct. The Board found that the employees believed that the Company had done so, but that no evidence introduced in defense of their resort to self-help supported this belief.

[9] Judge Wyzanski dissented insofar as the Board was directed on remand to evaluate the adequacy of the Union's efforts in opposing discrimination. He was of the view that minority concerted activity against discrimination would be protected regardless of the Union's efforts.

[10] *Id.,* at 150 n. 34, 485 F. 2d, at 929 n. 34 (majority opinion); *id.,* at 158, 485 F. 2d, at 937 (dissenting opinion) ("There could not be a plainer instance of an attempt to bargain respecting working conditions, as distinguished from an adjustment of grievances").

voted considerable effort to attacking it in this Court,[11] on the theory that the employees were attempting only to present a grievance to their employer within the meaning of the first proviso to § 9 (a).[12] We see no occasion to disturb the finding of the Board. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 491 (1951). The issue, then, is whether such attempts to engage in separate bargaining are protected by § 7 of the Act or proscribed by § 9 (a).

A

Section 7 affirmatively guarantees employees the most basic rights of industrial self-determination, "the right

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[11] Brief for Respondent 27–34; Tr. of Oral Arg. 34, 37–40, 44, 49.

[12] That proviso states:

"That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . . ."

Respondent clearly misapprehends the nature of the "right" conferred by this section. The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of § 8 (a)(5). H. R. Rep. No. 245, 80th Cong., 1st Sess., 7 (1947); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (House managers' statement), 46 (1947). The Act nowhere protects this "right" by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion. This matter is fully explicated in *Black-Clawson Co.* v. *Machinists,* 313 F. 2d 179 (CA2 1962). See also *Republic Steel* v. *Maddox,* 379 U. S. 650 (1965). If the employees' activity in the present litigation is to be deemed protected, therefore, it must be so by reason of the reading given to the main part of § 9 (a), in light of Title VII and the national policy against employment discrimination, and not by burdening the proviso to that section with a load it was not meant to carry.

to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from these activities. These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining." 29 U. S. C. § 151.

Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. See *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937). If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. 29 U. S. C. §§ 157, 158 (a)(3). In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power,[13] in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. *Vaca* v. *Sipes,* 386 U. S. 171, 182 (1967); *J. I. Case Co.* v. *NLRB,* 321 U. S. 332, 338–339 (1944); H. R. Rep. No. 972, 74th Cong., 1st Sess., 18 (1935). As a result, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 338 (1953).

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[13] In introducing the bill that became the NLRA, Senator Wagner said of the provisions establishing majority rule: "Without them the phrase 'collective bargaining' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves." 79 Cong. Rec. 2372 (1935).

The Court most recently had occasion to re-examine the underpinnings of the majoritarian principle in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967). In that case employees in two local unions had struck their common employer to enforce their bargaining demands for a new contract. In each local at least the two-thirds majority required by the constitution of the international union had voted for the strike, but some members nonetheless crossed the picket lines and continued to work. When the union later tried and fined these members, the employer charged that it had violated § 8 (b)(1)(A) by restraining or coercing the employees in the exercise of their § 7 right to refrain from concerted activities. In holding that the unions had not committed an unfair labor practice by disciplining the dissident members, we approached the literal language of § 8 (b)(1)(A) with an eye to the policy within which it must be read:

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . .' *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away

his right to strike during the contract term . . . ." 388 U. S., at 180 (footnotes omitted).[14]

In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests. First, it confined the exercise of these powers to the context of a "unit appropriate for the purposes of collective bargaining," *i. e.*, a group of employees with a sufficient commonality of circumstances to ensure against the submergence of a minority with distinctively different interests in the terms and conditions of their employment. See *Chemical Workers* v. *Pittsburgh Glass*, 404 U. S. 157, 171 (1971). Second, it undertook in the 1959 Landrum-Griffin amendments, 73 Stat. 519, to assure that minority voices are heard as they are in the functioning of a democratic institution. Third, we have held, by the very nature of the exclusive bargaining representative's status as representative of *all* unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit. *Vaca* v. *Sipes, supra; Wallace Corp.* v. *NLRB*, 323 U. S. 248 (1944); cf. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944). And the Board has taken the position that a union's refusal to process grievances against racial discrimination, in violation of that duty, is an unfair labor practice. *Hughes Tool Co.*, 147 N. L. R. B. 1573 (1964); see *Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962), enforcement denied, 326 F. 2d 172 (CA2 1963). Indeed, the Board has ordered a union implicated by a collective-bargaining agreement in discrimination with an employer to propose specific contractual provisions to prohibit racial discrimination. See *Local Union No. 12, United*

[14] The Union may not, of course, bargain away the employees' statutory right to choose a new, or to have no, bargaining representative. See *NLRB* v. *Magnavox Co.*, 415 U. S. 322 (1974).

Rubber Workers of America v. *NLRB*, 368 F. 2d 12 (CA5 1966) (enforcement granted).

B

Against this background of long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests, respondent urges this Court to fashion a limited exception to that principle: employees who seek to bargain separately with their employer as to the elimination of racially discriminatory employment practices peculiarly affecting them,[15] should be free from the constraints of the exclusivity principle of § 9 (a). Essentially because established procedures under Title VII or, as in this case, a grievance machinery, are too time consuming, the national labor policy against discrimination requires this exception, respondent argues, and its adoption would not unduly compromise the legitimate interests of either unions or employers.[16]

[15] As respondent conceded at oral argument, the rule it espouses here would necessarily have equal application to any identifiable group of employees—racial or religious groups, women, etc.—that reasonably believed themselves to be the object of invidious discrimination by their employer. Tr. of Oral Arg. 30–31. As seemingly limited by the Court of Appeals, however, such a group would have to give their elected representative an opportunity to adjust the matter in some way before resorting to self-help.

[16] Our analysis of respondent's argument in favor of the exception makes it unnecessary either to accept or reject its factual predicate, *viz.*, that the procedures now established for the elimination of discrimination in employment are too cumbersome to be effective. We note, however, that the present record provides no support for the proposition. Thus, while respondent stresses the fact that Hollins and Hawkins had brought their evidence of discrimination to the Union in April 1968 but did not resort to self-help until the following October, it overlooks the fact that although they had been in contact with the state FEPC they did not file a charge with that agency or the Equal Employment Opportunity Commission (EEOC). Fur-

Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority, *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974), and it is a commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part. See *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 456–458 (1957). These general principles do not aid respondent, however, as it is far from clear that separate bargaining is necessary to help eliminate discrimination. Indeed, as the facts of this litigation demonstrate, the proposed remedy might have just the opposite effect. The collective-bargaining agreement involved here prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred.[17] That orderly determination, if affirmative, could lead to an arbitral award enforceable in court.[18] Nor is there any reason to believe that the processing of grievances is inherently limited to the correction of individual cases of discrimination. Quite apart from the essentially contractual question of whether the Union could grieve against a "pattern or practice" it deems inconsistent with

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ther, when they abandoned the procedures to which the Union was bound because they thought "the union was sort of putting us off and on and was going into a lot of delay that we felt was unnecessary," App. 26, it was at the very moment that the Adjustment Board had been convened to hear their testimony.

[17] The Union in this case had been "prepared to go into arbitration" to enforce its position, but was advised by its attorney that it would be difficult to do so without the dissident members' testimony. Testimony of Walter Johnson, App. 76.

[18] Even if the arbitral decision denies the putative discriminatee's complaint his access to the processes of Title VII and thereby to the federal courts is not foreclosed. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974).

the nondiscrimination clause of the contract, one would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decisions.[19]

The decision by a handful of employees to bypass the grievance procedure in favor of attempting to bargain with their employer, by contrast, may or may not be predicated upon the actual existence of discrimination. An employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once. Competing claims on the employer's ability to accommodate each group's demands, *e. g.*, for reassignments and promotions to a limited number of positions, could only set one group against the other even if it is not the employer's intention to divide and overcome them. Having divided themselves, the minority employees will not be in position to advance their cause unless it be by recourse seriatim to economic coercion, which can only have the effect of further dividing them along racial or other lines.[20] Nor is the situation mate-

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[19] "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement," *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 581 (1960); hence the " 'common law of the shop.' " *Id.*, at 580, quoting Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1499 (1959).

The remarks of Union Secretary-Treasurer Johnson in response to the suggestion that the Union abandon the grievance-arbitration avenue in favor of economic coercion are indicative. " 'I informed them,' " he testified, " 'what an individual wanted to do on their own, they could do, but I wasn't going to engage in any drama, but I wanted some orderly legal procedures that would have some long lasting effect.' " 192 N. L. R. B., at 182.

[20] The Company's Employer Information Report EEO–1 to the EEOC for the period during which this dispute arose indicates that it had employees in every minority group for which information was

rially different where, as apparently happened here, self-designated representatives purport to speak for all groups that might consider themselves to be victims of discrimination. Even if in actual bargaining the various groups did not perceive their interests as divergent and further subdivide themselves, the employer would be bound to bargain with them in a field largely pre-empted by the current collective-bargaining agreement with the elected bargaining representative. In this instance we do not know precisely what form the demands advanced by Hollins, Hawkins, et al. would take, but the nature of the grievance that motivated them indicates that the demands would have included the transfer of some minority employees to sales areas in which higher commissions were paid.[21] Yet the collective-bargaining agreement provided that no employee would be transferred from a higher-paying to a lower-paying classification except by consent or in the course of a layoff or reduction in force.[22] The potential for conflict between the minority and other employees in this situation is manifest. With each group able to enforce its conflicting demands—the incumbent employees by resort to contractual processes and the minority employees by economic coercion—the probability of strife and deadlock, is high; the likelihood of

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required. Among sales workers alone it recorded male and female employees who were Negro, Oriental, and Spanish surnamed. App. 120. In addition, the Union took the position that older employees were also being discriminated against.

[21] At the Board hearing Hollins and Hawkins advanced as a basis for their belief that the Company was discriminating in assignments and promotions their own survey, Briefing on Conditions, Gen. Counsel Ex. 10, Court of Appeals App. 167. This document, reproduced in part in this Court, states: "We demand selling personnel of the following Racial groups to be infiltrated into the following high commission selling areas. Black, Mexicans, Chinese, Filipinos, etc." A number of such departments of the store are then listed. App. 118.

[22] § 20B (Seniority). Court of Appeals App. 205.

making headway against discriminatory practices would be minimal. See *Gateway Coal Co.* v. *Mine Workers,* 414 U. S. 368, 379 (1974).

What has been said here in evaluating respondent's claim that the policy against discrimination requires § 7 protection for concerted efforts at minority bargaining has obvious implications for the related claim that legitimate employer and union interests would not be unduly compromised thereby. The court below minimized the impact on the Union in this case by noting that it was not working at cross-purposes with the dissidents, and that indeed it could not do so consistent with its duty of fair representation and perhaps its obligations under Title VII. As to the Company, its obligations under Title VII are cited for the proposition that it could have no legitimate objection to bargaining with the dissidents in order to achieve full compliance with that law.

This argument confuses the employees' substantive right to be free of racial discrimination with the procedures available under the NLRA for securing these rights. Whether they are thought to depend upon Title VII or have an independent source in the NLRA,[23] they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA. The elimination of discrimination and its vestiges is an appropriate subject of bargaining, and an employer may have no objection to incorporating into a collective agreement the substance of his obligation not to discriminate in personnel decisions; the Company here has done as much, making any claimed dereliction a matter subject to the grievance-arbitration machinery as well as to the processes of Title VII. But that does not mean that an employer may not

[23] See *United Packinghouse Workers* v. *NLRB,* 135 U. S. App. D. C. 111, 416 F. 2d 1126, cert. denied, 396 U. S. 903 (1969); *Local Union No. 12, United Rubber Workers of America* v. *NLRB,* 368 F. 2d 12 (CA5 1966).

have strong and legitimate objections to bargaining on several fronts over the implementation of the right to be free of discrimination for some of the reasons set forth above. Similarly, while a union cannot lawfully bargain for the establishment or continuation of discriminatory practices, see *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944); 42 U. S. C. § 2000e–2 (c)(3), it has a legitimate interest in presenting a united front on this as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests. When union and employer are not responsive to their legal obligations, the bargain they have struck must yield *pro tanto* to the law, whether by means of conciliation through the offices of the EEOC, or by means of federal-court enforcement at the instance of either that agency or the party claiming to be aggrieved.

Accordingly, we think neither aspect of respondent's contention in support of a right to short-circuit orderly, established processes for eliminating discrimination in employment is well-founded. The policy of industrial self-determination as expressed in § 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.

III

Even if the NLRA, when read in the context of the general policy against discrimination, does not sanction these employees' attempt to bargain with the Company, it is contended that it must do so if a specific element of that policy is to be preserved. The element in question

is the congressional policy of protecting from employer reprisal employee efforts to oppose unlawful discrimination, as expressed in § 704 (a) of Title VII. See n. 7, *supra.* Since the discharged employees here had, by their own lights, "opposed" discrimination, it is argued that their activities "fell plainly within the scope of," and their discharges therefore violated, § 704 (a).[24] The notion here is that if the discharges did not also violate § 8 (a)(1) of the NLRA, then the integrity of § 704 (a) will be seriously undermined. We cannot agree.

Even assuming that § 704 (a) protects employees' picketing and instituting a consumer boycott of their employer,[25] the same conduct is not necessarily entitled to

[24] This argument as advanced by respondent is somewhat weakened by its context of insistence that the discharged employees were not seeking to bargain with the Company. The same argument is made in the *amicus curiae* brief of the National Association for the Advancement of Colored People, pp. 9–14, on the assumption, however, that bargaining—over the issue of racial discrimination alone—was their objective. In light of our declination to upset the finding to that effect, we take the argument as the *amicus* makes it.

[25] The question of whether § 704 (a) is applicable to the facts of this case is not as free from doubt as the respondent and *amicus* would have it. In its brief the NLRB argues that § 704 (a) is directed at protecting access to the EEOC and federal courts. *Pettway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998 (CA5 1969). We have previously had occasion to note that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 803 (1973). Whether the protection afforded by § 704 (a) extends only to the right of access or well beyond it, however, is not a question properly presented by these cases. Nor is it an appropriate question to be answered in the first instance by the NLRB. Questions arising under Title VII must be resolved by the means that Congress provided for that purpose.

In the course of arguing for affirmance of the decision below, under which the NLRB would be called upon to evaluate the effectiveness of a union's efforts to oppose employer discrimination in the bargaining unit, respondent takes the position that the Board

affirmative protection from the NLRA. Under the scheme of that Act, conduct which is not protected concerted activity may lawfully form the basis for the participants' discharge. That does not mean that the discharge is immune from attack on other statutory grounds in an appropriate case. If the discharges in these cases are violative of § 704 (a) of Title VII, the remedial provisions of that Title provide the means by which Hollins and Hawkins may recover their jobs with backpay. 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. III).

Respondent objects that reliance on the remedies provided by Title VII is inadequate effectively to secure the rights conferred by Title VII. There are indeed significant differences between proceedings initiated under Title VII and an unfair labor practice proceeding. Congress chose to encourage voluntary compliance with Title VII by emphasizing conciliatory procedures before federal coercive powers could be invoked. Even then it did not provide the EEOC with the power of direct enforcement, but made the federal courts available to the agency or individual to secure compliance with Title VII. See *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 44–45. By contrast, once the General Counsel of the NLRB decides to issue a complaint, vindication of the charging party's statutory rights becomes a public function discharged at public expense, and a favorable decision by the Board brings forth an administrative order. As

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is well equipped by reason of experience and perspective to play a major role in the process of eliminating discrimination in employment. The Board-enforced duty of fair representation, it is noted, has already exposed it to the problems that inhere in detecting and deterring racial discrimination within unions. What is said above does not call into question either the capacity or the propriety of the Board's sensitivity to questions of discrimination. It pertains, rather, to the proper allocation of a particular function—adjudication of claimed violations of Title VII—that Congress has assigned elsewhere.

a result of these and other differences, we are told that relief is typically available to the party filing a charge with the NLRB in a significantly shorter time, and with less risk, than obtains for one filing a charge with the EEOC.

Whatever its factual merit, this argument is properly addressed to the Congress and not to this Court or the NLRB. In order to hold that employer conduct violates § 8 (a)(1) of the NLRA *because* it violates § 704 (a) of Title VII, we would have to override a host of consciously made decisions well within the exclusive competence of the Legislature.[26] This obviously, we cannot do.

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

The Court's opinion makes these Union members—and others similarly situated—prisoners of the Union. The law, I think, was designed to prevent that tragic consequence. Hence, I dissent.

The employees involved, who are black and who were members of a Union through which they obtained employment by the Emporium, would seem to have suffered rank discrimination because of their race. They theoretically had a cause of action against their Union for breach of its duty of fair representation spelled out in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. But as the law on

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[26] In *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 48 n. 9, we had occasion to refer to Senator Clark's interpretive memorandum stating that "[n]othing in Title VII or anywhere else in this bill affects rights and obligations under the NLRA . . . ." Since the Senator's remarks were directed to the suggestion that enactment of Title VII would somehow constrict an employee's access to redress under other statutory regimes, we do not take them as foreclosing the possibility that in some circumstances rights created by the NLRA and related laws affecting the employment relationship must be broadened to accommodate the policies of Title VII.

that phase of the problem has evolved it would seem that the burden on the employee is heavy. See *Vaca* v. *Sipes*, 386 U. S. 171, 190, where it was held that the union action must be "arbitrary, discriminatory, or in bad faith."

The employees might also have sought relief under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, which forbids discrimination in employment on the basis of "race, color, religion, sex or national origin." Section 704 (a) of that Act makes it unlawful for an employer to "discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [the Act], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the Act]." In distinguishing "opposition" from participation in legal proceedings brought pursuant to the statute, it would seem that Congress brought employee self-help within the protection of § 704.*

In this case, the employees took neither of the foregoing courses, each fraught with obstacles, but picketed to protest Emporium's practices. I believe these were

*See CCH EEOC Decisions (1973) ¶ 6264 (Apr. 19, 1971). There the EEOC held that in spite of a collective agreement involving a "no strike" clause an employee might picket the plant for discrimination against blacks. The Commission said:

"An employee has a statutory right under Title VII to oppose, without retaliation, any unlawful employment practices of his employer. We believe this right cannot be abolished or diminished by a collective bargaining agreement. The protection which Title VII affords to Charging Party No. 1's conduct may be analogized to the protection the National Labor Relations Act affords employees who picket in protest against unfair labor practices committed by their employer, although there exists a valid collective bargaining agreement containing a no-strike clause."

The Commission rightly concluded that that decision was in line with *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270.

"concerted activities" protected under § 7 of the National Labor Relations Act. The employees were engaged in a traditional form of labor protest, directed at matters which are unquestionably a proper subject of employee concern. As long ago as *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 561, we observed:

> "The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association."

These observations have added force today with the enactment of Title VII, which unequivocally makes the eradication of employment discrimination part of the federal labor policy, in light of which all labor laws must be construed.

The Board has held that the employees were unprotected because they sought to confront the employer outside the grievance process, which was under Union control. The Court upholds the Board, on the view that this result is commanded by the principle of "exclusive representation" embodied in § 9 of the NLRA. But in the area of racial discrimination the Union is hardly in a position to demand exclusive control, for the employee's right to nondiscriminatory treatment does not depend upon Union demand but is based on the law. We held in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, that a union may not circumscribe an employee's opportunity to seek relief under Title VII. We said there that Title VII "concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congres-

sional command that each employee be free from discriminatory practices." *Id.*, at 51.

The law should facilitate the involvement of unions in the quest for racial equality in employment, but it should not make the individual a prisoner of the union. While employees may reasonably be required to approach the union first, as a kind of "exhaustion" requirement before resorting to economic protest, cf. *NLRB* v. *Tanner Motor Livery*, 419 F. 2d 216 (CA9), they should not be under continued inhibition when it becomes apparent that the union response is inadequate. The Court of Appeals held that the employees should be protected from discharge unless the Board found on remand that the Union had been prosecuting their complaints "to the *fullest extent possible, by the most expedient and efficacious means.*" 158 U. S. App. D. C. 138, 152, 485 F. 2d 917, 931. I would not disturb this standard. Union conduct can be oppressive even if not made in bad faith. The inertia of weak-kneed, docile union leadership can be as devastating to the cause of racial equality as aggressive subversion. Continued submission by employees to such a regime should not be demanded.

I would affirm the judgment below.

Syllabus

HARRIS COUNTY COMMISSIONERS COURT ET AL. *v.* MOORE ET AL.

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

No. 73-1475. Argued November 11, 1974—
Decided February 18, 1975

Appellee justices of the peace and constables, threatened with removal before their elected terms expired, brought this action in federal court, challenging on due process and equal protection grounds the constitutionality of a Texas statute providing, *inter alia,* that when the boundaries of certain precincts are changed and more than the allotted number of justices of the peace or constables reside within the changed district the offices shall become vacant and shall be filled as are other vacancies. Under Texas constitutional provisions (a) a justice of the peace or constable "shall hold his office for four years and until his successor shall be elected and qualified," and (b) such officers may be removed by state district court judges for various causes after notice and jury trial. A three-judge Federal District Court held that the statute violated equal protection by removing some county officers but not others, and ordered appellee officials' reinstatement. *Held:* In view of the unsettled state of Texas law as to whether the state constitutional provisions ensure justices of the peace and constables tenure until their elected terms expire even when the challenged statute would require their ouster, the District Court should have abstained from deciding the federal constitutional issue, it being far from certain under various Texas precedents that appellee officeholders must lose their jobs or that the reinstatement relief ordered by the District Court is available. Pp. 82–89.

378 F. Supp. 1006, reversed and remanded.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 89.

Edward J. Landry argued the cause for appellants. With him on the brief were *Joe Resweber* and *Michael R. Davis.*

John G. Gilleland argued the cause for appellees Moore et al. With him on the brief was *Virgil H. Barfield*. *C. Anthony Friloux, Jr.*, argued the cause and filed a brief for appellee Zaboroski.

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. CHIEF JUSTICE BURGER.

The appellees brought this action to challenge a plan redistricting the justice of the peace precincts in Harris County, Tex. Because the plan provided for consolidation of several precincts, three justices of the peace and two constables lost their jobs. These five officials, along with two voters from the defunct precincts, sought to enjoin implementation of the redistricting plan on the ground that the Texas statute providing for their removal from office at the time of redistricting denied them the equal protection of the laws. The three-judge District Court granted relief, declaring the statute unconstitutional and enjoining the redistricting. The order of the District Court was stayed by MR. JUSTICE POWELL. We denied a motion to vacate the stay, 415 U. S. 905 (1974), and subsequently noted probable jurisdiction, 417 U. S. 928 (1974). We reverse and remand to the District Court with instructions to dismiss the complaint without prejudice.

I

Under Texas law, the Commissioners Court is the general governing body of each county; one of its duties is to divide the county into precincts for the election of justices of the peace and constables, and to redistrict the precincts when necessary. Tex. Rev. Civ. Stat. Ann., Art. 2351 (1) (1971).

In June 1973, the Commissioners Court of Harris County adopted a redistricting plan for the eight justice

of the peace precincts in the county. The last redistricting had taken place in 1876, and the enormous population changes in the Houston area had resulted in gross disparities in population among the precincts: the largest precinct contained approximately one million persons, while the smallest had fewer than 7,000.

Under the old plan, one justice of the peace and one constable were assigned to each precinct except the largest, which was allotted two justices and one constable. Because of the apparent discrepancy in the workload of the officials in different precincts, the Commissioners Court adopted a redistricting plan that redrew the precinct lines. Although the proposed new precincts still varied substantially in population size, the disparity was much less than it had been.

Among other changes, the plan consolidated three of the smallest precincts and parts of two others into a single new precinct. As a result, four justices and three constables found themselves residents of a single precinct, which was entitled by law to a maximum of only one constable and two justices of the peace. Pursuant to a Texas statute, Tex. Rev. Civ. Stat. Ann., Art 2351½ (c) (1971), the Commissioners Court declared the constable and justice posts for that precinct to be vacant, since there were more officials living in the precinct than positions available.[1] The Commissioners Court then filled the

[1] Article 2351½ (c) provides:

"When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall

vacancies, Tex. Rev. Civ. Stat. Ann., Art. 2355 (1971), appointing one of the displaced constables to the new constable post and one of the displaced justices to one of the two new justice positions. A nonincumbent was appointed to fill the other slot.

The five officeholders, threatened with removal prior to the expiration of their elected terms, resorted to court action in an effort to block implementation of the redistricting plan. One of the constables filed suit in state court, but when that court denied his application for a temporary injunction, he apparently abandoned the action. Shortly thereafter, the three displaced justices and two constables, along with two voters who had lived in their precincts, brought suit in the United States District Court for the Southern District of Texas, claiming that the redistricting scheme was unconstitutional. Their removal pursuant to Art. 2351½ (c) violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the officials contended. More specifically, they argued that the redistricting order was

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become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant."

Another statute, Tex. Elec. Code Ann., Art. 1.05 (Supp. 1974–1975), has been read to require that school district officials reside throughout their terms in the districts that they serve. *Whitmarsh* v. *Buckley*, 324 S. W. 2d 298 (Tex. Ct. Civ. App. 1959). County commissioners, by contrast, are not required to reside in their precincts for their full terms. *Childress County* v. *Sachse*, 310 S. W. 2d 414 (Tex. Ct. Civ. App.), holding approved, 158 Tex. 371, 312 S. W. 2d 380 (1958). The Texas courts have not yet settled whether Art. 1.05 requires that justices of the peace and constables reside in their precincts throughout their terms, or whether the state constitutional provisions establishing a requirement of county residence for all county officers, Tex. Const., Art. 16, § 14; Art. 5, § 24, excuse justices and constables from the requirements of Art. 1.05.

constitutionally invalid because it did not meet "one man, one vote" standards, because it denied voters in certain precincts the full effect of their votes, and because the precincts were redrawn along racial lines. Although the appellees did not expressly raise a state-law claim in their complaint,[2] they argued in their pretrial brief that Art. 2351½ (c) was invalid under the State Constitution as well, relying on several state-court cases and two opinions of the Texas Attorney General. In response, the appellants requested that the complaint be dismissed because the suit raised no substantial federal questions and because the appellees had failed to exhaust their state remedies before bringing suit in federal court.[3]

A three-judge court was convened. It heard argument and issued an order later the same day. In its order, the court asserted jurisdiction and enjoined implementation of the redistricting plan on the ground that the Texas statute providing for the removal of the plaintiff justices and constables was unconstitutional on its face. A week later the court filed a brief opinion in which it wrote that insofar as the statute shortens the term of an elected public official merely because redistricting places him in a district with others, "it invidiously and irrationally discriminates between him and others not so affected." In addition, the court held that the statute as applied had discriminated between those who voted for or were entitled to vote for the displaced officials, and the voters in other precincts where the

[2] The appellees noted in their First Amended Complaint for Declaratory Judgment, filed September 17, 1973, that the state statute, as interpreted by the Commissioners Court, was in apparent conflict with Art. 5, § 24, of the Texas Constitution, which provides a mechanism for removal of county officers, including justices and constables.

[3] In their pretrial brief, the appellants more properly characterized their "exhaustion" defense as a request for the District Court to abstain.

elected officials were permitted to serve a full term. Because it found no compelling interest served by redistricting in the middle of plaintiffs' terms,[4] the court held that to the extent that the redistricting order appointed other persons to plaintiffs' offices and prevented plaintiffs from carrying out their duties and receiving their salaries for the remainder of their elected terms, the order was invalid.[5]

II

The appellants urge us to reverse the District Court on the merits or, in the alternative, to order the court to abstain pending determination of the state-law questions that pervade this case.[6] Because we agree with appellants that the District Court should have abstained, we

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[4] The appellants point out that since staggered terms are constitutionally mandated in Texas, Tex. Const., Art. 16, § 65, it would have been impossible for the Commissioners Court to have redistricted at a time that would not have fallen in the middle of some of the justices' or constables' terms.

[5] Because it granted relief on the equal protection claim, the court found it unnecessary to reach the appellees' other contentions. Nor did the court address the state-law questions or the appellants' abstention argument.

[6] We have jurisdiction of this appeal under 28 U. S. C. § 1253. The statute challenged here was plainly of statewide application; it was attacked as being unconstitutional on its face or as applied; and for the purposes of the Three-Judge Court Act, 28 U. S. C. § 2281, the defendant county commissioners were "state officers" in administering the challenged statute. *Board of Regents* v. *New Left Education Project*, 404 U. S. 541, 544 n. 2 (1972). The appellees' claim, moreover, appears sufficient to raise a question for a three-judge court. We recently stated that "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281." *Goosby* v. *Osser*, 409 U. S. 512, 518 (1973).

reverse without reaching the merits of the equal protection claim sustained by the District Court.

In *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941), the Court held that when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question. Since that decision, we have invoked the "*Pullman* doctrine" on numerous occasions. *E. g., Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498 (1972); *Askew* v. *Hargrave,* 401 U. S. 476 (1971); *Reetz* v. *Bozanich,* 397 U. S. 82 (1970); *Harrison* v. *NAACP,* 360 U. S. 167 (1959); *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101 (1944); see Field, Abstention in Constitutional Cases: The Scope of the *Pullman* Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1084–1101 (1974). We have repeatedly warned, however, that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court, abstention must be invoked only in "special circumstances," see *Zwickler* v. *Koota,* 389 U. S. 241, 248 (1967), and only upon careful consideration of the facts of each case. *Baggett* v. *Bullitt,* 377 U. S. 360, 375–379 (1964); *Railroad Comm'n* v. *Pullman Co., supra,* at 500.

Where there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, we have regularly ordered abstention. See *Askew* v. *Hargrave, supra; Albertson* v. *Millard,* 345 U. S. 242 (1953); *Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168, 173 (1942); cf. *Meredith* v. *Winter Haven,* 320 U. S. 228, 236 (1943).[7] Similarly, when the state-

[7] In *Gibson* v. *Berryhill,* 411 U. S. 564, 580–581 (1973), we held that abstention was not required, even though a suit that might have obviated the need for federal injunctive relief was pending in the

law questions have concerned matters peculiarly within the province of the local courts, see *Reetz* v. *Bozanich, supra; Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41 (1970); cf. *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25 (1959), we have inclined toward abstention. On the other hand, where the litigation has already been long delayed, see *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 329 (1964), or where it has seemed unlikely that resolution of the state-law question would significantly affect the federal claim, see *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 84 (1958); *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456, 462–463 (1943), the Court has held that abstention should not be required.

Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong. See *Kusper* v. *Pontikes*, 414 U. S. 51 (1973); *Lake Carriers' Assn.* v. *MacMullan, supra; Harman* v. *Forssenius*, 380 U. S. 528 (1965); *Harrison* v. *NAACP, supra.* The same considerations apply where, as in this case, the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute.[8] Here resolution of the

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state courts. In *Gibson*, however, state authorities were pressing charges against the plaintiffs without awaiting the results of the state-court action, and some of the charges against the plaintiffs might have survived even a favorable ruling in the State Supreme Court. Under those circumstances, we held that it was not an abuse of discretion for the District Court to decline to abstain.

[8] In *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), we declined to order abstention where the federal due process claim was not

question whether the Texas Constitution permits the County Commissioners Court to replace constables and justices of the peace when several live in the same precinct will define the scope of Art. 2351½ (c) and, as a consequence, the nature and continued vitality of the federal constitutional claim. As we wrote in *Reetz* v. *Bozanich,* 397 U. S., at 87, "the nub of the whole controversy may be the state constitution."

The appellees insist that abstention would be improper in this case because a Texas court construction of Art. 2351½ (c) would not modify or avoid the equal protection question passed on by the District Court. Having analyzed the relevant Texas statutes, constitutional provisions, and precedents, however, we are unable to share their conviction.

The Texas Constitution provides that a justice of the peace or constable "shall hold his office for four years and until his successor shall be elected and qualified." Art. 5, § 18. Justices of the peace and constables may be removed by state district court judges for various causes, after notice and a trial by jury. Art. 5, § 24. What is unsettled is whether these two provisions ensure justices and constables tenure until the completion of their elected terms even when midterm redistricting places them outside their original precinct or puts them into a precinct that has more than its full complement of officeholders.

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complicated by an unresolved state-law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution. But where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes, and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district courts to abstain. See *Reetz* v. *Bozanich,* 397 U. S. 82 (1970); *Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U. S. 639 (1959).

In two early cases, the Texas courts held that the State Constitution provides no guarantee of tenure for justices and constables when the County Commissioners Court elects to exercise its redistricting authority. *State ex rel. Dowlen* v. *Rigsby,* 17 Tex. Civ. App. 171, 43 S. W. 271, holding approved, 91 Tex. 351, 43 S. W. 1101 (1897); *Ward* v. *Bond,* 10 S. W. 2d 590 (Tex. Ct. Civ. App. 1928). The State Supreme Court later appeared to reverse this stand in approving a lower court decision that the State Constitution guaranteed to county commissioners the right to serve until the expiration of their terms, even if redistricting resulted in their living outside their precincts. *Childress County* v. *Sachse,* 310 S. W. 2d 414 (Tex. Ct. Civ. App.), holding approved, 158 Tex. 371, 312 S. W. 2d 380 (1958). In an opinion filed shortly before the District Court hearing in this case, the Texas Attorney General applied the reasoning of the *Sachse* case and ruled that to the extent that Art. 2351½ (c) vacated the office of a justice of the peace who no longer lived within his precinct, the statute was invalid.[9] The Attorney General concluded that the State Constitution entitles justices and constables to serve their full terms unless they are removed pursuant to Art. 5, § 24. Op. Atty. Gen. H–220 (1974). The reasoning of the Attorney General's opinion would appear to extend to this

[9] The appellees' allegation that Art. 2351½ (c) is unconstitutionally vague is revealing. The "vagueness" of which they complain is no more than uncertainty about the applicability of the statute to a particular situation; it is not the sort of vagueness that leaves those subject to a statute uncertain about what is required of them. In the case where applicability of the statute is uncertain, abstention is often proper, while in the case where the vagueness claim goes to the obligations imposed by the statute, it is not, since a single state construction often would not bring the challenged statute "within the bounds of permissible constitutional certainty." *Baggett* v. *Bullitt,* 377 U. S. 360, 378 (1964); *Procunier* v. *Martinez,* 416 U. S. 396, 401 n. 5 (1974).

case.[10] Although appellants contend that the Attorney General has misconstrued the Texas precedents, it seems far from settled that under state law the appellee office-holders must lose their jobs.[11]

These difficult state-law questions intrude in yet another way that strengthens the case for abstention. The proper scope of the order entered by the District Court and the applicability of that order to the plaintiffs' claims depend directly on questions of state law. The court's initial order held Art. 2351½ (c) unconstitutional and enjoined the redistricting plan altogether. In its opinion, the court apparently intended to narrow its order somewhat, by holding the statute unconstitutional as applied and by enjoining the redistricting order only to the extent that it removed the appellees from their jobs. Yet even that relief was broader than the court's holding would support. Absent Art. 2351½ (c), Texas law may well dictate that upon redistricting, all the justice and constable positions in the county would be vacated.[12]

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[10] Opinions of the Attorney General are "entitled to careful consideration by the courts, and quite generally regarded as highly persuasive," *Jones* v. *Williams,* 121 Tex. 94, 98, 45 S. W. 2d 130, 131 (1931). The 1974 opinion, however, may be given close scrutiny by the state courts, as it appears to be in direct conflict with several earlier opinions of the Attorney General, see n. 12, *infra.*

[11] Even if the *Sachse* case does not apply to justice precincts, Art. 2351½ (c) may still be invalid under state law as a legislative encroachment on the county commissioners' constitutional powers to fill justice vacancies created in the course of redistricting. Tex. Const., Art. 5, § 28. See Op. Atty. Gen. M–68 (1967). If the statute is unconstitutional for this reason, all the justice positions in the county would have been vacated, not just those occupied by the appellees. Obviously, this construction of Texas law would drastically alter the nature of appellees' federal claim.

[12] There is support for this view in several early cases and in a number of state Attorney General's opinions. See *Brown* v. *Meeks,* 96 S. W. 2d 839 (Tex. Ct. Civ. App. 1936); *State ex rel. Dowlen* v.

Since the District Court concluded only that Art. 2351½ (c) denied the officeholders and voters equal protection by removing some officials in the county but not others, it should not automatically have imposed one remedy—reinstatement—when Texas law might well call for quite another—removal of all the affected officeholders. Yet if the District Court had limited itself to declaring Art. 2351½ (c) unconstitutional, and the Commissioners Court had determined that state law would then require that all the county justice and constable positions be vacated,[13] the appellees would be forced to resort to state court in order to vindicate their claimed right to reinstatement. In short, not only the character of the federal right asserted in this case, but even the availability of the relief sought turn in large part on the same unsettled state-law questions. Because the federal claim in this case is "entangled in a skein of state law that must be untangled before the federal case can proceed," *McNeese* v. *Board of Education,* 373 U. S. 668, 674 (1963), we conclude that the District Court erred in not adopting appellants' suggestion to abstain.

In order to remove any possible obstacles to state-court jurisdiction, we direct the District Court to dismiss the complaint.[14] The dismissal should be without prejudice

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Rigsby, 17 Tex. Civ. App. 171, 43 S. W. 271, holding approved, 91 Tex. 351, 43 S. W. 1101 (1897); Ops. Atty. Gen. V–790 (1949); V–1032 (1950); WW–536 (1958); C–112 (1963). These opinions of the Attorney General were qualified in a manner not affecting this case in Op. Atty. Gen. M–68 (1967); see also Op. Atty. Gen. M–562 (1970).

[13] The Commissioners Court has in fact adopted this view of Texas law in this case. Brief for Appellants 18–20.

[14] Ordinarily the proper course in ordering "*Pullman* abstention" is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state-law questions in state court. See *Zwickler* v. *Koota,* 389 U. S. 241, 244 n. 4 (1967). The Texas Supreme Court has ruled, however, that it cannot grant

so that any remaining federal claim may be raised in a federal forum after the Texas courts have been given the opportunity to address the state-law questions in this case. *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 421–422 (1964).

Reversed and remanded.

MR. JUSTICE DOUGLAS, dissenting.

The principle of abstention—judicially created by *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941)—promises to become a serious barrier to the assertion by federal courts of the jurisdiction Congress has bestowed on them. In the present case, suit was started in 1973 in the District Court, which rendered its judgment January 30, 1974. The term of office of the three justices of the peace who were ousted expired December 31, 1974; that of the two constables will expire December 31, 1976. After being brought all the way here by the State that ousted them from office, they are now told that their federal suit is dismissed and that they must start litigation anew in the state courts. They would necessarily have to be very rich office-holders—or else be financed by some foundation—to be able to pay the expense of this long, drawn-out litigation.

The three judges who made up the District Court in

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declaratory relief under state law if a federal court retains jurisdiction over the federal claim. *United Services Life Ins. Co.* v. *Delaney,* 396 S. W. 2d 855 (1965); see *Romero* v. *Coldwell,* 455 F. 2d 1163, 1167 (CA5 1972); *Barrett* v. *Atlantic Richfield Co.,* 444 F. 2d 38, 45–46 (CA5 1971).

We have adopted the unusual course of dismissing in this case solely in order to avoid the possibility that some state-law remedies might otherwise be foreclosed to appellees on their return to state court. Obviously, the dismissal must not be used as a means to defeat the appellees' federal claims if and when they return to federal court.

this case were Thomas G. Gee, John V. Singleton, Jr., and Carl O. Bue, Jr., all named from Texas, all versed in the idiosyncrasies of Texas law. A state agency, acting with full authority of state law,* has ousted these elected officials. By remitting them to a state court we now leave them without an effective remedy in view of the short terms of office that are involved. I said in *Harrison* v. *NAACP*, 360 U. S. 167, 184 (1959) (dissenting opinion):

> "We need not—we should not—give deference to a state policy that seeks to undermine paramount federal law. We fail to perform the duty expressly enjoined by Congress on the federal judiciary in the Civil Rights Acts when we do so."

We have a like situation here.

Here, as in cases in a federal court by reason of diversity of citizenship, ordinarily a federal court must not decline to exercise the jurisdiction Congress has conferred upon it "merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state," *Meredith* v. *Winter Haven*, 320 U. S. 228, 234–235 (1943). The alternative course, we held, "would thwart the purpose of the jurisdictional act," *id.*, at 235.

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*Texas Rev. Civ. Stat. Ann., Art. 2351½ (c) (1971), provides: "When boundaries of justice of the peace precincts are changed, so that existing precincts are altered, new precincts are formed, or former precincts are abolished, if only one previously elected or appointed justice of the peace or constable resides within a precinct as so changed, he shall continue in office as justice or constable of that precinct for the remainder of the term to which he was elected or appointed. If more than one justice or constable resides within a precinct as so changed, or if none resides therein, the office shall become vacant and the vacancy shall be filled as other vacancies; provided, however, that in precincts having two justices, if two reside therein, both shall continue in office, and if more than two reside therein, both offices shall become vacant."

The teaching of *Pullman* is greatly exaggerated here. No special circumstances warranting abdication of federal jurisdiction have been shown. Where the judges making up the panel of the three-judge court are from the State whose local law is at issue, I would leave it to them to decide whether the policy of *Pullman* should be applied in a given case. They know about *Pullman* as well as most of us. It was a new doctrine when announced. It is word that has long been part of the warp and woof of federal law.

The three judges, seasoned in Texas law, saw no ambiguities, no exotic question of law remaining unresolved, and rendered a forthright decision that was eminently correct on federal law. I would leave to our district judges the question whether the local-law problem counseled abstention.

We do a great disservice when we send these tired and exhausted litigants into the desert in search of this Holy Grail that is already in the keeping of the federal court.

FOSTER *v.* DRAVO CORP.

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

No. 73–1773. Argued January 20, 1975—Decided February 18, 1975

The Military Selective Service Act provides that a veteran who applies for re-employment if still qualified shall be restored by his employer to his former position "or a position of like seniority, status, and pay." The Act further assures that benefits and advancements that would necessarily have accrued by virtue of continued employment will not be denied the veteran merely because of his absence in the military service. These provisions, however, do not apply to claimed benefits requiring more than simple continued status as an employee. *Held:*

1. In this case the Act's provisions do not entitle petitioner employee to full vacation benefits for the years he was in military service, under the terms of a collective-bargaining agreement that conditioned the award of such benefits on the receipt of earnings during 25 weeks of the previous year, since the vacation scheme was intended as a form of short-term deferred compensation for work performed and not as accruing automatically as a function of continued association with the company. Pp. 96–101.

2. Whether petitioner might be entitled to some pro rata vacation benefits under a contract provision applicable to those employees who were unable to accumulate the minimum of 25 weeks' employment because of layoffs should be determined by the District Court on remand. Pp. 101–102.

490 F. 2d 55, affirmed.

MARSHALL, J., wrote the opinion of the Court, in which all other Members joined except DOUGLAS, J., who took no part in the consideration or decision of the case.

Harry R. Sachse argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Assistant Attorney General Hills, Robert E. Kopp, Harold C. Nystrom,* and *Bobbye D. Spears.*

Robert H. Shoop, Jr., argued the cause for respondent. With him on the brief was *Clyde H. Slease.*

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. CHIEF JUSTICE BURGER.

Through the Military Selective Service Act, Congress has sought to protect veterans returning to civilian jobs from being penalized for having served in the Armed Forces. Section 9 of the Act, 62 Stat. 614, as amended, 50 U. S. C. App. § 459, ensures a returning serviceman the right to be restored to his job with the same levels of seniority, status, and pay that he would have enjoyed if he had held the job throughout the time he was in the military.[1] This case presents the question whether the statute entitles a veteran to vacation benefits when, because of his departure for military service, he has failed

[1] Section 9 (b) provides a right to re-employment for any serviceman who "has left or leaves a position . . . and . . . makes application for reemployment within ninety days after he is relieved from such training and service." Section 9 (b)(B)(i) adds that if the serviceman is "still qualified to perform the duties of such position, [he shall] be restored by such employer . . . to such position or to a position of like seniority, status, and pay." Section 9 (c), which governs the rights of those restored to positions after return from the service, provides in relevant part:

"(1) Any person who is restored to a position in accordance with the provisions of . . . this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

"(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of . . . this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

to satisfy a substantial work requirement upon which the vacation benefits are conditioned.

I

Petitioner, Earl R. Foster, began working full time for respondent Dravo Corp. in 1965. He worked 22 weeks for the company during that year and earned 20 hours of paid vacation eligibility.[2] In 1966, he worked the entire year and earned the standard second-year vacation benefits,[3] for which he subsequently accepted payment.

In March of the following year, petitioner took a military leave of absence from his job. Before leaving, he worked the first seven weeks of 1967 for the company, and upon his return some 18 months later he worked the last 13 weeks in 1968. Because the collective-bargaining agreement between petitioner's union and Dravo required employees to work a minimum of 25 weeks in each calendar year in order to earn full vacation benefits,[4]

[2] The collective-bargaining agreement between Dravo and petitioner's union, the Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO, governed the eligibility conditions for vacation benefits. In his first year with the company, petitioner was eligible for four hours of paid vacation for each month worked, up to a maximum of 40 hours. Art. XIV, § 1.

[3] Under the collective-bargaining agreement, the length of the vacation earned each year increases with the employee's seniority. The ordinary second-year vacation is seven days' leave with pay. After the second year, the vacation increases by one day per year, for the first five years with the company, and then by one week for each five years of "continuous employment," to a maximum of five weeks. *Ibid.*

[4] The agreement provides that after the first year an employee can qualify for a vacation if he has received earnings in at least 25 workweeks during the calendar year. A vacation earned in one year can be taken during the next year at a time designated by the company. When an employee is laid off prior to taking his earned

Foster was not awarded any benefits for either year. Since that time, he has continued to work full time for Dravo and has received full vacation benefits from the company for each year of his employment.

Unhappy with the denial of vacation benefits for 1967 and 1968, petitioner brought suit against Dravo in the District Court for the Western District of Pennsylvania.[5] He sought credit for full vacation benefits in both years, claiming that since he would have earned two vacations if he had worked for respondent throughout the time he was in the service, § 9 of the Military Selective Service Act requires that he be credited with the benefits even though he failed to meet the 25-week work requirement in either year.

The District Court held that since the vacation benefits in question did not accrue automatically with continued employment, it did not violate the statute to deny them to employees on military leave of absence. The Court of Appeals for the Third Circuit agreed with the District Court that petitioner had no statutory right to full vacation benefits. From its examination of the contract and other related factors, the court concluded that the vacation right in dispute was not a perquisite of seniority but an earned benefit, and was thus unavailable to a returning serviceman who had not satisfied the work requirement. Noting that a limited pro rata vacation provision in the collective-bargaining agreement might provide an alternative basis for petitioner to receive some vacation benefits for 1967 and 1968, the

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vacation, the company gives him his vacation pay at that time, regardless of when his vacation was scheduled. *Ibid.*

[5] Petitioner has been represented by the Government throughout this action. By statute, the United States Attorney is charged with representing claimants under § 9 of the Military Selective Service Act, if the claimant reasonably appears entitled to the benefits in dispute. 50 U. S. C. App. § 459 (d).

court remanded the case to the District Court for further proceedings on that narrow question. 490 F. 2d 55 (1973). We granted certiorari, 419 U. S. 823 (1974), because of an apparent conflict with the decisions of the Courts of Appeals for the Seventh and Ninth Circuits. See *Ewert* v. *Wrought Washer Mfg. Co.*, 477 F. 2d 128 (CA7 1973); *Locaynia* v. *American Airlines*, 457 F. 2d 1253 (CA9), cert. denied, 409 U. S. 982 (1972). We affirm.

II

The Selective Training and Service Act of 1940, 54 Stat. 885, 890, which was very similar to the present 50 U. S. C. App. § 459 (c)(1),[6] provided that any person leaving a civilian job to enter the military would be entitled to be restored to a position of "like seniority, status, and pay" upon his return unless circumstances had so changed "as to make it impossible or unreasonable to do so." The statute further required that the veteran be restored "without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his military service.

On the first of several encounters with the Act, this Court interpreted the guarantee against loss of seniority rights to mean that the veteran's time in the service must

[6] The 1940 Act was essentially re-enacted in the Selective Service Act of 1948, 62 Stat. 604. The name of the Act was changed in 1951 to the Universal Military Training and Service Act, 65 Stat. 75. In 1967 it was renamed the Military Selective Service Act of 1967, 81 Stat. 100. It was given its present name, the Military Selective Service Act, in 1971, 85 Stat. 348. The present §§ 9 (b) and 9 (c)(1) have remained largely unchanged since 1940, and § 9 (c)(2) has been preserved in its current form since the re-enactment of 1948.

The re-employment provisions of the Act apply not only to those drafted under the provisions of the Act, but also to men and women who enlist voluntarily in the Armed Forces, as long as the period of service does not exceed four, or in certain cases, five years. 50 U. S. C. App. § 459 (g)(1).

be credited toward his seniority with his employer just as if he had remained on the job throughout. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285 (1946). To deny him credit for time spent in the military would mean that the veteran would lose ground by reason of his absence. This, the Court stated, would violate the statutory principle that the serviceman "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Id.*, at 284–285. See also *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, 283 (1949).

After the *Fishgold* decision, Congress re-enacted the statute, adding language that expressly codified the holding in that case. The amendment provided that a veteran must be restored to his position with the status that "he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration." 62 Stat. 604, 615–616, 50 U. S. C. App. § 459 (c)(2).

In subsequent cases, the Court has consistently applied the statute to assure that benefits and advancements that would necessarily have accrued by virtue of continued employment would not be denied the veteran merely because of his absence in the military service. *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U. S. 265, 272 (1958). On the other hand, where the claimed benefit requires more than simple continued status as an employee, the Court has held that it is not protected by the statute. See *id.*, at 273; *Tilton* v. *Missouri Pacific R. Co.*, 376 U. S. 169, 181 (1964).

In *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225 (1966), the Court applied these principles for the first time to a benefit not traditionally considered a seniority right.

The dispute in that case concerned a veteran's eligibility for a severance payment. Under the applicable collective-bargaining agreement, the amount of severance pay due each employee depended on the length of the employee's "compensated service" with the respondent railroad. The railroad argued that the Act was inapplicable because the amount of the severance payment did not depend directly on seniority. The Court, however, took a broader view. Looking beyond the narrow characterization of seniority rights in the collective-bargaining agreement, the Court concluded that the severance payments were not intended as a form of deferred compensation for work done in the past, but rather as a means of compensating employees for the loss of rights and benefits accumulated over a long period of service. Accordingly, the Court held that the severance payments in that case were "just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." *Id.*, at 230.

Two years later, in *Eagar* v. *Magma Copper Co.*, 389 U. S. 323 (1967), the Court applied the statute to a vacation and holiday pay provision in a collective-bargaining agreement. The petitioner in that case had satisfied all the work requirements for the benefits in question, but he had not met the further conditions that he be employed on the one-year anniversary date of his starting work with the company, and that he be on the payroll for the three months preceding each paid holiday.

In a *per curiam* opinion, the Court reversed the judgment for the company on the authority of *Accardi*. Since the petitioner had met all the contractual work requirements and would have been eligible for the contested benefits if he had simply remained on the company payroll, it was unnecessary to consider whether the work requirements would have barred veterans who had not

met them. On the facts before the Court, the decision fell within the principle that a returning serviceman must be treated as if he had kept his job continuously throughout the period of his military service.[7]

III

Petitioner argues that under *Accardi* and *Eagar* the vacation benefits in this case must be granted to him as a returning serviceman because the entitlement to a vacation is not closely correlated to the amount of work actually performed by the employee. Under the collective-bargaining agreement, a Dravo employee theoretically could earn full vacation benefits by doing as little as one hour's work in each of 25 weeks during the year. From this, petitioner concludes that the agreement really conditions vacation benefits only on continued employment, and that Dravo therefore could not legally deny him full vacation benefits for either 1967 or 1968.

This approach would extend the statute well beyond the limits set out in our prior cases. Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation. Of course, as in the *Accardi* case, the work requirement may be so insubstantial that it appears plainly designed to measure time on the payroll rather than hours on the job; in that event, the Act requires that the benefit be granted to returning veterans. But where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates

[7] The dissenters in *Eagar* v. *Magma Copper Co.* argued that the statute's protection applied only to rights associated with seniority. 389 U. S. 323, 325 (1967) (DOUGLAS, J., joined by Harlan and STEWART, JJ., dissenting). They would have distinguished between eligibility based upon being on the payroll on a particular date or for a particular period from eligibility based upon length of service with the company. The majority implicitly rejected this distinction.

only loosely with the benefit is not enough to invoke the statutory guarantee.

We agree with the Court of Appeals that, unlike the severance payments in *Accardi*, the vacation benefits in this case were intended as a form of short-term compensation for work performed. Although Dravo employees who work for 25 weeks receive the same paid vacation rights as those who work a full year, the collective-bargaining agreement provides additional vacation credit for employees who work overtime for a substantial period. The benefits under the overtime vacation provision increase with the amount of overtime worked. In addition, the agreement provides that if an employee is laid off during the year and does not work the requisite 25 weeks, he will be awarded vacation benefits on a pro rata basis.

These provisions lend substantial support to respondent's claim that the vacation scheme was intended as a form of deferred compensation. Petitioner's observation that an employee could in theory earn a vacation under the collective-bargaining agreement with only a few carefully spaced hours of work is not enough to rebut the plain indication that a full vacation was intended in most cases to be awarded for a full year's work.[8]

On petitioner's theory of the case, the company would be required to provide full vacation benefits to a returning serviceman if he worked no more than one week in

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[8] Petitioner's reliance on the treatment of the work requirement in *Accardi* is misplaced. The Court there concluded that the severance payments were based primarily on the employees' length of service with the railroad, not on the actual total service rendered. The putative "work requirement" in that case, the Court concluded, did not disguise the true nature of the payments as compensation for the loss of jobs. The *Eagar* case provides even less support for petitioner since that case did not involve an unsatisfied work requirement.

each year; indeed, following this approach to its logical limits, a veteran who served in the Armed Forces for four years would be entitled to accumulated vacation benefits for all four years upon his return. This result is so sharply inconsistent with the common conception of a vacation as a reward for and respite from a lengthy period of labor that the statute should be applied only where it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company. Since no such showing was made here, and since petitioner has not met the bona fide work requirement in the collective-bargaining agreement, we conclude that § 9 did not guarantee him full vacation rights for the two years in question.[9]

IV

In the alternative, petitioner asserts that the statute entitles him at least to pro rata vacation benefits for the time he served Dravo during 1967 and 1968. If he is denied even a pro rata share of vacation benefits, petitioner claims he will in effect be penalized for taking a military leave of absence, a result that the Act was expressly intended to prevent.

We can find nothing in the statute, independent of the rights conferred in the collective-bargaining agreement, that would justify such a Solomonic solution. The

[9] In contrast to the conditions of eligibility for a vacation are the terms governing the length of the vacation to which an employee is entitled. As noted above, the length of vacation increases with the employee's length of "continuous employment" with Dravo, which is defined in the collective-bargaining agreement as "continuous seniority." Art. XIV, §§ 1, 2. Respondent concedes that the employee's time in the service must be counted in determining the length of the vacation that is earned; for the years in which petitioner has worked the 25 weeks required to earn a vacation, the length of his vacation has been calculated as if he had been continuously employed with the company since 1965.

statute requires that a returning veteran be treated the same as an employee "on furlough or leave of absence," 50 U. S. C. App. § 459 (c)(1), but petitioner's suggestion would grant pro rata vacation rights to veterans regardless of whether any other class of employees would be similarly treated.

Although we reject petitioner's statutory theory, the potential availability of pro rata vacation rights enters the case in a somewhat different way. The collective-bargaining agreement provides pro rata vacation rights to those employees who were unable to accumulate the minimum of 25 weeks of employment because of layoffs. Art. XIV, § 2. In light of this provision, the Court of Appeals noted that petitioner might have a claim for pro rata benefits under the agreement. It therefore remanded the case to the District Court to determine whether petitioner had adequately preserved that point before the District Court and, if so, whether he was entitled to some vacation benefits.[10]

We agree with the Court of Appeals that because it was not litigated at the trial level, this question should be remanded to the District Court for further proceedings. Accordingly, we affirm the judgment of the Court of Appeals.

Affirmed.

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

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[10] Even if petitioner is not eligible for vacation benefits as a purely contractual matter, he may be entitled to pro rata benefits under the "other benefits" provision of § 9 (c)(1) of the Act, read in conjunction with the collective-bargaining agreement. Since the statute requires that vacation benefits be granted to returning veterans on the same basis as they are to those on furlough or leave of absence, petitioner would be entitled to pro rata benefits if the layoff referred to in the collective-bargaining agreement includes a furlough or leave of absence, or is found to be the equivalent of either.

Syllabus

GERSTEIN *v.* PUGH ET AL.

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

No. 73–477. Argued March 25, 1974—Reargued October 21, 1974—Decided February 18, 1975

1. The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Accordingly, the Florida procedures challenged here whereby a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination are unconstitutional. Pp. 111–119.

   (a) The prosecutor's assessment of probable cause, standing alone, does not meet the requirements of the Fourth Amendment and is insufficient to justify restraint of liberty pending trial. Pp. 116–118.

   (b) The Constitution does not require, however, judicial oversight of the decision to prosecute by information, and a conviction will not be vacated on the ground that the defendant was detained pending trial without a probable cause determination. Pp. 118–119.

2. The probable cause determination, as an initial step in the criminal justice process, may be made by a judicial officer without an adversary hearing. Pp. 119–125.

   (a) The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings, and this issue can be determined reliably by the use of informal procedures. Pp. 120–122.

   (b) Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. Pp. 122–123.

483 F. 2d 778, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in Parts I and II of which all other Members joined, and in Parts III and IV of which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 126.

Leonard R. Mellon reargued the cause for petitioner. With him on the brief was *N. Joseph Durant, Jr.*

Bruce S. Rogow reargued the cause for respondents. With him on the briefs was *Phillip A. Hubbart.*

Paul L. Friedman reargued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Deputy Solicitor General Frey. Raymond L. Marky,* Assistant Attorney General, reargued the cause for the State of Florida as *amicus curiae* urging reversal. With him on the brief were *Robert L. Shevin,* Attorney General, and *George R. Georgieff,* Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed by *Arthur K. Bolton,* Attorney General, *Robert S. Stubbs II,* Executive Assistant Attorney General, *Richard L. Chambers,* Assistant Attorney General, and *John W. Dunsmore, Jr.,* Deputy Assistant Attorney General, for the State of Georgia; by *William J. Guste, Jr.,* Attorney General, and *Walter L. Smith, Jr.,* Assistant Attorney General, for the State of Louisiana; by *Robert H. Quinn,* Attorney General, *John J. Irwin, Jr., David A. Mills,* and *Barbara A. H. Smith,* Assistant Attorneys General, and *Michael C. Donahue,* Deputy Assistant Attorney General, for the Commonwealth of Massachusetts; by *John L. Hill,* Attorney General, *Larry F. York,* First Assistant Attorney General, *Joe B. Dibrell* and *Max P. Flusche, Jr.,* Assistant Attorneys General, and *Larry Gist* for the State of Texas; by *Vernon B. Romney,* Attorney General, and *M. Reid Russell,* Chief Assistant Attorney General, for the State of Utah; and by *Slade Gorton,* Attorney General, *Malachy R. Murphy,* Deputy Attorney General, and *Kevin M. Ryan,* Assistant Attorney General, for the State of Washington.

Briefs of *amici curiae* urging affirmance were filed by *Daniel S. Pearson* and *Louis M. Jepeway, Jr.,* for the Dade County Bar Assn., and by *Malvine Nathanson* for the National Legal Aid and Defender Assn.

Briefs of *amici curiae* were filed by *Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *Doris H. Maier,* Assistant Attorney General, and *Joseph P. Busch* for the Appellate Committee of the California District Attorneys Assn. et al.;

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Fla. Each was charged with several offenses under a prosecutor's information.[1] Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a $4,500 bond.

In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla. Rule Crim. Proc. 3.140 (a); *State* v. *Hernandez,* 217 So. 2d 109 (Fla. 1968); *Di Bona* v. *State,* 121 So. 2d 192 (Fla. App. 1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla. Rule Crim. Proc. 1.122 (before amendment in 1972).

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by *William F. Hyland,* Attorney General, and *Howard E. Drucks,* Deputy Attorney General, for the State of New Jersey; and by *Kimberly B. Cheney,* Attorney General, and *Alan W. Cook,* Assistant Attorney General, for the State of Vermont.

[1] Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.

But the Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy* v. *Blount,* 261 So. 2d 172 (Fla. 1972).[2] They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan* v. *State ex rel. McCrory,* 49 So. 2d 794, 797 (Fla. 1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla. Stat. Ann. § 907.045 (1973),[3] and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh* v. *Rainwater,* 332 F. Supp. 1107, 1110 (SD Fla. 1971).[4] As a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District

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[2] Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree* v. *Hamlin,* 235 So. 2d 729 (Fla. 1970); Fla. Rule Crim. Proc. 3.131 (a); but that procedure is not challenged in this case. See *infra,* at 117 n. 19.

[3] This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans* v. *State,* 197 So. 2d 323 (Fla. App. 1967); Fla. Op. Atty. Gen. 067–29 (1967). But cf. *Karz* v. *Overton,* 249 So. 2d 763 (Fla. App. 1971). It may also have been superseded by the subsequent amendments to the Rules of Criminal Procedure. *In re Florida Rules of Criminal Procedure,* 272 So. 2d 65 (1972).

[4] The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla. Rule Crim. Proc. 3.160, but counsel for petitioner represented at oral argument that arraignment affords the suspect an opportunity to "attack the sufficiency of the evidence to hold him." Tr. of Oral Arg. 17 (Mar. 25, 1974). The Court of Appeals assumed, without deciding, that this was true. 483 F. 2d 778, 781 n. 8 (CA5 1973).

Court,[5] claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief.[6] Respondents Turner and Faulk, also in custody under informations, subsequently intervened.[7] Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants.[8]

After an initial delay while the Florida Legislature considered a bill that would have afforded preliminary hearings to persons charged by information, the District Court granted the relief sought. *Pugh* v. *Rainwater, supra.* The court certified the case as a class action under Fed. Rule Civ. Proc. 23 (b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable

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[5] The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3).

[6] Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp. 1107, 1115–1116, (SD Fla. 1971). Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser* v. *Rodriguez,* 411 U. S. 475 (1973); see *Wolff* v. *McDonnell,* 418 U. S. 539, 554–555 (1974).

[7] Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

[8] The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.

cause for further detention.[9] It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

The defendants submitted a plan prepared by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F. Supp. 490 (SD Fla. 1972). Upon arrest the accused would be taken before a magistrate for a "first appearance hearing." The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a "preliminary hearing," to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearing at prescribed times. At the "preliminary hearing" the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

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[9] The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger* v. *Harris,* 401 U. S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. See *Conover* v. *Montemuro,* 477 F. 2d 1073, 1082 (CA3 1972); cf. *Perez* v. *Ledesma,* 401 U. S. 82 (1971); *Stefanelli* v. *Minard,* 342 U. S. 117 (1951).

The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla. Rule Crim. Proc. 3.130 (b). This "first appearance" is similar to the "first appearance hearing" ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131 (b), Florida Rules of Criminal Procedure,* 289 So. 2d 3 (Fla. 1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained pending trial without a judicial determination of probable cause. 355 F. Supp. 1286 (SD Fla. 1973). Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional.[10] The Court of Appeals

[10] Although this ruling held a statewide "legislative rule" unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U. S. C. § 2281. The original complaint did not ask for

affirmed, 483 F. 2d 778 (1973), modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788–789.

State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue.[11]

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an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state "statute" was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F. 2d, at 788–790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 152–155 (1963); *Flemming* v. *Nestor*, 363 U. S. 603, 606–608 (1960).

[11] At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna* v. *Iowa*, 419 U. S. 393 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

At the time the complaint was filed, the named respondents were

414 U. S. 1062 (1973). We affirm in part and reverse in part.

II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp* v. *Murphy*, 412 U. S. 291, 294–295 (1973); *Ex parte Bollman*, 4 Cranch 75 (1807); *Ex parte Burford*, 3 Cranch 448 (1806). The standard for arrest is probable cause, defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."

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members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna*. But this case is a suitable exception to that requirement. See *Sosna, supra*, at 402 n. 11; cf. *Rivera* v. *Freeman*, 469 F. 2d 1159, 1162–1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

Beck v. *Ohio*, 379 U. S. 89, 91 (1964). See also *Henry* v. *United States*, 361 U. S. 98 (1959); *Brinegar* v. *United States*, 338 U. S. 160, 175–176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.*, at 176.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its pro-

> tection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

See also *Terry* v. *Ohio,* 392 U. S. 1, 20–22 (1968).[12]

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck* v. *Ohio, supra,* at 96; *Wong Sun* v. *United States,* 371 U. S. 471, 479–482 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker* v. *California,* 374 U. S. 23 (1963); *Draper* v. *United States,* 358 U. S. 307 (1959); *Trupiano* v. *United States,* 334 U. S. 699, 705 (1948).[13]

Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justifi-

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[12] We reiterated this principle in *United States* v. *United States District Court,* 407 U. S. 297 (1972). In terms that apply equally to arrests, we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *Id.,* at 316.

[13] Another aspect of *Trupiano* was overruled in *United States* v. *Rabinowitz,* 339 U. S. 56 (1950), which was overruled in turn by *Chimel* v. *California,* 395 U. S. 752 (1969).

The issue of warrantless arrest that has generated the most controversy, and that remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge* v. *New Hampshire,* 403 U. S. 443, 474–481 (1971); *id.,* at 510–512, and n. 1 (WHITE, J., dissenting); *Jones* v. *United States,* 357 U. S. 493, 499–500 (1958).

cation for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, Ransom 32–91 (1965); L. Katz, Justice Is the Crime 51–62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. See, *e. g.*, 18 U. S. C. §§ 3146 (a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll* v. *United States*, 267 U. S. 132, 149 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, Pleas of the Crown 77, 81, 95, 121 (1736); 2 W. Hawkins, Pleas of the Crown 116–117 (4th ed. 1762). See also *Kurtz* v. *Moffitt*, 115 U. S. 487, 498–499 (1885).[14] The justice of the peace

[14] The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact

would "examine" the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra,* at 583–586; 2 W. Hawkins, *supra,* at 116–119; 1 J. Stephen, History of the Criminal Law of England 233 (1883).[15] The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra,* at 112–115; 1 J. Stephen, *supra,* at 243; see *Ex parte Bollman,* 4 Cranch, at 97–101. This practice furnished the model for criminal procedure in America immediately following the adoption of the

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committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a *mittimus,* was required for more than brief detention.

"When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

"1. He may carry him to the common gaol, . . . but that is now rarely done.

"2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace to be examined, and farther proceeded against as case shall require. . . .

"3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

"And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining." 1 M. Hale, Pleas of the Crown 589–590 (1736).

[15] The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although this method of proceeding was considered quite harsh, 1 J. Stephen, *supra,* at 219–225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.,* at 233.

Fourth Amendment, see *Ex parte Bollman, supra;*[16] *Ex parte Burford,* 3 Cranch 448 (1806); *United States* v. *Hamilton,* 3 Dall. 17 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a "reasonable" seizure. See *Draper* v. *United States,* 358 U. S., at 317–320 (DOUGLAS, J., dissenting).[17]

B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination.[18] Petitioner defends this practice on the

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[16] In *Ex parte Bollman,* two men charged in the Aaron Burr case were committed following an examination in the Circuit Court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Mr. Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

[17] See also N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 15–16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a "reasonable" search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra,* at 149–152; T. Taylor, Two Studies in Constitutional Interpretation 24–25, 39–40 (1969); see *Boyd* v. *United States,* 116 U. S. 616, 626–629 (1886).

[18] A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla. Rule Crim.

ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht* v. *United States,* 273 U. S. 1, 5 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.[19] More recently, in *Coolidge* v. *New Hampshire,* 403 U. S. 443, 449–453 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in *Shad-*

Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

[19] By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury," conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States,* 287 U. S. 241, 250 (1932). See also *Giordenello* v. *United States,* 357 U. S. 480, 487 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States* v. *Calandra,* 414 U. S. 338, 342–346 (1974).

wick v. *City of Tampa,* 407 U. S. 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States* v. *United States District Court,* 407 U. S. 297, 317 (1972).[20] The reason for this separation of functions was expressed by Mr. Justice Frankfurter in a similar context:

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." *McNabb* v. *United States,* 318 U. S. 332, 343 (1943).

In holding that the prosecutor's assessment of probable

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[20] The Court had earlier reached a different result in *Ocampo* v. *United States,* 234 U. S. 91 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, § 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green* v. *United States,* 355 U. S. 184, 194–198 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht, Coolidge,* and *Shadwick.*

cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck* v. *Washington,* 369 U. S. 541, 545 (1962); *Lem Woon* v. *Oregon,* 229 U. S. 586 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie* v. *Collins,* 342 U. S. 519 (1952); *Ker* v. *Illinois,* 119 U. S. 436 (1886). Thus, as the Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F. 2d, at 786–787. Compare *Scarbrough* v. *Dutton,* 393 F. 2d 6 (CA5 1968), with *Brown* v. *Fauntleroy,* 143 U. S. App. D. C. 116, 442 F. 2d 838 (1971), and *Cooley* v. *Stone,* 134 U. S. App. D. C. 317, 414 F. 2d 1213 (1969).

III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman* v. *Alabama,* 399 U. S. 1 (1970); Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 957–967, 996–1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as "probable cause," but in some jurisdictions it may approach a prima facie case of guilt.

ALI, Model Code of Pre-arraignment Procedure, Commentary on Art. 330, pp. 90–91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman* v. *Alabama, supra.* And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See ALI, Model Code of Pre-arraignment Procedure, *supra,* at 33–34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest.[21] That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition,

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[21] Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

"Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory* v. *United States,* 354 U. S. 449, 456 (1957).

> to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.
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> . . . . .
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> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Brinegar* v. *United States,* 338 U. S., at 174–175.

Cf. *McCray* v. *Illinois,* 386 U. S. 300 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 64–109 (1969).[22] This is not to say that confrontation and

[22] In *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), and *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U. S., at 487; 411 U. S., at 786. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U. S., at 485; 411 U. S., at 782–783, n. 5. Moreover, revocation

cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.[23]

Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman* v. *Alabama,* 399 U. S. 1 (1970); *United States* v. *Wade,* 388 U. S. 218, 226–227 (1967). In *Coleman* v. *Alabama,* where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First,

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proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility DR 7–103 (A) (Final Draft 1969) (a prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); American Bar Association Project on Standards for Criminal Justice, The Prosecution Function §§ 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, Code of Trial Conduct, Rule 4 (c) (1963).

[23] Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.

under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer,[24]

[24] Several States already authorize a determination of probable cause at this stage or immediately thereafter. See, *e. g.,* Hawaii Rev. Stat. §§ 708–9 (5), 710–7 (1968); Vt. Rules Crim. Proc. 3 (b), 5 (c). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. *Jaben* v. *United States,* 381 U. S. 214, 218 (1965); *Mallory* v. *United States,* 354 U. S., at 454.

see *McNabb* v. *United States*, 318 U. S., at 342–344, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention.[25] Whatever

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[25] Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, "without unnecessary delay," to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The ALI Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. § 310.1. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an "adjourned session" of the first appearance to be held within two "court days." At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

"The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks

procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty,[26] and this determination must be made by a judicial officer either before or promptly after arrest.[27]

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subpoenas might lead to a finding that there is no reasonable cause." § 310.2 (2) (Tent. Draft No. 5A, 1973).

[26] Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U. S. C. § 3146; American Bar Association Project on Standards for Criminal Justice, Pretrial Release § 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

[27] In his concurring opinion, MR. JUSTICE STEWART objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial. Part II–A, *supra*. Moreover, the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (*e. g.*, prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

It would not be practicable to follow the further suggestion implicit in MR. JUSTICE STEWART'S concurring opinion that we leave for

IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, AND MR. JUSTICE MARSHALL join, concurring.

I concur in Parts I and II of the Court's opinion, since the Constitution clearly requires at least a timely judicial determination of probable cause as a prerequisite to pretrial detention. Because Florida does not provide all defendants in custody pending trial with a fair and reliable determination of probable cause for their detention, the respondents and the members of the class they represent are entitled to declaratory and injunctive relief.

Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta. In particular, I would not, in the abstract, attempt to specify those procedural protections that constitutionally need *not* be accorded incarcerated suspects awaiting trial.

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another day determination of the procedural safeguards that are required in making a probable cause determination under the Fourth Amendment. The judgment under review both declares the right not to be detained without a probable cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.

Specifically, I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601; the custody of a refrigerator, *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600; the temporary suspension of a public school student, *Goss* v. *Lopez*, 419 U. S. 565; or the suspension of a driver's license, *Bell* v. *Burson*, 402 U. S. 535. Although it may be true that the Fourth Amendment's "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases," *ante*, at 125 n. 27, this case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person. Accordingly, I cannot join the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention.

It is the prerogative of each State in the first instance to develop pretrial procedures that provide defendants in pretrial custody with the fair and reliable determination of probable cause for detention required by the Constitution. Cf. *Morrissey* v. *Brewer*, 408 U. S. 471, 488. The constitutionality of any particular method for determining probable cause can be properly decided only by evaluating a State's pretrial procedures as a whole, not by isolating a particular part of its total system. As the Court recognizes, great diversity exists among the procedures employed by the States in this aspect of their criminal justice system. *Ante*, at 123–124.

There will be adequate opportunity to evaluate in an appropriate future case the constitutionality of any new procedures that may be adopted by Florida in response to the Court's judgment today holding that Florida's present procedures are constitutionally inadequate.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS ET AL. *v.* JACOBS ET AL.

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

No. 73–1347. Argued December 11, 1974—
Decided February 18, 1975

A purported class action by six named plaintiffs, who at the time were high school students, challenging the constitutionality of certain school rules and regulations, is moot, where all six have graduated from school and the District Court neither properly certified the class action under Fed. Rule Civ. Proc. 23 (c)(1) nor properly identified the class under Rule 23 (c)(3).

490 F. 2d 601, vacated and remanded.

Lila J. Young argued the cause for petitioners. With her on the briefs were *Harold H. Bredell* and *Lawrence McTurnan.*

Craig Eldon Pinkus argued the cause for respondents. With him on the brief was *Ronald E. Elberger.*

PER CURIAM.

This action was brought in the District Court by six named plaintiffs seeking to have declared unconstitutional certain regulations and rules promulgated by the petitioner Board and to have the enforcement of those regulations and rules enjoined, as well as seeking other relief no longer relevant to this case.* In the complaint, the named plaintiffs stated that the action was brought as a

*The named plaintiffs sought expunction from their respective records of certain information and compensatory and punitive damages against petitioners. These prayers for relief were denied by the District Court for failure of proof and no appeal was taken from this decision.

class action pursuant to Fed. Rules Civ. Proc. 23 (a) and (b)(2), and further stated that "[p]laintiff class members are all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." At the time this action was brought, plaintiffs were or had been involved in the publication and distribution of a student newspaper, and they alleged that certain actions taken by petitioner Board or its subordinates, as well as certain of its rules and regulations, interfered or threatened to interfere with the publication and distribution of the newspaper in violation of their First and Fourteenth Amendment rights. The plaintiffs (respondents here) prevailed on the merits of their action in the District Court, 349 F. Supp. 605 (SD Ind. 1972), and the Court of Appeals, one judge dissenting in part, affirmed, 490 F. 2d 601 (CA7 1973). Petitioners brought the case to this Court, and we granted certiorari, 417 U. S. 929 (1974). At oral argument, we were informed by counsel for petitioners that all of the named plaintiffs in the action had graduated from the Indianapolis school system; in these circumstances, it seems clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue. The case is therefore moot unless it was duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23, a controversy still exists between petitioners and the present members of the class, and the issue in controversy is such that it is capable of repetition yet evading review. *Sosna* v. *Iowa,* 419 U. S. 393 (1975). Because in our view there was inadequate compliance with the requirements of Rule 23 (c), we have concluded that the case has become moot.

The only formal entry made by the District Court below purporting to certify this case as a class action is con-

tained in that court's "Entry on Motion for Permanent Injunction," wherein the court "conclude[d] and ordered" that "the remaining named plaintiffs are qualified as proper representatives of the class whose interest they seek to protect." 349 F. Supp., at 611. No other effort was made to identify the class or to certify the class action as contemplated by Rule 23 (c)(1); nor does the quoted language comply with the requirement of Rule 23 (c)(3) that "[t]he judgment in an action maintained as a class action under subdivision . . . (b)(2) . . . shall include and describe those whom the court finds to be members of the class." The need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as to the initially named plaintiffs prior to the exhaustion of appellate review. Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

In *Sosna* v. *Iowa,* 419 U. S. 393 (1975), we found no mootness problem where a named plaintiff belatedly satisfied the durational residency requirement which she had initially sought to attack. Our holding to that effect was based upon three factors which we found present in that case: (1) a certification of the suit as a class action; (2) a continuing injury suffered by other members of the class; and (3) a time factor which made it highly probable that any single individual would find his claim inevitably mooted before the full course of litigation had been run.

Applying those principles to the present case, I would hold that an Art. III controversy exists and that the parties are therefore entitled to a ruling on the merits.

This suit was instituted as a class action on behalf of all high school students attending Indianapolis public schools. The record does not contain any written order formally certifying the class, but the absence of such a written order is too slender a reed to support a holding of mootness, particularly in the face of the incontrovertible evidence that certification was intended and did, in fact, take place. At the close of the second day of the proceedings on plaintiffs' application for a temporary restraining order, the District Judge stated: "I will make a finding that this is an appropriate action, or a class action is appropriate insofar as this controversy is concerned." [1] Later, in his written opinion, he stated that the two named plaintiffs who had not graduated by the time of these proceedings were "qualified as proper representatives of the class whose interest they seek to protect." [2] 349 F. Supp. 605,

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[1] Tr., Aug. 25, 1972, p. 368. This statement was made immediately after a discussion of whether the four plaintiffs who had previously graduated could be "proper representatives of a class," *ibid.;* while tentatively holding that they could not, the District Judge permitted the action to continue in the names of the two plaintiffs who had not yet graduated. *Ibid.;* 349 F. Supp. 605, 611.

[2] Respondents' complaint alleged that the plaintiff class members were "all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." While there had been a suggestion in the trial court that the class might be broadened to include all Indianapolis public school students, it was conceded in the Court of Appeals that the case was concerned only with the application of petitioners' rules in high schools. 490 F. 2d 601, 610. This concession is consistent with the scope of the class as defined in the complaint, and with the District Court's obvious intent in finding the named plaintiffs to be "proper representatives of the class *whose interest they seek to protect*" (emphasis added). I see no serious problem, therefore, in

611. At oral argument, moreover, counsel for the Board of School Commissioners stated, in response to a question from us, that there had been a declaration of certification of class action.[3] The findings of the lower court, coupled with the representations of counsel for the petitioners, provide, in my view, a more than ample basis for holding that the first *Sosna* criterion has been met.[4]

The Court today, however, purports to find this case distinguishable from *Sosna* in terms of the adequacy of compliance below with the requirements of Fed. Rule Civ. Proc. 23 (c). A review of the record in *Sosna* discloses that the judgment entered by the District Court in that case does not in any way "include and describe those whom the court finds to be members of the class," as required by Rule 23 (c)(3); nor is there anything in the record identifiable as a separate certification of the class in the sense which the Court finds to be contemplated by Rule 23 (c)(1). The District Court in *Sosna,* in its pretrial order, adopted a stipulation of the parties to the effect that the prerequisites for a class action were met, and that there were numerous persons barred by Iowa's residency requirement from having their marriages dissolved; and in its final opinion, the District Court incorporated a bare reference to the fact that the suit was being treated as a class action. *Sosna* v. *Iowa,* 360 F. Supp. 1182, 1183 n. 5 (ND Iowa 1973). If these two factors alone were sufficient to establish proper certification of the class in *Sosna,* then I am at a loss to see why

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defining the proper and intended scope of the class as approved by the trial court.

[3] Tr. of Oral Arg. 11.

[4] The Court of Appeals adverted at one point in its opinion to the issue of whether "plaintiffs or class members" would be bound by the judgment, 490 F. 2d, at 603, a reference which might be taken to suggest that that court as well harbored no doubts as to whether the suit was in fact proceeding as a class action.

the factors catalogued earlier are not sufficient to establish proper certification in the instant case.

It is undoubtedly true that many federal district judges have been careless in their dealings with class actions, and have failed to comply carefully with the technical requirements of Rule 23. If we are to embark upon a program of scrupulous enforcement of compliance with those requirements, so be it; the end result may well be to avoid troublesome mootness problems of the sort which arose both here and in *Sosna*. Elementary principles of fairness to litigants suggest, however, that we should be reluctant to throw these respondents entirely out of court for their failure to induce the District Court to comply with technical requirements, when those requirements clearly were not being strictly enforced during the pendency of this litigation in the lower courts. And in particular, these principles of fairness suggest that the Court ought to provide a more reasoned explanation than it has given today for the difference in treatment which it has accorded to the appellants in *Sosna* and to the respondents herein.

With respect to the second *Sosna* criterion, it is clear that the Board intends to enforce the regulations struck down by the courts below unless it is flatly barred from doing so. A continuing dispute therefore exists between the Board and the members of the class, unless it can be said with some assurance that there are no class members who desire either to resurrect the "Corn Cob Curtain" or to distribute some comparable "underground" publication. The mere statement by counsel for the Board that the Corn Cob Curtain "is no longer in existence" [5] can hardly be deemed to provide that assurance; to the contrary, the Board's very insistence on the need for enforceable regulations reinforces the likelihood that the desire for

[5] Tr. of Oral Arg. 4, 5.

unfettered expression will continue to breed clashes between Indianapolis high school students and the Board's proposed regulations. The inference of a continuing controversy is, in my view, just as strong as that which we found sufficient in *Sosna.*

The Court's readiness to find this controversy moot is particularly distressing in light of the issues at stake. True, there is no absolute time factor (such as that in *Sosna*) which will inevitably moot any future litigation over these regulations before it reaches a conclusion; it is conceivable that another plaintiff in a subsequent suit will be able to avoid the trap of mootness which the Court has sprung upon these unwitting parties. In remitting the underlying issues of this case to the course of some future, more expeditious lawsuit, however, we permit the Board to continue its enforcement, for an indefinite period of time, of regulations which have been held facially unconstitutional by both of the courts below. In allowing the Board to reimpose its system of prior restraints on student publications, we raise a very serious prospect of the precise sort of chilling effect which has long been a central concern in our First Amendment decisions. *New York Times Co.* v. *United States,* 403 U. S. 713 (1971); *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415 (1971); *Blount* v. *Rizzi,* 400 U. S. 410 (1971); *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931). Any student who desires to express his views in a manner which may be offensive to school authorities is now put on notice that he faces not only a threat of immediate suppression of his ideas, but also the prospect of a long and arduous court battle if he is to vindicate his rights of free expression. Not the least inhibiting of all these factors will be the knowledge that all his efforts may come

to naught as his claims are mooted by circumstances beyond his control.

In view of these likely consequences of today's decision, I am unable to join in the Court's rush to avoid resolving this case on the merits.

TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CAMPAIGN CLEAN WATER, INC.

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

No. 73–1378. Argued November 12, 1974—
Decided February 18, 1975

In respondent's action to compel petitioner Administrator of the Environmental Protection Agency to allot among the States the full sums authorized to be appropriated for fiscal years 1973 and 1974 by § 207 of the Federal Water Pollution Control Act Amendments of 1972 for municipal waste treatment plants, the District Court held that the Administrator had abused his discretion by allotting only 45% of the authorized sums. The Court of Appeals, on the premise that there was discretion to control or delay allotments, concluded that further proceedings were essential to determine whether that discretion had been abused. *Held:* Since the holding in *Train* v. *City of New York, ante,* p. 35, that the Administrator has no authority to allot less than the full amounts authorized to be appropriated under § 207, is at odds with the Court of Appeals' premise, that court's judgment is vacated and the case is remanded for further proceedings consistent with *Train* v. *City of New York.*

489 F. 2d 492, vacated and remanded.

Solicitor General Bork argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Hills, Deputy Solicitor General Friedman, Edmund W. Kitch, William L. Patton, Robert E. Kopp, Eloise E. Davies,* and *David M. Cohen.*

W. Thomas Jacks argued the cause for respondent. With him on the brief was *Alan B. Morrison.**

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*Briefs of *amici curiae* were filed by *Evelle J. Younger,* Attorney General, *pro se, Robert H. O'Brien,* Senior Assistant Attorney General, and *Nicholas C. Yost,* Deputy Attorney General, for the Attorney General of California; by *Frank J. Kelley,* Attorney Gen-

PER CURIAM.

On January 15, 1973, respondent filed a complaint in the District Court seeking to compel the petitioner, as Administrator of the Environmental Protection Agency, to allot among the States the full sums authorized to be appropriated for fiscal years 1973 and 1974 by § 207 of the Federal Water Pollution Control Act, as added by the Amendments of 1972, 86 Stat. 839, 33 U. S. C. § 1287 (1970 ed., Supp. II), for federal grants to municipalities for construction of publicly owned waste treatment works. Although conceding in the trial court that the Administrator had a measure of discretion in making the allot-

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eral, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman* and *Charles Alpert,* Assistant Attorneys General, for the State of Michigan; by *Warren Spannaus,* Attorney General, *Byron E. Starns,* Deputy Attorney General, *Peter W. Sipkins,* Solicitor General, and *Eldon G. Kaul,* Special Assistant Attorney General, for the State of Minnesota; by *William J. Brown,* Attorney General, and *Richard P. Fahey,* and *David E. Northrop,* Assistant Attorneys General, for the State of Ohio; by *John L. Hill,* Attorney General, *Larry F. York,* First Assistant Attorney General, and *Philip K. Maxwell,* Assistant Attorney General of Texas, *Robert W. Warren,* Attorney General, and *Theodore L. Priebe,* Assistant Attorney General of Wisconsin, *John C. Danforth,* Attorney General, and *Robert M. Lindholm,* Assistant Attorney General of Missouri, *Larry Derryberry,* Attorney General, and *Paul C. Duncan,* Assistant Attorney General of Oklahoma, and *Vern Miller,* Attorney General, and *Curt T. Schneider,* Assistant Attorney General of Kansas, for the States of Texas, Wisconsin, Missouri, Oklahoma, and Kansas; by *Andrew P. Miller,* Attorney General, *Gerald L. Baliles,* Deputy Attorney General, and *James E. Ryan, Jr.,* Assistant Attorney General, for the Commonwealth of Virginia; by *Slade Gorton,* Attorney General, *Charles B. Roe, Jr.,* Senior Assistant Attorney General, and *Martin J. Durkan* and *James B. McCabe,* Special Assistant Attorneys General of Washington, and *Israel Packel,* Attorney General, and *James R. Adams,* Deputy Attorney General of Pennsylvania, for the State of Washington and the Commonwealth of Pennsylvania; and by *Fletcher N. Baldwin, Jr.,* for the Center for Governmental Responsibility.

ments authorized by § 205 of the Act, 86 Stat. 837, 33 U. S. C. § 1285 (1970 ed., Supp. III), respondent asserted that the Administrator had abused his discretion by allotting only 45% of the sums authorized to be appropriated by § 207. In sustaining respondent's position, the District Court rejected the holding by the United States District Court for the District of Columbia in *City of New York* v. *Ruckelshaus,* 358 F. Supp. 669 (1973), that the Administrator has no discretion to allot less than the full amounts authorized by the Act. The Court of Appeals proceeded on the premise that there was discretion to control or delay allotments but concluded that further proceedings were essential to determine whether the Administrator's discretion had been abused. The Administrator petitioned for certiorari, asserting that the exercise of his discretion to allot funds under § 205 is not subject to judicial review.* We granted certiorari, 416 U. S. 969 (1974), and heard the case with *Train* v. *City of New York, ante,* p. 35.

We held in *Train* v. *City of New York* that the Administrator has no authority under § 205 to allot less than the full amounts sought to be appropriated under § 207. Because that holding is at odds with the premise underlying the judgment of the Court of Appeals, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion and with the opinion in *Train* v. *City of New York.*

So ordered.

MR. JUSTICE DOUGLAS concurs in the result.

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*The petition also asserted that the doctrine of sovereign immunity foreclosed ordering the Administrator to allot funds that he had withheld in the course of exercising his discretion under the Act. In light of *Train* v. *City of New York, ante,* p. 35, and our disposition of the instant case, we need not address this question.

Per Curiam

LEE ET AL. *v.* THORNTON, DISTRICT DIRECTOR, UNITED STATES CUSTOMS SERVICE, ET AL.

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

No. 73–7006. Decided February 18, 1975

The district courts' jurisdiction under Tucker Act over "any civil action or claim against the United States . . . founded either upon the Constitution or any Act of Congress," did not give District Court here jurisdiction over appellants' claims to enjoin enforcement of certain challenged provisions of the customs laws, since the Tucker Act empowers a district court only to award damages. Therefore, a three-judge court was improperly convened, and this Court has no jurisdiction over the appeal based on the District Court's refusal to grant injunctive relief founded on certain constitutional claims.

370 F. Supp. 312, vacated and remanded.

PER CURIAM.

Appellants brought actions in the District Court for the District of Vermont that challenged the constitutionality, facially and as applied, of various provisions of the customs laws, 46 Stat. 717 and 757, as amended, 19 U. S. C. §§ 1460 and 1618, that mandate procedures to effect forfeiture and remission or mitigation of penalties imposed after Border Patrol agents apprehended them and seized their vehicles when they crossed the border from Canada without passing through a customs station. The complaints sought (1) declaratory judgments that the challenged provisions were unconstitutional, (2) injunctions against their enforcement, (3) mandamus relief requiring the return of moneys paid as mitigated forfeitures or penalties based on violations of the customs laws, and (4) damages. A three-judge court was convened. The court held that it had jurisdic-

tion under the Tucker Act, 28 U. S. C. § 1346 (a)(2), rejected appellants' constitutional claims, enjoined appellees from applying the customs laws except as construed by the court, declined to remit appellants' fines, and returned to the single-judge District Court the question of damages.

The District Court held that it had jurisdiction of the complaints under the Tucker Act, and did not address other alternative bases of jurisdiction asserted in the complaints. The jurisdiction of the district courts under the Tucker Act over "[a]ny . . . civil action or claim against the United States . . . founded either upon the Constitution, or any Act of Congress . . ." does not include jurisdiction over appellants' claims to enjoin enforcement of the challenged provisions of the customs laws. The Tucker Act empowers district courts to award damages but not to grant injunctive or declaratory relief. *Richardson* v. *Morris,* 409 U. S. 464 (1973); *United States* v. *King,* 395 U. S. 1 (1969); *United States* v. *Sherwood,* 312 U. S. 584, 589–591 (1941). It follows that the three-judge court was improperly convened, and this Court therefore has no jurisdiction to entertain the appeal based on the District Court's refusal to grant injunctive relief founded on appellants' additional constitutional claims. Appellants' motion for leave to proceed *in forma pauperis* is granted, the judgment of the District Court is vacated, and the case is remanded for consideration of appellants' other asserted bases of jurisdiction.

So ordered.

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

Syllabus

UNITED STATES ET AL. *v.* BISCEGLIA

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

No. 73–1245. Argued November 11–12, 1974—
Decided February 19, 1975

The Internal Revenue Service (IRS) *held* to have authority under §§ 7601 and 7602 of the Internal Revenue Code of 1954 to issue a "John Doe" summons to a bank or other depository to discover the identity of a person who has had bank transactions suggesting the possibility of liability for unpaid taxes, in this instance a summons to respondent bank officer during an investigation to identify the person or persons who deposited 400 deteriorated $100 bills with the bank within the space of a few weeks. Pp. 148–151.

(a) That the summons was styled in a fictitious name is not a sufficient ground for denying enforcement. Pp. 148–149.

(b) The language of § 7601 permitting the IRS to investigate and inquire after "*all* persons . . . who *may* be liable to pay *any* internal revenue tax . . ." and of § 7602 authorizing the summoning of "*any* person" for the taking of testimony and examination of books and witnesses that may be relevant for "ascertaining the correctness of *any* return, . . . determining the liability of *any* person . . . or collecting *any* such liability . . . ," is inconsistent with an interpretation that would limit the issuance of summonses to investigations which have already focused upon a particular return, a particular named person, or a particular potential tax liability, and moreover such a reading of the summons power of the IRS ignores the agency's legitimate interest in large or unusual financial transactions, especially those involving cash. Pp. 149–150.

486 F. 2d 706, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which POWELL, J., joined, *post,* p. 151. STEWART, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 152.

Stuart A. Smith argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assist-*

ant Attorney General Crampton, and *Deputy Solicitor General Wallace.*

William A. Watson argued the cause and filed a brief for respondent.*

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

We granted certiorari to resolve the question whether the Internal Revenue Service has statutory authority to issue a "John Doe" summons to a bank or other depository to discover the identity of a person who has had bank transactions suggesting the possibility of liability for unpaid taxes.

I

On November 6 and 16, 1970, the Commercial Bank of Middlesboro, Ky., made two separate deposits with the Cincinnati Branch of the Federal Reserve Bank of Cleveland, each of which included $20,000 in $100 bills. The evidence is undisputed that the $100 bills were "paper thin" and showed signs of severe disintegration which could have been caused by a long period of storage under abnormal conditions. As a result the bills were no longer suitable for circulation and they were destroyed by the Federal Reserve in accord with established procedures. Also in accord with regular Federal Reserve procedures, the Cincinnati Branch reported these facts to the Internal Revenue Service.

It is not disputed that a deposit of such a large amount of high denomination currency was out of the ordinary for the Commercial Bank of Middlesboro; for example, in the 11 months preceding the two $20,000 deposits in $100 bills, the Federal Reserve had received only 218 $100 bills from that bank. This fact, together with the

*The American Bankers Assn. filed a brief as *amicus curiae* urging affirmance.

uniformly unusual state of deterioration of the $40,000 in $100 bills, caused the Internal Revenue Service to suspect that the transactions relating to those deposits may not have been reported for tax purposes. An agent was therefore assigned to investigate the matter.

After interviewing some of the bank's employees, none of whom could provide him with information regarding the two $20,000 deposits, the agent issued a "John Doe" summons directed to respondent, an executive vice president of the Commercial Bank of Middlesboro. The summons called for production of "[t]hose books and records which will provide information as to the person(s) or firm(s) which deposited, redeemed or otherwise gave to the Commercial Bank $100 bills U. S. Currency which the Commercial Bank sent in two shipments of (200) two hundred each $100 bills to the Cincinnati Branch of the Federal Reserve Bank on or about November 6, 1970 and November 16, 1970." This, of course, was simply the initial step in an investigation which might lead to nothing or might have revealed that there had been a failure to report money on which federal estate, gift, or income taxes were due.[1] Respondent, however, refused to comply with the summons even though he has not seriously argued that compliance would be unduly burdensome.

In due course, proceedings were commenced in the United States District Court for the Eastern District of

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[1] The Internal Revenue Service agent testified:

"Q. What possible tax effect could this have on the taxpayer if he is determined?

"A. Well, it could be anything from nothing at all, a simple explanation, or it could be that this is money that has been secreted away for a period of time as a means of avoiding the tax.

. . . . . .

"Q. Then you really have not reached first base yet, is that correct?

"A. That's correct."

Kentucky to enforce the summons. That court narrowed its scope to require production only of deposit slips showing cash deposits in the amount of $20,000 and deposit slips showing cash deposits of $5,000 or more which involved $100 bills, and restricted it to the period between October 16, 1970, and November 16, 1970. Respondent was ordered to comply with the summons as modified.

The Court of Appeals reversed, holding that § 7602 of the Internal Revenue Code of 1954, 26 U. S. C. § 7602, pursuant to which the summons had been issued, "presupposes that the [Internal Revenue Service] has already identified the person in whom it is interested as a taxpayer before proceeding." 486 F. 2d 706, 710. We disagree, and reverse the judgment of the Court of Appeals.

II

The statutory framework for this case consists of §§ 7601 and 7602 of the Internal Revenue Code of 1954, which provide:

> "Section 7601. Canvass of districts for taxable persons and objects.
>
> "(a) General rule.
>
> "The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.
>
> "Section 7602. Examination of books and witnesses.
>
> "For the purpose of ascertaining the correctness of any return, making a return where none has been

made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

We begin examination of these sections against the familiar background that our tax structure is based on a system of self-reporting. There is legal compulsion, to be sure, but basically the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability. Nonetheless, it would be naive to ignore the reality that some persons attempt to outwit the system, and tax evaders are not readily identifiable. Thus, § 7601 gives the Internal Revenue Service a broad mandate to investigate and audit "persons who *may be* liable" for taxes and § 7602 provides the power to "examine any books, papers, records, or other data which may be relevant . . . [and to summon] any person having posses-

sion . . . of books of account . . . relevant or material to such inquiry." Of necessity, the investigative authority so provided is not limited to situations in which there is probable cause, in the traditional sense, to believe that a violation of the tax laws exists. *United States* v. *Powell,* 379 U. S. 48 (1964). The purpose of the statutes is not to accuse, but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business, and records.

We recognize that the authority vested in tax collectors may be abused, as all power is subject to abuse. However, the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system, which seeks to assure that taxpayers pay what Congress has mandated and to prevent dishonest persons from escaping taxation thus shifting heavier burdens to honest taxpayers. Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts. 26 U. S. C. § 7604 (b); *Reisman* v. *Caplin,* 375 U. S. 440 (1964). Once a summons is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose and is not meant "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States* v. *Powell, supra,* at 58. The cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons. See, *e. g., United States* v. *Matras,* 487 F. 2d 1271 (CA8 1973); *United States* v. *Theodore,* 479 F. 2d 749, 755 (CA4 1973); *United States* v. *Pritchard,* 438 F. 2d 969 (CA5 1971); *United States* v. *Dauphin Deposit Trust*

Co., 385 F. 2d 129 (CA3 1967). Indeed, the District Judge in this case viewed the demands of the summons as too broad and carefully narrowed them.

Finally, we note that the power to summon and inquire in cases such as the instant one is not unprecedented. For example, had respondent been brought before a grand jury under identical circumstances there can be little doubt that he would have been required to testify and produce records or be held in contempt. In *Blair* v. *United States*, 250 U. S. 273 (1919), petitioners were summoned to appear before a grand jury. They refused to testify on the ground that the investigation exceeded the authority of the court and grand jury, despite the fact that it was not directed at them. Their subsequent contempt convictions were affirmed by this Court:

> "[The witness] is not entitled to set limits to the investigation that the grand jury may conduct. . . . It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Id.*, at 282.

The holding of *Blair* is not insignificant for our resolution of this case. In *United States* v. *Powell, supra,* Mr. Justice Harlan reviewed this Court's cases dealing with the subpoena power of federal enforcement agencies, and observed:

> "[T]he Federal Trade Commission . . . 'has a power of inquisition, if one chooses to call it that,

which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' While the power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called in question." 379 U. S., at 57, quoting *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643 (1950).

III

Against this background, we turn to the question whether the summons issued to respondent, as modified by the District Court, was authorized by the Internal Revenue Code of 1954.[2] Of course, the mere fact that the summons was styled "In the matter of the tax liability of John Doe" is not sufficient ground for denying enforcement. The use of such fictitious names is common in indictments, see, *e. g.*, *Baker* v. *United States*, 115 F. 2d 533 (CA8 1940), cert. denied, 312 U. S. 692 (1941), and other types of compulsory process. Indeed, the Courts of Appeals have regularly enforced Internal Revenue Service summonses which did not name a specific taxpayer who was under investigation. *E. g.*, *United States* v. *Carter*, 489 F. 2d 413 (CA5 1973); *United States* v. *Turner*, 480 F. 2d 272, 279 (CA7 1973); *Tillotson* v.

[2] Respondent also argues that, even if the summons issued in this case was authorized by statute, it violates the Fourth Amendment. This contention was not passed upon by the Court of Appeals. In any event, as narrowed by the District Court the summons is at least as specific as the reporting requirements which were upheld against a Fourth Amendment challenge by banks in *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 63–70 (1974).

Boughner, 333 F. 2d 515 (CA7), cert. denied, 379 U. S. 913 (1964). Respondent undertakes to distinguish these cases on the ground that they involved situations in which either a taxpayer was identified or a tax liability was known to exist as to an unidentified taxpayer. However, while they serve to suggest the almost infinite variety of factual situations in which a "John Doe" summons may be necessary, it does not follow that these cases define the limits of the Internal Revenue Service's power to inquire concerning tax liability.

The first question is whether the words of the statute require the restrictive reading given them by the Court of Appeals. Section 7601 permits the Internal Revenue Service to investigate and inquire after "*all* persons . . . who *may be* liable to pay *any* internal revenue tax . . . ." To aid in this investigative function, § 7602 authorizes the summoning of "*any* . . . person" for the taking of testimony and examination of books which may be relevant for "ascertaining the correctness of *any* return, . . . determining the liability of *any* person . . . or collecting *any* such liability . . . ." Plainly, this language is inconsistent with an interpretation that would limit the issuance of summonses to investigations which have already focused upon a particular return, a particular named person, or a particular potential tax liability.

Moreover, such a reading of the Internal Revenue Service's summons power ignores the fact that it has a legitimate interest in large or unusual financial transactions, especially those involving cash. The reasons for that interest are too numerous and too obvious to catalog. Indeed, Congress has recently determined that information regarding transactions with foreign financial institutions and transactions which involve large amounts of money is so likely to be useful to persons responsible for enforcing the tax laws that it must be reported by banks.

See generally *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 26–40 (1974).

It would seem elementary that no meaningful investigation of such events could be conducted if the identity of the persons involved must first be ascertained, and that is not always an easy task. Fiduciaries and other agents are understandably reluctant to disclose information regarding their principals, as respondent was in this case. Moreover, if criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks. Thus, if the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases. Settled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress. See *NLRB* v. *Lion Oil Co.,* 352 U. S. 282, 288 (1957); *United States* v. *American Trucking Assns.,* 310 U. S. 534, 542–544 (1940). No such congressional purpose is discernible in this case.

We hold that the Internal Revenue Service was acting within its statutory authority in issuing a summons to respondent for the purpose of identifying the person or persons who deposited 400 decrepit $100 bills with the Commercial Bank of Middlesboro within the space of a few weeks. Further investigation may well reveal that such person or persons have a perfectly innocent explanation for the transactions. It is not unknown for taxpayers to hide large amounts of currency in odd places out of a fear of banks. But on this record the deposits were extraordinary, and no meaningful inquiry can be made until respondent complies with the summons as modified by the District Court.

We do not mean to suggest by this holding that respondent's fears that the § 7602 summons power could be used to conduct "fishing expeditions" into the private affairs

of bank depositors are trivial. However, as we have observed in a similar context:

> " 'That the power may be abused, is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts.' " *McGrain* v. *Daugherty,* 273 U. S. 135, 166 (1927), quoting *People ex rel. McDonald* v. *Keeler,* 99 N. Y. 463, 482 (1885).

So here, Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned. The District Court in this case conscientiously discharged its duty to see that a legitimate investigation was being conducted and that the summons was no broader than necessary to achieve its purpose.

The judgment of the Court of Appeals is reversed and the cause is remanded to it with directions to affirm the order of the District Court.

It is so ordered.

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

I join the Court's opinion and its judgment, and add this word only to emphasize the narrowness of the issue at stake here. We decide today that the Internal Revenue Service has statutory authority to issue a summons to a bank in order to ascertain the identity of a person whose transactions with that bank strongly suggest liability for unpaid taxes. Under the circumstances here, there was an overwhelming probability, if not a certitude, that one individual or entity was responsible for the deposits. The uniformly deteriorated condition of the currency and the amount, combined with other unusual

aspects, gave the Service good reason, and, indeed, the duty to investigate. The Service's suspicion as to possible liability was more than plausible.* The summons was closely scrutinized and appropriately narrowed in scope by the United States District Court.

The summons, in short, was issued pursuant to a genuine investigation. The Service was not engaged in researching some general problem; its mission was not exploratory. The distinction between an investigative and a more general exploratory purpose has been stressed appropriately by federal courts, see, *e. g., United States* v. *Humble Oil & Refining Co.,* 488 F. 2d 953, 958 (CA5 1974), pet. for cert. pending, No. 73–1827; *United States* v. *Armour,* 376 F. Supp. 318 (Conn. 1974), and that distinction is important to our decision here.

We need not decide in this case whether the Service has statutory authority to issue a "John Doe" summons where neither a particular taxpayer nor an ascertainable group of taxpayers is under investigation. At most, we hold that the Service is not always required to state a taxpayer's name in order to obtain enforcement of its summons, and that under the circumstances of this case it is definitely not required to do so. We do not decide that a "John Doe" summons is always enforceable where the name of an individual is lacking and the Service's pupose is other than investigative.

Upon this understanding, I join the Court's opinion.

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

The Court today says that it "recogniz[es] that the authority vested in tax collectors may be abused," *ante,*

*The Service may not have reached "first base," see *ante,* at 143 n. 1, but it had been at bat before, and it knew both the game and the ball park well.

at 146, but it is nonetheless unable to find any statutory limitation upon that authority. The only "protection" from abuse that Congress has provided, it says, is "placing the federal courts between the Government and the person summoned," *ante,* at 151. But that, of course, is no protection at all, unless the federal courts are provided with a measurable standard when asked to enforce a summons. I agree with the Court of Appeals that Congress has provided such a standard, and that the standard was not met in this case. Accordingly, I respectfully dissent from the opinion and judgment of the Court.

Congress has carefully restricted the summons power to certain rather precisely delineated purposes:

> "ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability." 26 U. S. C. § 7602.

This provision speaks in the singular—referring to "the correctness of any return" and to "the liability of any person." The delineated purposes are jointly denominated an "inquiry" concerning "the person liable for tax or required to perform the act," and the summons is designed to facilitate the "[e]xamination of books and witnesses" which "may be relevant or material to such inquiry." 26 U. S. C. §§ 7602 (1), (2), and (3). This language indicates unmistakably that the summons power is a tool for the investigation of particular taxpayers.

By contrast, the general *duties* of the IRS are vastly broader than its summons authority. For instance, § 7601 mandates a "[c]anvass of districts for taxable persons and objects." Unlike § 7602, the canvassing pro-

vision speaks broadly and in the plural, instructing Treasury Department officials

> "to proceed, from time to time, through each internal revenue district and inquire after and concerning *all persons* therein who *may be liable* to pay any internal revenue tax, and *all persons* owning or having the care and management of *any objects* with respect to which any tax is imposed." (Emphasis added.)

Virtually all "persons" or "objects" in this country "may," of course, have federal tax problems. Every day the economy generates thousands of sales, loans, gifts, purchases, leases, deposits, mergers, wills, and the like which—because of their size or complexity—suggest the possibility of tax problems for somebody. Our economy is "tax relevant" in almost every detail. Accordingly, if a summons could issue for any material conceivably relevant to "taxation"—that is, relevant to the general *duties* of the IRS—the Service could use the summons power as a broad research device. The Service could use that power methodically to force disclosure of whole categories of transactions and closely monitor the operations of myriad segments of the economy on the theory that the information thereby accumulated might facilitate the assessment and collection of some kind of a federal tax from somebody. Cf. *United States* v. *Humble Oil & Refining Co.*, 488 F. 2d 953. And the Court's opinion today seems to authorize exactly that.

But Congress has provided otherwise. The Congress *has* recognized that information concerning certain classes of transactions is of peculiar importance to the sound administration of the tax system, but the legislative solution has not been the conferral of a limitless summons power. Instead, various special-purpose statutes have been written to require the reporting or disclosure of particular kinds of transactions. *E. g.*, 26 U. S. C. §§ 6049,

6051–6053, 31 U. S. C. §§ 1081–1083, 1101, and 1121–1122, and 31 U. S. C. §§ 1141–1143 (1970 ed., Supp. III). Meanwhile, the scope of the summons power itself has been kept narrow. Congress has never made that power coextensive with the Service's broad and general canvassing duties set out in § 7601. Instead, the summons power has always been restricted to the particular purposes of individual investigation, delineated in § 7602.[1]

Thus, a financial or economic transaction is not subject to disclosure through summons merely because it is large or unusual or generally "tax relevant"—but only when the summoned information is reasonably pertinent to an ongoing investigation of somebody's tax status. This restriction checks possible abuses of the summons power in two rather obvious ways. First, it guards against an

[1] The canvassing duties and the summons power have always been found in separate and distinct statutory provisions. The spatial proximity of the two contemporary provisions is utterly without legal significance. 26 U. S. C. § 7806 (b). The general mandate to canvass and inquire, now found in § 7601, is derived from § 3172 of the Revised Statutes of 1874. See *Donaldson* v. *United States*, 400 U. S. 517, 523–524. The summons power, however, has different historical roots. Section 7602, enacted in 1954, was meant to consolidate and carry forward several prior statutes, with "no material change from existing law." H. R. Rep. No. 1337, 83d Cong., 2d Sess., A436; S. Rep. No. 1622, 83d Cong., 2d Sess., 617. The relevant prior statutes were §§ 3614 and 3615 (a)–(c) of the Internal Revenue Code of 1939. See Table II of the 1954 Code, 68A Stat. 969. Section 3614 granted the summons power to the Commissioner "for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made." Sections 3615 (a)–(c) granted the summons power to "collectors" and provided that a "summons may be issued" whenever "any person" refuses to make a return or makes a false or fraudulent return. Thus, like the present § 7602, these earlier provisions clearly limited use of the summons power to the investigation of particular taxpayers.

overbroad summons by allowing the enforcing court to prune away those demands which are not relevant to the particular, ongoing investigation. See, *e. g., First Nat. Bank of Mobile* v. *United States,* 160 F. 2d 532, 533–535. Second, the restriction altogether prohibits a summons which is wholly unconnected with such an investigation.

The Court today completely obliterates the historic distinction between the general duties of the IRS, summarized in § 7601, and the limited purposes for which a summons may issue, specified in § 7602. Relying heavily on § 7601, and noting that the IRS "has a legitimate interest in large or unusual financial transactions, especially those involving cash," *ante,* at 149, the Court approves enforcement of a summons having no investigative predicate. The sole premise for this summons was the Service's theory that the deposit of old wornout $100 bills was a sufficiently unusual and interesting transaction to justify compulsory disclosure of the identities of all the large-amount depositors at the respondent's bank over a one-month period.[2] That the summons was not incident to an ongoing, particularized investigation, but was merely a shot in the dark to see if one might be warranted, was freely conceded by the IRS agent who served the summons.[3]

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[2] The summons here used a scattershot technique to learn the identity of the unknown depositor. Rather than merely asking bank officials who the depositor was, the IRS required production of all deposit slips exceeding specified amounts that had been filled out during the period when the suspect deposits were, presumably, made. Thus, enforcement of the summons, even as redrafted by the District Court, will doubtlessly apprise the IRS of the identities of many bank depositors other than the one who submitted the old and worn-out $100 bills.

[3] He testified at the enforcement hearing:

"Q. What possible tax effect could this have on the taxpayer if he is determined?

"A. Well, it could be anything from nothing at all, a simple ex-

The Court's opinion thus approves a breathtaking expansion of the summons power: There are obviously thousands of transactions occurring daily throughout the country which, on their face, suggest the *possibility* of tax complications for the unknown parties involved. These transactions will now be subject to forced disclosure at the whim of any IRS agent, so long only as he is acting in "good faith." *Ante,* at 146.

This is a sharp and dangerous detour from the settled course of precedent. The decision of the Court of Appeals in this case has been explicitly accepted as sound by the Courts of Appeals of two other Circuits. See *United States* v. *Berkowitz,* 488 F. 2d 1235, 1236 (CA3), and *United States* v. *Humble Oil & Refining Co.,* 488 F. 2d 953, 960 (CA5), cert. pending, No. 73–1827. No federal court has disagreed with it.

The federal courts have always scrutinized with particular care any IRS summons directed to a "third party," *i. e.,* to a party other than the taxpayer under investigation. See, *e. g., United States* v. *Humble Oil & Refining Co., supra,* at 963; *Venn* v. *United States,* 400 F. 2d 207, 211–212; *United States* v. *Harrington,* 388 F. 2d 520, 523. When, as here, the third-party summons does not identify the party under investigation, a presumption naturally arises that the summons is not genuinely investigative but merely exploratory—a device for general research or for the hit-or-miss monitoring of "unusual" transactions. Unless this presumption is rebutted by the Service, the courts have denied enforcement.

Thus, the IRS was not permitted to summon from a bank the names and addresses of all beneficiaries of cer-

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planation, or it could be that this is money that has been secreted away for a period of time as a means of avoiding the tax.

. . . . . .

"Q. Then you really have not reached first base yet, is that correct?

"A. That's correct."

tain types of trust arrangements merely on the theory that these arrangements were unusual in form or size. *Mays* v. *Davis,* 7 F. Supp. 596. Nor could the Service force a company to disclose the identity of whole classes of its oil land lessees merely on the theory that oil lessees commonly have tax problems. *United States* v. *Humble Oil & Refining Co., supra.* See also *McDonough* v. *Lambert,* 94 F. 2d 838; *First Nat. Bank of Mobile* v. *United States,* 160 F. 2d, at 533–535; *Teamsters* v. *United States,* 240 F. 2d 387, 390.

On the other hand, enforcement has been granted where the Service has been able to demonstrate that the John Doe summons was issued incident to an ongoing and particularized investigation. Thus, enforcement was granted of summonses seeking to identify the clients of those tax-return-preparation firms which *prior investigation* had shown to be less than honest or accurate in the preparation of sample returns. *United States* v. *Theodore,* 479 F. 2d 749; *United States* v. *Turner,* 480 F. 2d 272; *United States* v. *Berkowitz, supra; United States* v. *Carter,* 489 F. 2d 413. Similarly, enforcement was granted of summonses directed to an attorney, and his bank, seeking to identify the client for whom the attorney had mailed to the IRS a large, anonymous check, purporting to satisfy an outstanding tax deficiency of the client. *Tillotson* v. *Boughner,* 333 F. 2d 515; *Schulze* v. *Rayunec,* 350 F. 2d 666. Like the prior investigative work in the tax-return-preparer cases, the receipt of the mysterious check established the predicate of a particularized investigation which was necessary, under § 7602, to the enforcement of a summons. In each case, the Service had already proceeded to the point where the unknown individual's tax liability had become a reasonable possibility, rather than a matter of sheer speculation.

Today's decision shatters this long line of precedent.

For this summons, there was absolutely no investigative predicate. The sole indication of this John Doe's tax liability was the unusual character of the deposit transaction itself. Any private economic transaction is now fair game for forced disclosure, if any IRS agent happens in good faith to want it disclosed. This new rule simply disregards the language of § 7602 and the body of established case law construing it.

The Court's attempt to justify this extraordinary departure from established law is hardly persuasive. The Court first notes that a witness may not refuse testimony to a grand jury merely because the grand jury has not yet specified the "identity of the offender," *ante,* at 147, quoting *Blair* v. *United States,* 250 U. S. 273, 282. This is true but irrelevant. The IRS is not a grand jury. It is a creature not of the Constitution but of legislation and is thus peculiarly subject to legislative constraints. See *In re Groban,* 352 U. S. 330, 346 (Black, J., dissenting). It is true that the Court drew an analogy between an IRS summons and a grand jury subpoena in *United States* v. *Powell,* 379 U. S. 48, 57, but this was merely to emphasize that an IRS summons does not require the support of "probable cause" to suspect tax fraud when the summons is *issued incident to an ongoing, individualized investigation of an identified party.* A major premise of *Powell* was that an extrastatutory "probable cause" requirement was unnecessary in view of the "legitimate purpose" requirements already specified in § 7602, 379 U. S., at 56–57.

The Court next suggests that this expansion of the summons power is innocuous, at least on the facts of this case, because the Bank Secrecy Act of 1970 [4] itself com-

[4] 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. See *California Bankers Assn.* v. *Shultz,* 416 U. S. 21.

pels banks to disclose the identity of certain cash depositors. *Ante,* at 149–150. Aside from the fact that the summons at issue here forces disclosure of some deposits not covered by the Act and its attendant regulations,[5] the argument has a more basic flaw. If the summons authority of § 7602 allows preinvestigative inquiry into any large or unusual bank deposit, the 1970 Act was largely redundant. The IRS could have saved Congress months of hearings and debates by simply directing § 7602 summonses on a regular basis to the Nation's banks, demanding the identities of their large cash depositors. In *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, we gave extended consideration to the complex constitutional issues raised by the 1970 Act; some of those issues—*e. g.,* whether and to what extent bank depositors have Fourth Amendment and Fifth Amendment rights to the secrecy of their domestic deposits—were left unresolved by the Court's opinion, 416 U. S., at 67–75. If the disclosure requirements in the 1970 Act were already encompassed within the Service's summons power, one must wonder why the Court labored so long and carefully in *Shultz.*

Finally, the Court suggests that respect for the plain language of § 7602 would "undermine the efficacy of the federal tax system, which seeks to assure that taxpayers pay what Congress has mandated and prevents dishonest persons from escaping taxation and thus shifting heavier burdens to honest taxpayers." *Ante,* at 146. But the federal courts have applied the strictures of § 7602, and its predecessors, for many decades without occasioning these

[5] As limited by the District Court, the summons calls for production of deposit slips showing cash deposits in the amount of $20,000 and deposit slips showing cash deposits of $5,000 or more involving $100 bills, for deposits made between October 16 and November 16, 1970. Current regulations under the Bank Secrecy Act require reporting only with respect to cash transactions exceeding $10,000. 31 CFR § 103.22 (1974).

dire effects. If such a danger exists, Congress can deal with it. But until Congress changes the provision of § 7602, it is our duty to apply the statute as it is written.

I would affirm the judgment of the Court of Appeals.

DROPE *v.* MISSOURI

CERTIORARI TO THE COURT OF APPEALS OF MISSOURI FOR THE ST. LOUIS DISTRICT

No. 73-6038. Argued November 13, 1974—
Decided February 19, 1975

In 1969 petitioner was indicted, with two others, for rape of petitioner's wife. Following severance of petitioner's case, he filed a motion for a continuance so that he might be further examined and receive psychiatric treatment, attaching thereto the report of a psychiatrist who had examined him at his counsel's request and had suggested such treatment. The motion was denied and the case proceeded to trial. Petitioner's wife testified, repeating and confirming information concerning petitioner's "strange behavior" which was contained in the report and stating that she had changed her mind about not wanting to prosecute petitioner because he had tried to kill her on the Sunday prior to trial. On the second day of the trial petitioner shot himself in a suicide attempt and was hospitalized, but despite his absence the trial court denied a motion for a mistrial on the ground that his absence was voluntary, and the trial continued. The jury returned a guilty verdict and petitioner was sentenced to life imprisonment. His motion for a new trial, asserting that the trial court had erred in proceeding with the trial when no evidence was produced that his absence was voluntary, was denied, the trial court finding again that his absence was voluntary. The Missouri Supreme Court affirmed, sustaining that finding and also holding that the trial court's denial of the continuance motion was not an abuse of discretion. Subsequently, petitioner's motion to vacate the conviction and sentence, alleging, *inter alia,* that his constitutional rights had been violated by the failure to order a pretrial psychiatric examination and by completing the trial in his absence, was denied. The Missouri Court of Appeals affirmed, holding that neither the psychiatric report attached to petitioner's motion for a continuance nor his wife's testimony raised a reasonable doubt of his fitness to proceed, that petitioner's suicide attempt did not create a reasonable doubt of his competence as a matter of law, and that he had failed to demonstrate the inadequacy of the procedures employed for protecting his rights. The court also held that the

trial court's finding as to voluntary absence was not clearly erroneous. *Held:*

1. The Missouri courts failed to accord proper weight to the evidence suggesting petitioner's incompetence. When considered together with the information available prior to trial and the testimony of petitioner's wife at trial, the information concerning petitioner's suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry. Pp. 178–181.

2. Whatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his suicide attempt, and there being no opportunity without his presence to evaluate that bearing in fact, the correct course was to suspend the trial until such an evaluation could be made. Pp. 181–182.

3. Assuming petitioner's right to be present at the trial was one that could be waived, there was an insufficient inquiry to afford a basis for deciding the issue of waiver. P. 182.

4. Petitioner's due process rights would not be adequately protected by remanding the case for a psychiatric examination to determine whether he was in fact competent to stand trial in 1969, but the State is free to retry him, assuming that at the time of such trial he is competent to be tried. P. 183.

498 S. W. 2d 838, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Thomas C. Walsh argued the cause for petitioner. With him on the briefs was *Charles A. Weiss.*

Neil MacFarlane, Assistant Attorney General of Missouri, argued the cause for respondent. With him on the brief were *John C. Danforth,* Attorney General, and *David Robards,* Assistant Attorney General.

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

We granted certiorari in this case to consider petitioner's claims that he was deprived of due process of law by the failure of the trial court to order a psychiatric

examination with respect to his competence to stand trial and by the conduct in his absence of a portion of his trial on an indictment charging a capital offense.

I

In February 1969 an indictment was returned in the Circuit Court of St. Louis, Mo., charging petitioner and two others with the forcible rape of petitioner's wife. Following severance of petitioner's case from those of the other defendants and a continuance, on May 27 his counsel filed a motion for a continuance until September, in order that petitioner might be examined and receive psychiatric treatment. Treatment had been suggested by a psychiatrist who had examined petitioner at his counsel's request and whose report was attached to the motion.[1] On the same date respondent, through the

[1] The motion recites: "Comes now the Defendant, JAMES E. DROPE, and states to the court that he has had a psychiatric examination made by Dr. Joseph F. Shuman, M. D., a copy of which report is attached hereto.

"Defendant moves the court to continue his case until September, 1969 in order that he might receive an Examination, Evaluation and psychiatric treatment, as suggested by Dr. Shuman, at the Malcomb Bliss Hospital in the City of St. Louis, Missouri." App. 7.

The report, in the form of a letter to petitioner's attorney, states that the psychiatrist examined petitioner on February 20, 1969. In a section entitled "Past Medical History" it describes petitioner as "markedly agitated and upset," noting that he "appeared to be cooperative in this examination, but he had difficulty in participating well." The report continues: "The patient had a difficult time relating. He was markedly circumstantial and irrelevant in his speech. . . . There was no sign as to the presence of any delusions, illusions, hallucinations, obsessions, ideas of reference, compulsions or phobias at this time.

"In a simple IQ exam Mr. Drope was able to achieve a score in the low normal range . . . . Mr. Drope was well oriented in all spheres. With much difficulty he was able to

Assistant Circuit Attorney, filed a document stating that the State did not oppose the motion for a psychiatric examination. Apparently no action was taken on the motion, and petitioner's case was continued until June 23, at which time his counsel objected to proceeding with the trial on the ground that he had understood the case would be continued until September and consequently was not prepared. He objected further "for the reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial." App. 19. The trial judge noted that the motion for a continuance was not in proper form and that, although petitioner's counsel had agreed to file another, he had failed to do so, and he overruled his objections and directed that the case proceed to trial.

On June 24 a jury was empaneled, and the prosecution called petitioner's wife as its first witness. She testified that petitioner participated with four of his acquaintances in forcibly raping her and subjecting her to other bizarre abuse and indignities, but that she had resumed living

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explain a few abstractions. . . . He was able, without trouble, to answer questions testing judgement. He had much difficulty even doing the simple counting and calculation problems." The report then recounts the details of a conversation between the psychiatrist and petitioner's wife. The latter admitted that she had left petitioner on a number of occasions because of his sexual perversions and described the "strange behavior" of petitioner, including falling down flights of stairs, as an attempt to gain sympathy from her. In a section entitled "Impression," the report states that petitioner had "always led a marginal existence," that he had a "history of anti-social conduct," but that there were no "strong signs of psychosis at this time." It concludes that petitioner "certainly needs the aid of a psychiatrist," and that he "is a very neurotic individual who is also depressed and perhaps he is depressed for most of the time," and it offers as diagnoses: "(1) Sociopathic personality disorder, sexual perversion. (2) Borderline mental deficiency. (3) Chronic Anxiety reaction with depression." *Id.*, at 11–12.

with him after the incident on the advice of petitioner's psychiatrist and so that their children would be taken care of. On cross-examination, she testified that she had told petitioner's attorney of her belief that her husband was sick and needed psychiatric care and that for these reasons she had signed a statement disavowing a desire to prosecute. She related that on several occasions when petitioner did not "get his way or [was] worried about something," he would roll down the stairs. She could explain such behavior only by relating "what they told him many times at City Hospital, that is something he does upon hisself [*sic*]." *Id.*, at 47. However, she also stated that she was not convinced petitioner was sick after talking to his psychiatrist, and that she had changed her mind about not wanting to prosecute petitioner because, as she testified, he had "tried to choke me, tried to kill me" on the Sunday evening prior to trial. *Id.*, at 52.

The prosecution called three more witnesses, but did not conclude its case, before adjournment on June 24. The following morning, petitioner did not appear. When the trial judge directed counsel to proceed, petitioner's attorney moved for a mistrial "in view of the fact that the defendant, I am informed, shot himself this morning." App. 63. The trial judge denied the motion, stating that he had already decided the matter would proceed for trial, and when petitioner's counsel complained of the difficulty of proceeding without a client, the trial judge replied that the difficulty was brought about by petitioner, who was on bond and had a responsibility to be present. The prosecution then called four more witnesses and, after producing proof of a prior conviction,[2] rested its case. Petitioner's "Motion for Verdict of Acquittal," including

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[2] Petitioner was tried as a second offender under Mo. Rev. Stat. § 556.280 (1969), having been convicted in 1958 of second-degree burglary and "stealing."

in effect a renewal of the motion for a mistrial, was denied, and his counsel stated that he had "no evidence to produce at this time under the circumstances." *Id.*, at 64. The jury returned a verdict of guilty, and on July 21, 1969, petitioner, who had been in the hospital for three weeks recovering from a bullet wound in the abdomen, appeared, and the trial court fixed the penalty at life imprisonment.

Petitioner filed a motion for a new trial, the burden of which was that the trial court had erred in proceeding with the trial when no evidence had been produced that his absence from the trial was voluntary. A hearing was held before the judge who had presided at trial. Petitioner testified that on June 25 he had gone to his brother's house and that he remembered nothing concerning the shooting except that he felt a burning pain in his stomach and later woke up in the hospital. He testified he did not remember talking to anyone at the hospital. The State presented evidence that upon admission to the hospital petitioner stated that he had shot himself because of " 'some problem with the law,' " *id.*, at 90, and that he had told a policeman he had shot himself because "he was supposed to go to court for rape, and he didn't do it; he rather be [*sic*] dead than to go to trial for something he didn't do." *Id.*, at 97. The trial judge denied the motion. Stating that on the morning of petitioner's failure to appear he had received information on the telephone which was checked with the hospital, the judge concluded that petitioner had the burden of showing that his absence was not voluntary and found on the basis of the evidence that his absence " 'was due to his own voluntary act in shooting himself; done for the very purpose of avoiding trial.' " *Id.*, at 103.

The Missouri Supreme Court affirmed, accepting the trial court's finding, in ruling on petitioner's motion for a

new trial, that his absence was voluntary,[3] and holding that there was "no logical basis" for positing a different rule with respect to waiver of the right to be present in capital cases [4] than that which applies in felony cases generally. 462 S. W. 2d 677, 683–684. The Missouri Supreme Court also held that the denial of petitioner's motion for a continuance of the trial in order to procure further psychiatric evaluation was not an abuse of discretion, noting that petitioner did not contend that he lacked the mental capacity to proceed with the trial.

In April 1971 petitioner filed a motion to vacate the judgment of conviction and sentence in the court where sentence had been imposed, pursuant to Missouri Supreme Court Rule 27.26.[5] He alleged that his rights under Mo. Rev. Stat. § 552.020 (2) (1969)[6] and his

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[3] As to the situation at trial, the Missouri Supreme Court stated: "We disagree with defendant's contention that there is 'no evidence upon the record' that he voluntarily absented himself. The court made such a determination before proceeding with the trial, although the basis for that determination is not fully disclosed. However, when defendant is free on bond, and he does not appear at the appointed time, it is presumed that the absence is voluntary until established otherwise." 462 S. W. 2d 677, 681 (1971).

[4] At the time of petitioner's trial, rape was punishable by death under Mo. Rev. Stat. § 559.260 (1969), and respondent had not waived the death penalty.

[5] A petition for a writ of habeas corpus previously filed in the United States District Court for the Eastern District of Missouri had been dismissed without prejudice on April 1, 1971, for failure to exhaust available state remedies. See 28 U. S. C. §§ 2254 (b), (c).

[6] Subdivision 2 of § 552.020 provides in pertinent part: "Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private physicians to make a psychiatric examination of the accused or shall direct the superintendent of a facility of the division of mental diseases to have the accused so examined by one or more physi-

constitutional rights had been violated by the failure to order a psychiatric examination prior to trial and by conducting the trial to conclusion in his absence. Petitioner also asserted that he had been denied the effective assistance of counsel, a claim which is not before us.

In July 1971 a hearing was held on the motion; petitioner called two psychiatrists as witnesses. The psychiatrist who had examined petitioner prior to his trial testified that in his opinion there was reasonable cause to believe that a person who attempted to commit suicide in the midst of a trial might not be mentally competent to understand the proceedings against him. Another psychiatrist, whose duties included the examination of accused persons under Mo. Rev. Stat. c. 552, testified that in his opinion a man who was charged with raping his wife and attempted suicide during his trial was in need of a psychiatric evaluation to find out his mental condition, and that there should be an evaluation to determine whether the person was competent to assist in his own defense and whether he was "malingering or did it intentionally or if it was due to a true psychiatric disorder." App. 156. The same psychiatrist stated that he had examined petitioner at City Hospital in 1965 and had found that he had psychiatric problems and was in need of care. Petitioner took the stand, repeating his previous testimony with respect to the shooting.

In June 1972 the sentencing judge denied petitioner's Rule 27.26 motion, and the Missouri Court of Appeals affirmed. The Court of Appeals concluded that the provisions for psychiatric examinations and hearings under Mo. Rev. Stat. § 552.020 (1969) comported with the re-

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cians whom the superintendent shall designate." Subdivision 3 delineates the requirements for reports of psychiatric examinations, and subdivision 6 requires the court to hold a hearing if the opinion relative to fitness to proceed which is required to be included in the report is contested.

quirements of *Pate* v. *Robinson,* 383 U. S. 375 (1966), and that the test of incompetence to stand trial was that stated in *Dusky* v. *United States,* 362 U. S. 402 (1960).[7] It reasoned that it was necessary to examine the indicia of petitioner's incompetence "at three different times—before the trial, during the trial after the suicide attempt, and at the time of the motion for new trial." 498 S. W. 2d 838, 842.

As to the situation before trial, the court held that the psychiatric report attached to petitioner's motion for a continuance did not raise a reasonable doubt of his fitness to proceed. Turning to the second time period, "during the trial after the suicide attempt," the court held that *Pate* v. *Robinson, supra,* which involved a competence hearing rather than a competence examination followed by a hearing, did not require that the examination and hearing be held during the trial rather than immediately thereafter. With regard to the period after trial, and accepting petitioner's contention that his was a "bona fide attempt at suicide," the court was of the view that the legal significance of the attempt under *Robinson* should be evaluated without resort to the psychiatric testimony presented at the Rule 27.26 hearing, which was not before the trial judge. It held that petitioner's suicide attempt did not create a reasonable doubt of his competence as a matter of law, that petitioner had failed to demonstrate the inadequacy of the procedures employed for protecting his rights, and that the finding of the trial court was not clearly erroneous.[8]

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[7] "[T]he 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " See also Mo. Rev. Stat. § 552.020 (1) (1969).

[8] Under Missouri Supreme Court Rule 27.26 (f) (1969), the "prisoner has the burden of establishing his grounds for relief by a

Finally, the Missouri Court of Appeals rejected petitioner's claim that he was deprived of due process of law by the conduct of a portion of his trial in his absence; it noted that the State Supreme Court had upheld a finding of voluntary absence on petitioner's direct appeal and concluded that the psychiatrists' testimony at the Rule 27.26 hearing did not meet the burden of proof placed on petitioner. "Again we cannot hold the trial court's finding to be clearly erroneous." 498 S. W. 2d, at 843. We granted certiorari, and we now reverse.

II

It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Thus, Blackstone wrote that one who became "mad" after the commission of an offense should not be arraigned for it "because he is not able to plead to it with that advice and caution that he ought." Similarly, if he became "mad" after pleading, he should not be tried, "for how can he make his defense?" 4 W. Blackstone, Commentaries *24. See *Youtsey* v. *United States,* 97 F. 937, 940–946 (CA6 1899). Some have viewed the common-law prohibition "as a by-product of the ban against trials *in absentia;* the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U. Pa. L. Rev. 832, 834 (1960). See *Thomas* v. *Cunningham,* 313 F. 2d 934, 938 (CA4 1963). For our purposes, it suffices

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preponderance of the evidence." Appellate review is limited under Rule 27.26 (j) "to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous."

to note that the prohibition is fundamental to an adversary system of justice. See generally Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 455, 457–459 (1967). Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant " 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " *Dusky* v. *United States,* 362 U. S., at 402.

In *Pate* v. *Robinson,* 383 U. S. 375 (1966), we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. Although in *Robinson* we noted that Illinois "jealously guard[ed] this right," *id.,* at 385, we held that the failure of the state courts to invoke the statutory procedures deprived Robinson of the inquiry into the issue of his competence to stand trial to which, on the facts of the case, we concluded he was constitutionally entitled. The Court did not hold that the procedure prescribed by Ill. Rev. Stat., c. 38, § 104–2 (1963), was constitutionally mandated, although central to its discussion was the conclusion that the statutory procedure, if followed, was constitutionally adequate. See, *e. g., United States* v. *Knohl,* 379 F. 2d 427, 434–435 (CA2), cert. denied, 389 U. S. 973 (1967); *United States ex rel. Evans* v. *LaVallee,* 446 F. 2d 782, 785–786 (CA2 1971), cert. denied, 404 U. S. 1020 (1972). Nor did the Court prescribe a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure.[9] Rather, it noted that

[9] In discussing the evidence adduced at Robinson's trial, the Court did, however, indicate that a history of irrational behavior is a rele-

under the Illinois statute a hearing was required where the evidence raised a " '*bona fide* doubt' " as to a defendant's competence, and the Court concluded "that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue." 383 U. S., at 385. See *United States* v. *Marshall,* 458 F. 2d 446, 450 (CA2 1972).

As was true of Illinois in *Robinson,* Missouri's statutory scheme "jealously guards" a defendant's right to a fair trial. Missouri Rev. Stat. § 552.020 (1) (1969) provides: "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Section 552.020 (2), see n. 6, provides that a judge or magistrate shall, "upon his own motion or upon motion filed by the state or by or on behalf of the accused," order a psychiatric examination whenever he "has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed." Section 552.020 (3) prescribes the contents of a report of the psychiatric examination, and § 552.030 (6) requires the court to hold a hearing if the opinion relative to fitness to proceed which is required to be included in the report is contested. In addition, the trial court may conduct a hearing on its own motion. Such a procedure is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent. Our task is to determine whether the proceedings in this case were consistent with petitioner's right to a fair trial.

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vant factor which, on the record before it, was sufficient to require further inquiry notwithstanding Robinson's demeanor at trial and the stipulated opinion of a psychiatrist that Robinson knew the nature of the charges against him and could cooperate with counsel when the psychiatrist examined him two or three months before. See *infra,* at 180–181.

At the outset we are met by respondent's argument that the Court is bound by "limitations placed on proceedings under" Missouri Supreme Court Rule 27.26. Brief for Respondent 23. Specifically, respondent notes that under Rule 27.26 (f) petitioner had "the burden of establishing his grounds for relief by a preponderance of the evidence," and that the appellate-review function of the Missouri Court of Appeals was limited by Rule 27.26 (j) "to a determination of whether the findings, conclusions and judgment of the trial court [were] clearly erroneous." It urges that the Rule was "designed . . . to provide a valuable post-conviction remedy and not to provide another direct appeal . . . ," and expresses concern that "the state-federal relationship . . . remain in proper balance." Brief for Respondent 22.

We share respondent's concern for this necessary balance, and we do not question the State's power, in post-conviction proceedings, to reallocate the respective burdens of the individual and the State and to delimit the scope of state appellate review. Cf. *Hawk* v. *Olson,* 326 U. S. 271, 279 (1945); *Conner* v. *Wingo,* 429 F. 2d 630, 637–639 (CA6 1970). At the same time we note that while proceedings under the Rule "ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal," nevertheless "trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal." Mo. Sup. Ct. Rule 27.26 (b)(3).

In the present case there is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court prior to trial and thereafter. Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry into petitioner's competence to

stand trial, denied him a fair trial. In such circumstances we believe it is "incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris* v. *Alabama,* 294 U. S. 587, 590 (1935).[10] "When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." *Hawk* v. *Olson, supra,* at 276.

III

The sentencing judge and the Missouri Court of Appeals concluded that the psychiatric evaluation of petitioner attached to his pretrial motion for a continuance did not contain sufficient indicia of incompetence to stand trial to require further inquiry. Both courts mentioned aspects of the report suggesting competence, such as the impressions that petitioner did not have "any delusions, illusions, hallucinations . . . ," was "well oriented in all spheres," and "was able, without trouble, to answer questions testing judgement," but neither court mentioned the contrary data. The report also showed that petitioner, although cooperative in the examination, "had difficulty in participating well," "had a difficult

[10] "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. . . . Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits." *Watts* v. *Indiana,* 338 U. S. 49, 51 (1949) (opinion of Frankfurter, J.). See also *Culombe* v. *Connecticut,* 367 U. S. 568, 605 (1961) (opinion of Frankfurter, J.).

time relating," and that he "was markedly circumstantial and irrelevant in his speech." In addition, neither court felt that petitioner's episodic irrational acts described in the report or the psychiatrist's diagnoses of "[b]orderline mental deficiency" and "[c]hronic [a]nxiety reaction with depression" created a sufficient doubt of competence to require further inquiry.[11]

It does not appear that the examining psychiatrist was asked to address himself to medical facts bearing specifically on the issue of petitioner's competence to stand trial, as distinguished from his mental and emotional condition generally. Thus, it is not surprising that before this Court the dispute centers on the inferences that could or should properly have been drawn from the report. Even where the issue is in focus we have recognized "the uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Greenwood* v. *United States,* 350 U. S. 366, 375 (1956). Here the inquiry is rendered more difficult by the fact that a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies. See *Jackson* v. *Indiana,* 406 U. S. 715, 739 (1972); *Pate* v. *Robinson,* 383 U. S., at 388–389 (Harlan, J., dissenting); Weihofen, The Definition of Mental Illness, 21 Ohio St. L. J. 1 (1960).

Like the report itself, the motion for a continuance did not clearly suggest that petitioner's competence to stand trial was the question sought to be resolved. While we have expressed doubt that the right to further inquiry upon the question can be waived, see *Pate* v. *Robinson,* 383 U. S., at 384, it is nevertheless true that judges must

[11] See n. 1, *supra.* The Court of Appeals determined that the other diagnosis offered, "[s]ociopathic personality disorder, sexual perversion," was excluded as a "mental disease or defect" under Missouri law. See Mo. Rev. Stat. § 552.010 (1969).

depend to some extent on counsel to bring issues into focus. Petitioner's somewhat inartfully drawn motion for a continuance probably fell short of appropriate assistance to the trial court in that regard. However, we are constrained to disagree with the sentencing judge that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial," did not raise the issue of petitioner's competence to stand trial.[12] This statement also may have tended to blur the aspect of petitioner's mental condition which would bear on his criminal responsibility and that which would bear on his competence to stand trial. However, at that stage, and with the obvious advantages of hindsight, it seems to us that it would have been, at the very least, the better practice to order an immediate examination under Mo. Rev. Code § 552.020 (2) (1969).[13] It

[12] In a colloquy with the trial judge, petitioner's counsel noted that the examination and evaluation "could be done during the summer months and be ready for trial *or else the examination would eliminate trial by September.*" App. 17. (Emphasis added.)

[13] The sentencing judge observed that "motions for psychiatric examinations have often been made merely for the purpose of delay," and "estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent." App. 202. Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, see *United States ex rel. Rizzi* v. *Follette,* 367 F. 2d 559, 561 (CA2 1966), an expressed doubt in that regard by one with "the closest contact with the defendant," *Pate* v. *Robinson,* 383 U. S. 375, 391 (1966) (Harlan, J., dissenting), is unquestionably a factor which should be considered. Moreover, resolution of the issue of competence to stand trial at an early date best serves both the interests of fairness, see *Peyton* v. *Rowe,* 391 U. S. 54, 62 (1968), and of sound judicial administration. See Panel on Recognizing and Determining Mental Competency to Stand Trial—Insanity as a Defense, in Institutes on Sentencing, 37 F. R. D. 111, 155, 161 (1964). Realization of those facts may have prompted the practice, noted by the sentencing

is unnecessary for us to decide whether such examination was constitutionally required on the basis of what was then known to the trial court since in our view the question was settled by later events.

IV

Turning to the situation at petitioner's trial, the state courts viewed the evidence as failing to show that during trial petitioner had acted in a manner that would cause the trial court to doubt his competence. The testimony of petitioner's wife, some of which repeated and confirmed information contained in the psychiatric evaluation attached to petitioner's motion for a continuance, was given little weight.[14] Finally, the sentencing judge, relying on his finding on petitioner's motion for a new trial and although stating "that it does not take a psychiatrist to know that such a man has a problem and indicates poor judgment," App. 203, concluded that the "fact that Mr. Drope shot himself to avoid trial suggests very

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court, "of the Circuit Attorney at the time to consent in all cases to a psychiatric examination whether with or without merit and without looking into the matter further." App. 206.

[14] See n. 1, *supra*. The sentencing court noted: "She did testify in answer to the question 'And at that time didn't you tell me that you felt your husband was sick and needed psychiatric care?' The answer 'Yes.' There was also some evidence of disputes and trouble accompanied by some physical force between husband and wife but not to the extent to indicate inability to understand the proceedings. There was no recitation of facts upon which a layman could base the opinion that the defendant was insane except the testimony perhaps that he rolled down the steps but this occurred only two or three times over a period of eight or nine or ten years." App. 201. The Court of Appeals dealt with her testimony only insofar as it repeated information in the psychiatric evaluation. It concluded that her feelings that petitioner had mental problems "bore on his sexual perversions—not his competency," and that the stairs episodes "demonstrate[d] pique more than anything." 498 S. W. 2d, at 842.

strongly an awareness of what was going on." *Id.*, at 208. The Missouri Court of Appeals, accepting *arguendo* petitioner's contention that his was "a bona fide attempt at suicide," refused to conclude "that as a matter of law an attempt at suicide creates a reasonable doubt as to the movant's competency to stand trial." *Id.*, at 222.

Notwithstanding the difficulty of making evaluations of the kind required in these circumstances, we conclude that the record reveals a failure to give proper weight to the information suggesting incompetence which came to light during trial. This is particularly so when viewed in the context of the events surrounding petitioner's suicide attempt and against the background of the pretrial showing. Although a defendant's demeanor during trial may be such as to obviate "the need for extensive reliance on psychiatric prediction concerning his capabilities," Note, 81 Harv. L. Rev., at 469, we concluded in *Pate* v. *Robinson*, 383 U. S., at 385–386, that "this reasoning offers no justification for ignoring the uncontradicted testimony of . . . [a] history of pronounced irrational behavior." We do not mean to suggest that the indicia of such behavior in this case approximated those in *Robinson*, but we believe the Missouri courts failed to consider and give proper weight to the record evidence. Too little weight was given to the testimony of petitioner's wife that on the Sunday prior to trial he tried to choke her to death. For a man whose fate depended in large measure on the indulgence of his wife, who had hesitated about pressing the prosecution, this hardly could be regarded as rational conduct.[15] Moreover, in considering the indicia of petitioner's

[15] It appears that under Mo. Rev. Stat. § 546.260 (1969) petitioner's wife could not be compelled to testify against him. See *State* v. *Dunbar*, 360 Mo. 788, 230 S. W. 2d 845 (1950). Similarly, neither court mentioned Mrs. Drope's testimony concerning petitioner's consultations at City Hospital. At the Rule 27.26 hearing, it will be recalled, a psychiatrist testified that he had examined peti-

incompetence separately, the state courts gave insufficient attention to the aggregate of those indicia in applying the objective standard of Mo. Rev. Stat. § 552.020 (2). We need not address the Court of Appeals' conclusion that an attempt to commit suicide does not create a reasonable doubt of competence to stand trial as a matter of law. As was true of the psychiatric evaluation, petitioner's attempt to commit suicide "did not stand alone." *Moore* v. *United States,* 464 F. 2d 663, 666 (CA9 1972). We conclude that when considered together with the information available prior to trial and the testimony of petitioner's wife at trial, the information concerning petitioner's suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry on the question.

The import of our decision in *Pate* v. *Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Here, the evidence of irrational behavior prior to trial was weaker than in *Robinson,* but there was no opinion evidence as to petitioner's competence to stand trial. See n. 9, *supra.* Moreover, Robinson was present throughout his trial; petitioner was absent for a crucial portion of his

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tioner at City Hospital in 1965 and had determined that he was in need of psychiatric care.

trial. Petitioner's absence bears on the analysis in two ways: first, it was due to an act which suggests a rather substantial degree of mental instability contemporaneous with the trial, see *Pate* v. *Robinson,* 383 U. S., at 389 (Harlan, J., dissenting); [16] second, as a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him.

Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. Whatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his suicide attempt, and there being no opportunity without his presence to evaluate that bearing in fact, the correct course was to suspend the trial until such an evaluation could be made.[17] That this might have

[16] We assume, as did the Missouri Court of Appeals, that petitioner's was a "bona fide" suicide attempt, rather than, as respondent contends, malingering. In that regard, the hearsay information in the possession of the trial judge when he denied the motion for a mistrial suggested an intent on the part of petitioner to kill himself, and a self-inflicted wound near vital organs does not suggest malingering. Of course we also recognize that "the empirical relationship between mental illness and suicide" or suicide attempts is uncertain and that a suicide attempt need not always signal "an inability to perceive reality accurately, to reason logically and to make plans and carry them out in an organized fashion." Greenberg, Involuntary Psychiatric Commitments to Prevent Suicide, 49 N. Y. U. L. Rev. 227, 234, 236 (1974). See also Pokorny, Myths about Suicide, in Suicidal Behaviors 64–65 (H. Resnik ed. 1968).

[17] In reaching this conclusion we have not relied on the testimony of the psychiatrists at the Rule 27.26 hearing, which, we agree with

aborted the trial is a hard reality, but we cannot fail to note that such a result might have been avoided by prompt psychiatric examination before trial, when it was sought by petitioner.

V

Our resolution of the first issue raised by petitioner makes it unnecessary to decide whether, as he contends, it was constitutionally impermissible to conduct the remainder of his trial on a capital offense in his enforced absence from a self-inflicted wound. See *Diaz* v. *United States,* 223 U. S. 442, 445 (1912). However, even assuming the right to be present was one that could be waived, what we have already said makes it clear that there was an insufficient inquiry to afford a basis for deciding the issue of waiver. Cf. *Westbrook* v. *Arizona,* 384 U. S. 150 (1966); *United States* v. *Silva,* 418 F. 2d 328 (CA2 1969).

The Missouri Court of Appeals concluded that, had further inquiry into petitioner's competence to stand trial been constitutionally mandated in this case, it would have been permissible to defer it until the trial had been completed. Such a procedure may have advantages, at least where the defendant is present at the trial and the appropriate inquiry is implemented with dispatch. See Note, 81 Harv. L. Rev., at 469; *Hansford* v. *United States,* 127 U. S. App. D. C. 359, 360, 384 F. 2d 311, 312 (1966) (rehearing en banc denied) (statement of Leventhal, J.); *Jackson* v. *Indiana,* 406 U. S., at 741. However, because of petitioner's absence during a critical stage of his trial, neither the judge nor counsel was able to observe him, and the hearing on his motion for a new trial, held approximately three months after the trial, was not informed by an inquiry into either his competence to stand

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the Missouri Court of Appeals, is not relevant to the question before us.

trial or his capacity effectively to waive his right to be present.

The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, see *Pate* v. *Robinson,* 383 U. S., at 386–387; *Dusky* v. *United States,* 362 U. S., at 403, we cannot conclude that such a procedure would be adequate here. Cf. *Conner* v. *Wingo,* 429 F. 2d, at 639–640. The State is free to retry petitioner, assuming, of course, that at the time of such trial he is competent to be tried.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

INTERSTATE COMMERCE COMMISSION *v.* OREGON PACIFIC INDUSTRIES, INC., ET AL.

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

No. 73–1210. Argued November 20, 1974—
Decided February 19, 1975

Service Order No. 1134, promulgated by the Interstate Commerce Commission (ICC) without notice or hearing pursuant to its emergency powers under § 1 (15) of the Interstate Commerce Act, which limited the holding time of lumber cars at reconsignment points to five working days and subjected the shipper holding the car at such points for more than that period to the sum of the rates from origin, to hold point, to destination, *held* within the ICC's power under § 1 (15) to avoid undue detention of freight cars used as places of storage, during an emergency freight car shortage that the ICC, exercising its expertise, found to exist. Pp. 187–191.

365 F. Supp. 609, reversed.

DOUGLAS, J., wrote the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, *post*, p. 191.

Charles H. White, Jr., argued the cause for appellant. With him on the brief were *Fritz R. Kahn* and *Betty Jo Christian*.

Seymour L. Coblens argued the cause and filed a brief for appellees.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. CHIEF JUSTICE BURGER.

This is an appeal from a judgment of a three-judge District Court, 28 U. S. C. § 1253, which held invalid an order of the Interstate Commerce Commission promul-

**James H. Clarke* filed a brief for Western Railroad Traffic Assn. as *amicus curiae* urging reversal.

gating a car Service Order [1] under § 1 (15) of the Interstate Commerce Act, as amended, 41 Stat. 476, 49 U. S. C. § 1 (15).[2] *Oregon Pacific Industries* v. *United States,* 365 F. Supp. 609 (Ore. 1973).

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[1] This Service Order by its original terms was to expire July 31, 1973, unless otherwise modified or changed by the Commission. 38 Fed. Reg. 12606. The Commission twice extended the deadline, *id.*, at 19831, 31681, and on April 11, 1974, made it effective "until further order of the Commission," 39 Fed. Reg. 13971, on each occasion having found "good cause" for the extension. The April 11 amendment also suspended the Service Order indefinitely, effective April 15, 1974.

The Solicitor General without citation of any authority expressed his view that the District Court's decision was correct and moved that its judgment be affirmed. The Western Railroad Traffic Association has filed an *amicus* brief taking the opposing view.

[2] Section 1 (15), 49 U. S. C. § 1 (15), provides:

"Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commis-

Lumber is often moved to market on a wholesalers' sale-in-transit schedule. Cars are sent to hold points, where in time reconsignment orders are received for shipment to customers of wholesalers. The tariffs allow indefinite holding, subject to demurrage charges for detention in excess of 24 hours, but the Commission found that these demurrage charges never discouraged shippers from lengthy holding of cars. In 1973 there was, according to the Commission, a transportation "emergency" which required "immediate action to promote car service in the interest of the public and the commerce of the people." Accordingly, on May 8, 1973, the Commission, *sua sponte,* without notice and hearing, entered its Service Order No. 1134 which limited the hold time at reconsignment points to five days (120 hours), exclusive of Saturdays, Sundays, and holidays. If the lumber cars were held at reconsignment points longer than five working days, the reconsignment privilege would be lost and the shippers would be subject to local or joint tariff rates from the point of origin to the hold point, and from the hold point to the ultimate destination.

The District Court held that there were four categories of emergency action which the Commission could take under § 1 (15):

> "(a) to suspend . . . rules, regulations, or practices then established with respect to car service . . . ,

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sion may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded."

"(b) to make . . . directions with respect to car service . . . during such emergency as . . . will best promote . . . service . . . [and provide compensation as between carriers].

"(c) to require . . . common use of terminals, . . . and

"(d) to give directions for preference or priority in transportation . . . ."

The District Court held that the Commission's authority under (b), (c), or (d) would not support the order in this case and that the order could be sustained, if at all, only under (a). It concluded that (a) was not adequate since the challenged order did not "suspend" any rule or regulation "with respect to car service." It reasoned that the order "condones the practice of sales-in-transit" for an indefinite time but requires shippers employing the practice to pay a higher rate to the carriers than the demurrage rate under the prior order. That was, in its view, a rate order having no place under § 1 (15), which gives the Commission power to act *sua sponte* in an "emergency" in a narrow group of cases. 365 F. Supp., at 612.

The District Court pointed out that § 1 (10) defines "car service" as "the use . . . movement . . . and return of . . . cars . . . used in the transportation of property . . . by any carrier by railroad"; and it emphasized that " 'car service' connotes the use to which the vehicles of transportation are put [by a carrier]; not the transportation service rendered by means of them," 365 F. Supp., at 611; *Peoria & P. U. R. Co.* v. *United States,* 263 U. S. 528, 533. We emphasized in *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U. S. 742, 743, that car service rules dealt with the management of "a single common pool" of cars "used by all roads," and that they pertain to railroad use

of cars. Since "railroad use" involves shippers, we think the District Court read § 1 (15) too narrowly.

We noted in *Allegheny-Ludlum* that § 1 (15) traces back to the Esch Car Service Act of 1917, 40 Stat 101.[3] 406 U. S., at 744. The use of freight cars as warehouses—the practice which prompted the Commission to act in the present case—was one of the evils at which the original Car Service Act was aimed.

Mr. Esch, sponsor of the legislation, said: [4]

> "Another cause of car shortage is the holding of cars on the part of shippers themselves, using the car as a species of warehouse, instead of promptly unloading it. I think that is quite a universal evil throughout the United States, but it is due in some measure to the lack of warehouse and elevator facilities at the terminals.
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> . . . . .
>
> "Mr. MADDEN. If the gentleman will yield to me, I would like to ask him one question. I would like to ask the gentleman if there is any provision in this bill to compel railroad companies to pay demurrage to the shippers in case they failed to furnish the cars within the time they were required for the shipment of the goods?
>
> "Mr. ESCH. The gentleman means reciprocal demurrage?
>
> "Mr. MADDEN. This gives the Interstate Commerce Commission the right to authorize them to charge certain demurrage of the shipper if he fails to unload the car. Ought not the shipper to have a claim against the railroad company in case they fail to furnish the cars?

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[3] See H. R. Rep. No. 18, 65th Cong., 1st Sess.; S. Rep. No. 43, 65th Cong., 1st Sess.

[4] 55 Cong. Rec. 2020–2021.

"Mr. ESCH. I have no doubt under the proposed amendment, in case of emergency, the commission could make any rules or regulations that they saw fit that would promote the transit of freight, because the power is very broad, and necessarily so."

And the Reports make clear that one aim of the Act was "to the end that the public may receive the best possible service in transportation." [5] Car shortages, it was found, resulted in short supplies of basic foods in the markets "with attendant high prices." [6] The interests of shippers and consumers—not the carriers alone—were very much in the forefront.

As we have noted, *Peoria & P. U. R. Co., supra,* emphasized that the car service authority extends to the "use" of cars and not to a "transportation service," but there the issue was whether one carrier was bound to perform switching services for another carrier. The Court held that it was not; power over the "use" of cars, however, was left undisturbed. In this connection it is obvious that a shipper by rail does not "rent" a vehicle as do shippers by truck. The cars are all "used" under the management of carriers, who naturally receive directions or requests from shippers. The cars cannot be used efficiently to serve the needs of shippers and consumers if they are used not as carriers but as warehouses.

In *Turner Lumber Co.* v. *Chicago, M. & St. P. R. Co.,* 271 U. S. 259, demurrage to prevent "undue detention" of cars "loaded with lumber held for reconsignment" was fixed by the Commission without notice. The Court, speaking through Mr. Justice Brandeis, upheld the charge saying: "All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car effi-

[5] S. Rep., *supra,* n. 3, at 2.

[6] H. R. Rep., *supra,* n. 3, at 1.

ciency by providing a deterrent against undue detention." *Id.*, at 262. In *Iversen* v. *United States*, 63 F. Supp. 1001, aff'd *per curiam*, 327 U. S. 767, the Commission entered a car Service Order limiting reconsignment privileges to a specific number of days and providing that cars held in excess of that time would be subject to the sum of the local rates from origin to reconsignment point to destination.[7] It was held that the demurrage item was a "rule" respecting "car service" within the meaning of § 1 (15). The holding in *Iversen* was implicit in the holding in *Turner*.[8]

The District Court suggested that the Service Order was invalid because its effect was to "fix" rates and charges during an emergency—a power not covered by § 1 (15). That precise point was raised in *Iversen*, 63 F. Supp., at 1006, and the ruling, which we affirmed, was *contra*. Suspending or changing demurrage charges

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[7] *Iversen* v. *United States*, involved four Service Orders of the Commission. Service Order No. 396 in that case was on all fours with the one in the instant case. In *Iversen*, Judge Prettyman, speaking for a three-judge District Court, said:

"[D]emurrage charges are in part compensation and in part penalty; . . . in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are sui generis. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars. From the beginning they have been sustained as rules and regulations. They could not have been sustained as carrier charges or as penalties. As an integral part of the rules and regulations in respect to car service, they fall within the provisions of Section 1 (15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing, issue, effective for a limited time, orders in respect to these charges." 63 F. Supp., at 1005–1006.

[8] The District Court distinguished *Turner* on the ground that it involved a "demurrage tariff duly filed," 271 U. S., at 260. But it was filed by reason of § 1 (15) during an "emergency" and, as in the present case, "without notice." 271 U. S., at 260.

may increase the transportation charges; but, as *Turner* makes clear, demurrage charges have a dual purpose; and it is enough if one of them is a deterrent against undue detention of cars. As we said in *Turner,* at times the cause of "undue detention" of freight cars is that they are used "as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein." 271 U. S., at 262. The substitution of tariff rates already fixed and on file for the old demurrage rate is not an unreasonable method of accelerating the movement of freight cars. That was the aim and purpose of the present Service Order; and it was promulgated in an "emergency" [9] which the Commission, using its expertise, found to exist. We cannot say the order was unreasonable on the record before us. Insofar as appellees raise questions of unfairness, they are precluded by the opinions of Mr. Justice Holmes in *Avent* v. *United States,* 266 U. S. 127, and of Mr. Justice Brandeis in *Turner Lumber Co.* v. *Chicago, M. & St. P. R. Co., supra,* which disposed of due process questions under § 1 (15). We therefore hold that the Commission had the power to promulgate Service Order No. 1134 summarily.[10]

Reversed.

MR. JUSTICE POWELL, concurring.

I am in agreement with the Court's opinion that the Interstate Commerce Commission had the power under

[9] A car Service Order of the Commission issued July 25, 1922, because of an "emergency" without notice and hearing was sustained in *Avent* v. *United States,* 266 U. S. 127, against the claim that the order violated the Fifth Amendment.

[10] This is the only question we decide today. The Commission's present obligation with respect to the promulgation of car service rules, the issue that concerns our Brother POWELL, has not been raised by counsel here or in the court below, and, accordingly, is a matter we do not address.

§ 1 (15) summarily to take the action which is the subject of this litigation. I believe, however, that in addition to reversing the judgment of the District Court, we should direct that the case be remanded for a prompt proceeding under § 1 (14) of the Act.

The Commission entered Service Order No. 1134 on May 8, 1973, without notice, hearing, or an opportunity by interested parties to submit evidence or grounds of objection. The Commission found, as it had to under § 1 (15):

> "[A]n emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest . . . ."

The Commission's counsel stated at oral argument that while the car shortage problem has a long history, the present order was in response to a particularly sharp but temporary increase in the severity of the problem. Counsel acknowledged, however, that this temporary emergency has subsided and that the order has been maintained in effect largely because of this litigation.[1]

Summary action is justified by the need to prevent imminent and severe public harm, harm that could not be avoided were action delayed. In authorizing this type of action, Congress implicitly concluded that avoidance of the public harm justifies bypassing normal procedures.

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[1] Although originally drawn to expire July 31, 1973, the Commission later continued it in effect, while suspending its application, "until further order of the Commission." 39 Fed. Reg. 13971. The order was vacated, however, by the District Court on October 18, 1973, some five and a half months after its promulgation. Presumably, our reversal of the District Court will allow the Commission, in its discretion, to lift the suspension of the order without any renewed finding of emergency.

But the justification for summary action ends with the emergency that called it forth.

No reason has been given us why the normal procedures with respect to "car service" rules under § 1 (14) should not now be followed.[2] Although these do not require a full adversary hearing, due notice must be given all interested parties, with the opportunity to object, submit evidence, and file briefs in support of their position. *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742 (1972).

The Court's reversal of the District Court's decision, without more, will result in the vacating of its order of October 18, 1973, restraining enforcement of the Commission's emergency order of May 8, 1973. Absent the restraining order of the District Court, the emergency car service rules apparently will remain in effect. I think it unfortunate to leave the case in this posture. Accordingly, in addition to reversing the judgment of the District Court, I would direct that the case be remanded to the Commission with directions that it proceed promptly in accordance with the requirements of § 1 (14) to determine what changes, if any, are required in the car service rules.

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[2] The procedural safeguards afforded by § 1 (14), and which the Commission must follow absent an emergency, not only afford protection to the interests of private parties affected by agency action; they also insure that the agency has before it the information necessary to make a decision reasonably accommodating diverse and often competing public interests. Summary action may result in the imposition of hardships which, upon a more adequate consideration, will prove to have been unnecessary. See Freedman, Summary Action by Administrative Agencies, 40 U. Chi. L. Rev. 1, 27–30 (1972).

ANTOINE ET UX. *v.* WASHINGTON

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 73–717. Argued December 16, 1974—Decided February 19, 1975

Appellant Indians were convicted of state statutory game violations that had allegedly been committed in an area of a former Indian reservation that the tribe had ceded to the Government by an Agreement made in 1891, later ratified and implemented by Congress, one of whose provisions (Art. 6), relied upon as a defense by appellants, specified that the hunting rights of Indians in common with other persons would not be taken away or abridged. The State Supreme Court, upholding the lower court's rejection of appellants' defense, held that Congress was not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract, to which as here the State was not a party, between the Executive Branch and an Indian tribe; that in any event the federal implementing statutes (which did not mention Art. 6) did not render the State's game laws inapplicable to the Indian beneficiaries of the Agreement; and that Art. 6 was merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians also would be permitted to hunt there. *Held:*

1. The ratifying legislation must be construed in the light of the longstanding canon of construction that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. Pp. 199–200.

2. The Supremacy Clause precludes application of the state game laws here since the federal statutes ratifying the 1891 Agreement between the Executive Branch and the Indian tribe are "Laws of the United States . . . made in Pursuance" of the Constitution and therefore like all "Treaties made" are made binding upon affected States. Nor does the fact that Congress had abolished the contract-by-treaty method of dealing with Indian tribes affect Congress' power to *legislate* on the problems of Indians, including legislation ratifying contracts between the Executive Branch with Indian tribes to which affected States were not parties. *Choate* v. *Trapp,* 224 U. S. 665; *Perrin* v. *United States,* 232 U. S. 478. Pp. 200–204.

3. In ratifying the Agreement pursuant to its plenary constitutional powers Congress manifested no purpose of subjecting the

rights conferred upon the Indians to state regulation, and in view of the unqualified ratification of Art. 6 any state qualification of those rights is precluded by the Supremacy Clause. Pp. 204–205.

4. Although the State is free to regulate non-Indian hunting rights in the ceded area, the ratifying legislation must be construed to exempt the Indians from like state control or Congress would have preserved nothing that the Indians would not have had without the legislation, which would have been "an impotent outcome to [the] negotiations," *United States* v. *Winans,* 198 U. S. 371, 380. Pp. 205–206.

82 Wash. 2d 440, 511 P. 2d 1351, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post,* p. 208. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined, *post,* p. 213.

Mason D. Morisset argued the cause and filed a brief for appellants.

Joseph Lawrence Coniff, Jr., Assistant Attorney General of Washington, argued the cause for appellee. With him on the briefs were *Slade Gorton,* Attorney General, and *James M. Johnson,* Assistant Attorney General.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The appellants, husband and wife, are Indians. They were convicted in the Superior Court of the State of Washington [1] of the offenses of hunting and possession

**Solicitor General Bork, Assistant Attorney General Johnson, Louis F. Claiborne, Harry R. Sachse,* and *Edmund B. Clark* filed a brief for the United States as *amicus curiae* urging reversal.

[1] The appellant husband is an enrolled member of the Confederated Tribes of the Colville Indian Reservation. Tribes that formed the Confederated Tribes included the Colville, Columbia, San Poil, Okanogan, Nez Perce, Lake, Spokane, and Coeur d'Alene. Appellant wife is a Canadian Indian and is not enrolled in the United States. We do not deal, however, with whether her case

of deer during closed season in violation of Wash. Rev. Code §§ 77.16.020 and 77.16.030 (1974).[2] The offenses occurred on September 11, 1971, in Ferry County on unallotted non-Indian land in what was once the north half of the Colville Indian Reservation.[3] The Colville Confederated Tribes ceded to the United States that northern half under a congressionally ratified and adopted Agreement, dated May 9, 1891. Article 6 of that ratified Agreement provided expressly that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged." [4] Appellants' defense was that con-

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is for that reason distinguishable from her husband's since the State Supreme Court drew no distinction between them. Moreover, appellee State conceded at oral argument in this Court that reversal of the husband's conviction would require reversal of the wife's conviction. Tr. of Oral Arg. 22.

[2] Washington Rev. Code § 77.16.020 provides in pertinent part:

"It shall be unlawful for any person to hunt . . . game animals . . . during the respective closed seasons therefor. . . .

"Any person who hunts . . . deer in violation of this section is guilty of a gross misdemeanor . . . ."

Section 77.16.030 provides in pertinent part:

"It shall be unlawful for any person to have in his possession . . . any . . . game animal . . . during the closed season . . .

"Any person who has in his possession . . . any . . . deer . . . in violation of the foregoing portion of this section is guilty of a gross misdemeanor . . . ."

[3] The original reservation was over 3 million acres "bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions." Exec. Order of July 2, 1872; 1 C. Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904); see also *Seymour* v. *Superintendent,* 368 U. S. 351, 354 (1962).

[4] Article 6 provided in full:

"It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy

gressional approval of Art. 6 excluded from the cession and retained and preserved for the Confederated Tribes the exclusive, absolute, and unrestricted rights to hunt and fish that had been part of the Indians' larger rights in the ceded portion of the reservation, thus limiting governmental regulation of the rights to federal regulation and precluding application to them of Wash. Rev. Code §§ 77.16.020 and 77.16.030. The Supreme Court of Washington held that the Superior Court had properly rejected this defense and affirmed the convictions, 82 Wash. 2d 440, 511 P. 2d 1351 (1973). We noted probable jurisdiction, 417 U. S. 966 (1974). We reverse.

I

President Grant established the original Colville Indian Reservation by Executive Order of July 2, 1872. Washington became a State in 1889, 26 Stat. 1552, and the next year, by the Act of Aug. 19, 1890, 26 Stat. 355, Congress created the Commission that negotiated the 1891 Agreement.[5] By its terms, the Tribes ceded the

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without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

The status of the southern half of the Colville Reservation was considered in *Seymour* v. *Superintendent, supra.* At issue in this case are the residual rights to hunt and fish on the northern half preserved by the above Art. 6.

[5] The Colville Indian Commission was composed of Chairman Fullerton and Commissioners Durfur and Payne. The Commission first met on May 7, 1891, with representatives of the Confederated Tribes at Nespelem, Wash., on the reservation to discuss "a sale of a part of Reservation. . . ." During succeeding days, Ko-Mo-Del-Kiah, Chief of the San Poil, strongly opposed the sale of any part of the reservation, but Antoine, Chief of the Okanogan and great-grandfather of appellant Alexander Antoine, Moses, Chief of the Columbia, and Joseph, Chief of the Nez Perce, favored the

northern half of the reservation in return for benefits which included the stipulations of Art. 6 and the promise of the United States to pay $1,500,000 in five installments. The Agreement was to become effective, however, only "from and after its approval by Congress." Congressional approval was given in a series of statutes. The first statute was the Act of July 1, 1892, 27 Stat. 62, which "vacated and restored [the tract] to the public domain . . . ," and "open[ed] . . . [it] to settlement . . . ." The second statute came 14 years later, the Act of June 21, 1906, 34 Stat. 325, 377–378. That statute in terms "carr[ied] into effect the agreement," and authorized the appropriation of the $1,500,000. Payment of the $1,500,000 was effected by five subsequent enactments from 1907 to 1911, each of which appropriated $300,000 and recited in substantially identical language that it was part payment "to the Indians on the Colville Reservation, Washington, for the cession of land opened to settlement by the Act of July first, eighteen hundred and ninety-two . . . being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act of June twenty-first, nineteen hundred and six, *ratifying the agreement* ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one . . . ." (Emphasis supplied.) 34 Stat. 1015, 1050–1051 (1907); 35 Stat. 70, 96 (1908); 35 Stat. 781, 813 (1909); 36 Stat. 269, 286 (1910); 36 Stat. 1058, 1075 (1911).[6]

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proposed 1891 Agreement as fair. At a later meeting on May 23 at Marcus on the reservation, Barnaby, Chief of the Colville, and the Chief of the Lake agreed to the proposed sale. Minutes of Colville Indian Commission Concerning Negotiation for the 1891 Agreement of Sale, National Archives Document 21167.

[6] The delay in approval was occasioned by the initial reluctance of the House to ratify the Agreement without certain changes, 23

The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. *Worcester* v. *Georgia,* 6 Pet. 515 (1832). See also *The Kansas Indians,* 5 Wall. 737, 760 (1867); *United States* v. *Kagama,* 118 U. S. 375

Cong. Rec. 3840 (1892), and by doubts raised in the Senate whether the Indians had title to the reservation, since it was created by Executive Order. See S. Rep. No. 664, 52d Cong., 1st Sess., 2 (1892). The Interior Department reported some years later that the doubts were unfounded. S. Rep. No. 2561, 59th Cong., 1st Sess., 137, 139 (1906). A bill passed by the House in 1891 replaced the $1,500,000 lump sum with a payment of $1.25 per acre, to be paid from the proceeds of sales of land opened for homesteading. The Senate disagreed, however, and passed a bill that ultimately became the Act of July 1, 1892. That Act makes no mention either of the consideration to be paid, or of the hunting and fishing rights preserved. Many protests were thereupon made that Congress had failed to live up to the terms of the Agreement. These included protests from the Department of the Interior, S. Rep. No. 2561, *supra,* at 137, 139, and from Chairman Fullerton, who had become Chief Justice of the Supreme Court of Washington. In a letter, *id.,* at 140, the Chief Justice said:

"It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie to earth, I can not help a feeling of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation."

The many protests finally bore fruit and Congress enacted the Act of June 21, 1906, and the five subsequent installment Acts. The Colville claims required the services of 16 lawyers from the States of Washington, Pennsylvania, and Georgia, and the District of Columbia. They recovered judgments against the United States for their services in the Court of Claims. *Butler and Vale* v. *United States,* 43 Ct. Cl. 497 (1908).

(1886); *Choctaw Nation* v. *United States,* 119 U. S. 1, 28 (1886); *United States* v. *Winans,* 198 U. S. 371, 380–381 (1905); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912); *Menominee Tribe* v. *United States,* 391 U. S. 404, 406 n. 2 (1968). In *Choate* v. *Trapp, supra,* also a case involving a ratifying statute, the Court stated: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." 224 U. S., at 675. See also *Seminole Nation* v. *United States,* 316 U. S. 286, 296 (1942); *Morton* v. *Ruiz,* 415 U. S. 199, 236 (1974). Thus, even if there were doubt, and there is none, that the words "[t]o carry into effect the [1891] agreement," in the 1906 Act, and the words "ratifying the [1891] agreement," in the 1907–1911 laws, ratified Art. 6, application of this canon would require that we construe the series of statutes as having ratified that article.

II

Although admitted to statehood two years earlier, the State of Washington was not a party to the 1891 Agreement. The opinion of the State Supreme Court relies upon that fact to attempt a distinction for purposes of the Supremacy Clause [7] between the binding result upon

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[7] Article VI, cl. 2, of the Constitution, the Supremacy Clause, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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."

the State of ratification of a contract by *treaty* effected by concurrence of two-thirds of the Senate, Art. II, § 2, cl. 2, and the binding result of ratification of a contract effected by legislation passed by the House and the Senate. The opinion states that "[o]nce ratified, a *treaty* becomes the supreme law of the land" (emphasis supplied), but that the ratified 1891 Agreement was a mere contract enforceable "only against those party to it," and "not a treaty . . . [and] not the supreme law of the land." 82 Wash. 2d, at 444, 451, 511 P. 2d, at 1354, 1358. The grounds of this attempted distinction do not clearly emerge from the opinion. The opinion states, however: "The statutes enacted by Congress in implementation of this [1891] agreement . . . are the supreme law if they are within the power of the Congress to enact . . . ." *Id.*, at 451, 511 P. 2d, at 1358. In the context of the discussion in the opinion we take this to mean that the Congress is not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract between the Executive Branch and an Indian tribe to which the State is not a party. The fallacy in that proposition is that a legislated ratification of an agreement between the Executive Branch and an Indian tribe is a "[Law] of the United States . . . made in Pursuance" of the Constitution and, therefore, like "all Treaties made," is made binding upon affected States by the Supremacy Clause.

The opinion seems to find support for the attempted distinction in the fact that, in 1891, the Executive Branch was not authorized to contract by treaty with Indian tribes as sovereign and independent nations. *Id.*, at 444, 511 P. 2d, at 1354. Twenty years earlier, in 1871, 16 Stat. 544, 566, Congress had forbidden thereafter recognition of Indian nations and tribes as sovereign independent nations, and thus had abrogated the con-

tract-by-treaty method of dealing with Indian tribes.[8] The Act of 1871 resulted from the opposition of the House of Representatives to its practical exclusion from any policy role in Indian affairs. For nearly a century the Executive Branch made treaty arrangements with the Indians "by and with the Advice and Consent of the Senate," Art. II, § 2, cl. 2. Although the House appropriated money to carry out these treaties, it had no voice in the development of substantive Indian policy reflected in them. House resentment first resulted in legislation in 1867 repealing "all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes," Act of Mar. 29, 1867, 15 Stat. 7, 9, but this was repealed a few months later, Act of July 20, 1867, 15 Stat. 18. After further unsuccessful House attempts to enter the field of federal Indian policy, the House refused to grant funds to carry out new treaties. United States Department of the Interior, Federal Indian Law 211 (1958). Finally, the Senate capitulated and joined the House in passage of the 1871 Act as a rider to the Indian Appropriation Act of 1871. Federal Indian Law, *supra*, at 138.[9]

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[8] The Act of Mar. 3, 1871, 16 Stat. 544, 566, now codified as 25 U. S. C. § 71, provides:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired."

[9] Former Commissioner of Indian Affairs Walker summarized the struggle as follows:

"In 1871, however, the insolence of conscious strength, and the growing jealousy of the House of Representatives towards the prerogative—arrogated by the Senate—of determining, in connection with the executive, all questions of Indian right and title, and of committing the United States incidentally to pecuniary obligations

This meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty. *Elk* v. *Wilkins,* 112 U. S. 94 (1884); *In re Heff,* 197 U. S. 488 (1905). The change in no way affected Congress' plenary powers to *legislate* on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties. Several decisions of this Court have long settled that proposition. In *Choate* v. *Trapp,* 224 U. S. 665 (1912), the Court held that tax exemptions contained in an 1897 agreement ratified by Congress between the United States and Indian tribes as part of a cession of Indian lands were enforceable against the State of Oklahoma, which was not a party to the agreement. In *Perrin* v. *United States,* 232 U. S. 478 (1914), the Court enforced a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on land in South Dakota ceded and relinquished to the United States, although South Dakota was not a party to the agreement. The Court expressly rejected the contention that the power to regulate the sale of intoxicating liquors upon all ceded lands rested exclusively in the State. Rather, because Congress was empowered, when securing the cession of part of an Indian reservation within a State, to prohibit the sale of intoxicants upon the ceded lands, "it follows that the State possesses no exclusive control over the subject and that the congressional prohibition is supreme." *Id.,* at 483. See also *Dick* v. *United States,*

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limited only by its own discretion, for which the House should be bound to make provision without inquiry, led to the adoption, after several severe parliamentary struggles, of the declaration . . . that 'hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty.'" Federal Indian Law 211–212, citing F. Walker, The Indian Question (1874).

208 U. S. 340 (1908). These decisions sustained the ratified agreements as the exercise by Congress of its "plenary power . . . to deal with the special problems of Indians [that] is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation." *Morton* v. *Mancari*, 417 U. S. 535, 551–552 (1974); see also *Morton* v. *Ruiz*, 415 U. S., at 236.

Once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, the supreme law of the land. Congress could constitutionally have terminated the northern half of the Colville Indian Reservation on the terms and conditions in the 1891 Agreement, even if that Agreement had never been made. *Mattz* v. *Arnett*, 412 U. S. 481 (1973). The decisions in *Choate, Perrin,* and *Dick, supra,* settle that Congress, by its legislation ratifying the 1891 Agreement, constituted those provisions, including Art. 6, "Laws of the United States . . . made in Pursuance" of the Constitution, and the supreme law of the land, "superior and paramount to the authority of any State within whose limits are Indian tribes." *Dick* v. *United States, supra,* at 353.[10]

III

The opinion of the State Supreme Court also holds that in any event the implementing statutes cannot be

[10] Washington Rev. Code § 37.12.060, which assumes limited jurisdiction over Indians, expressly provides that the law shall not deprive any Indian of rights secured by agreement.

"Nothing in this chapter . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, *agreement,* statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof." (Emphasis added.)

construed to render Wash. Rev. Code §§ 77.16.020 and 77.16.030 inapplicable to Indian beneficiaries of the Agreement since the implementing statutes "make no reference to the provision [Art. 6] relied upon by the appellants." 82 Wash. 2d, at 451, 511 P. 2d, at 1358. The opinion reasons: "[I]f it was thought that state regulation but not federal regulation would constitute an abridgement, an express provision to that effect should have been inserted, but only after the consent of the state had been sought and obtained." *Id.*, at 448, 511 P. 2d, at 1357. This reasoning is fatally flawed. The proper inquiry is not whether the State was or should have been a consenting party to the 1891 Agreement, but whether appellants acquired federally guaranteed rights by congressional ratification of the Agreement. Plainly appellants acquired such rights. Congress exercised its plenary constitutional powers to legislate those federally protected rights into law in enacting the implementing statutes that ratified the Agreement. No congressional purpose to subject the preserved rights to state regulation is to be found in the Acts or their legislative history. Rather, the implementing statutes unqualifiedly, "carr[ied] into effect" and "ratif[ied]" the explicit and unqualified provision of Art. 6 that "the right to hunt and fish . . . shall not be taken away or in anywise abridged." State qualification of the rights is therefore precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State was required to achieve that result.

IV

Finally, the opinion of the State Supreme Court construes Art. 6 as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to

hunt there. 82 Wash. 2d, at 449–450, 511 P. 2d, at 1357–1358. But the provision of Art. 6 that the preserved rights are not exclusive and are to be enjoyed "in common with all other persons," does not support that interpretation or affect the Supremacy Clause's preclusion of qualifying state regulation. Non-Indians are, of course, not beneficiaries of the preserved rights, and the State remains wholly free to prohibit or regulate non-Indian hunting and fishing. The ratifying legislation must be construed to exempt the Indians' preserved rights from like state regulation, however, else Congress preserved nothing which the Indians would not have had without that legislation. For consistency with the canon that the wording is not to be construed to the prejudice of the Indians makes it impermissible in the absence of explicit congressional expression, to construe the implementing Acts as "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *United States* v. *Winans,* 198 U. S., at 380; *Puyallup Tribe* v. *Department of Game* (*Puyallup I*), 391 U. S. 392, 397–398 (1968). *Winans* involved a treaty that reserved to the Indians in the area ceded to the United States "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." 198 U. S., at 378. *Puyallup I* considered a provision that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . ." 391 U. S., at 395. The Court held that rights so preserved "may, of course, not be qualified by the State . . . ." *Id.,* at 398; 198 U. S., at 384. Article 6 presents an even stronger case since Congress' ratification of it included the flat prohibition that the right "shall not be taken away or in anywise abridged."

V

In *Puyallup I, supra,* at 398, we held that although, these rights "may . . . not be qualified by the State, . . . the manner of fishing [and hunting], the size of the take, the restriction of commercial fishing [and hunting], and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." The "appropriate standards" requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, *Washington Game Dept.* v. *Puyallup Tribe,* 414 U. S. 44 (1973); *Tulee* v. *Washington,* 315 U. S. 681, 684 (1942), *and* that its application to the Indians is necessary in the interest of conservation.

The United States as *amicus curiae* invites the Court to announce that state restrictions "cannot abridge the Indians' federally protected rights without [the State's] demonstrating a compelling need" in the interest of conservation. Brief for United States as *Amicus Curiae* 16. We have no occasion in this case to address this question. The State of Washington has not argued, let alone established, that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer. See *Hunt* v. *United States,* 278 U. S. 96 (1928).[11]

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[11] Appellants apparently claim no right to hunt on fenced private property. The State Supreme Court stated:

"Counsel . . . conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgment of that right . . . ." 82 Wash. 2d 440, 448, 511 P. 2d 1351, 1356 (1973).

A claim of entitlement to hunt on fenced or posted private land

The judgment of the Supreme Court of the State of Washington sustaining appellants' convictions is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

I agree with the opinion of the Court that Congress ratified the cession Agreement together with all the rights secured by the Indians, thus putting the Agreement under the umbrella of the Supremacy Clause.

In 1872 President Grant, by Executive Order,[1] established a reservation for Indian tribes which came to be known as the Colville Confederated Tribes. By the Act of Aug. 19, 1890,[2] a Commission was appointed by the President to negotiate with the Tribes for "the cession of such portion of said reservation as said Indians may be willing to dispose of . . . ." On May 9, 1891, the Commission entered into an Agreement with the Tribes by which the latter ceded to the United States "all their right, title, claim and interest in" a tract of land constituting approximately the northern half of the reservation. Article 6 of the Agreement, however, provided that "the *right to hunt* and fish *in common with* all other persons on lands not allotted to said Indians *shall not be taken away or in anywise abridged.*" (Italics added.)

In 1892 the Congress passed an Act restoring the northern tract to the public domain and opening it to settlement.[3] The Agreement had promised the Indians

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without prior permission of the owner would raise serious questions not presented in this case.

[1] Exec. Order of July 2, 1872; 1 C. Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904).

[2] 26 Stat. 355.

[3] 27 Stat. 62.

payment of $1,500,000 in cash by installments. The 1892 Act made no reference to this promise or to the rights to fish and hunt. Therefore there was agitation for further action by Congress. In 1906 and succeeding years, Congress eventually acted, authorizing and appropriating the money in five installments.[4] Each Act is essentially the same, appropriating the sum of $300,000:

> "In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by [the 1892 Act], . . . being a part of the full sum set aside . . . in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, *ratifying the agreement ceding said land to the United States* under date of May ninth, eighteen hundred and ninety-one . . . ." [5] (Italics added.)

The Agreement and its ratification were made after the practice of making treaties with Indian tribes ended.[6] Yet "the Laws of the United States" as well as "all Treaties" are covered by the Supremacy Clause of the Constitution, Art. VI, cl. 2. We so held recently in

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[4] The authorization appears at 34 Stat. 325, 377–378. The appropriations appear at 34 Stat. 1015, 1050–1051; 35 Stat. 70, 96, 781, 813; 36 Stat. 269, 286, 1058, 1075.

[5] The quoted language is from the 1907 Appropriations Act, 34 Stat. 1050–1051.

[6] See Act of Mar. 3, 1871, 16 Stat. 544, 566, now codified as 25 U. S. C. § 71:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired."

Morton v. *Mancari,* 417 U. S. 535 (1974); *Morton* v. *Ruiz,* 415 U. S. 199 (1974). And see *Choate* v. *Trapp,* 224 U. S. 665 (1912); *Perrin* v. *United States,* 232 U. S. 478 (1914).

The pressures on Congress to live up to its Agreement were great and are discussed in S. Rep. No. 2561, 59th Cong., 1st Sess., 134–140 (1906). Would Congress stand by the "Agreement" of 1891? The head of the Commission that negotiated the Agreement with the Indians was Mark A. Fullerton, who in 1904 was Chief Justice of the Supreme Court of Washington. He stated his views:

> "I can not understand why the right of the Indians to this land is not just as sacred as it would have been had it been awarded to them under the most solemn treaty. When they entered upon the reservation they gave up forever land to which they had title as absolute as any band of Indians ever had to any land; and even though the exchange was a forced one, yet exchange it was, and the Government was, under its promise, as I believe, in all honor and right bound to respect it as an exchange and protect the Indians in their title accordingly. Legally, therefore, I can see no difference between the rights of these Indians to compensation for the land taken and the rights of the Puyallup, the Wyakimas, and the Nez Perces to the lands on their reservations which the Government has taken, and which the right to compensation was not even questioned; and, morally, certainly it would be hard to make a distinction.
>
> "It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not

> to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie to earth, I can not help a feeling of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation." [7]

The "right to hunt and fish in common with all other persons on lands not allotted to said Indians" plainly covers land ceded and held as public lands and also land ceded and taken up by homesteaders, for the reservation of the "right" contains no exception. As to all such lands the 1891 Agreement seems clear—the hunting and fishing right "shall not be taken away or in anywise abridged." As the Solicitor General says, that is "strong language." It has long been settled that a grant of rights—in the first case, fishing rights—on an equal footing with citizens of the United States would not be construed as a grant only of such rights as other inhabitants had. As stated in *United States* v. *Winans,* 198 U. S. 371, 380 (1905): "This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." That was our view in *Puyallup Tribe* v. *Department of Game,* 391 U. S. 392 (1968). A "right" which the Federal Government grants an Indian may "not be qualified or conditioned by the State," *id.,* at 399.

I agree with the Court that conservation measures, applicable to all, are available to the State, *id.,* at 398–403; but discrimination against the Indians by conservation measures is not permissible, *Washington Game Dept.* v. *Puyallup Tribe,* 414 U. S. 44, 48 (1973). In any event no conservation interest has been tendered here.

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[7] S. Rep. No. 2561, 59th Cong., 1st Sess., 140 (1906).

The record in this case is devoid of any findings as to conservation needs or conservation methods. The State boldly claims that its power to exact a hunting license from all hunters qualifies even the Indians' right to hunt granted by Congress, irrespective of any conservation need. A State may do that when it comes to non-Indians or to Indians with no federal hunting rights, *Lacoste* v. *Department of Conservation,* 263 U. S. 545, 549 (1924). But Indians with federal hunting "rights" are quite different.

An effort is made to restrict these hunting rights to public lands, not to tracts ceded by this Agreement and taken up by private parties. The Agreement, however, speaks only of the ceded tract, not the ultimate disposition of the several parts of it. We would strain hard to find an implied exception for parcels in the ceded tract that ended in private ownership. The general rule of construction governing contracts or agreements with Indians is apt here:

> "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . . ." *Choate* v. *Trapp,* 224 U. S., at 675.

Whether the result would be different if the contest were between the owner of the private tract and the Indian is a question that need not be reached. We have here only an issue involving the power of a State to impose a regulatory restraint upon a right which Congress bestowed on these Indians. Such an assertion of state power must fall by reason of the Supremacy Clause.

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

I do not agree with the Court's conclusion, *ante,* at 198, that "[c]ongressional approval was given" to the provisions of Art. 6 of the Agreement of May 9, 1891.

The Supremacy Clause of the Constitution specifies both "Laws" and "Treaties" as enactments which are the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." If the game laws enacted by the State of Washington, containing customary provisions respecting seasons in which deer may be hunted, are invalid under the Supremacy Clause, they must be so by virtue of either a treaty or a law enacted by Congress. Concededly the Agreement of 1891, between Commissioners appointed by the President and members of the Colville Confederated Tribes was not a treaty; it was not intended to be such, and Congress had explicitly provided 20 years earlier that Indian tribes were not to be considered as independent nations with which the United States could deal under the treaty power. Washington's game laws, therefore, can only be invalid by reason of some law enacted by Congress.

The Court's opinion refers us to the Act of Congress of June 21, 1906, which authorized monetary compensation to the Colvilles for the termination of the northern half of their reservation, and to a series of appropriation measures enacted during the following five years. There is, however, not one syllable in any of these Acts about Indian hunting or fishing rights, and it is fair to say that a member of Congress voting for or against them would not have had the remotest idea, even from the most careful of readings, that they would preserve Indian hunting and fishing rights. But because the language in the Act of 1906 states that it was enacted for the purpose of

"carrying out" the Agreement of 1891, and because language in subsequent appropriations Acts described the Act of 1906 as "ratifying" the Agreement of 1891, the Court concludes that Congress enacted as substantive law all 12 articles of the agreement.

The Court relies on three earlier decisions of this Court as settling the proposition that Congress could legislatively ratify the 1891 Agreement, and that once accomplished, the "legislation ratifying the 1891 Agreement, constituted those provisions . . . 'Laws of the United States . . . in Pursuance' of the Constitution, and the supreme law of the land." *Ante,* at 204. Congress *could* undoubtedly have enacted the provisions of the 1891 Agreement, but the critical question is whether it *did* so. Far from supporting the result reached by the Court in this case, the decisions of this Court in *Choate* v. *Trapp,* 224 U. S. 665 (1912), *Perrin* v. *United States,* 232 U. S. 478 (1914), and *Dick* v. *United States,* 208 U. S. 340 (1908), show instead how virtually devoid of support in either precedent or reason that result is.

Each of those cases did involve an agreement negotiated between Commissioners representing the United States and Indian bands and tribes. Each of the agreements was held to have been ratified by Congress, and its substantive provisions to have thereby been made law. But the contrast with the manner in which Congress accomplished ratification in those cases, and the manner in which it acted in this case, is great indeed.

Choate involved the Atoka Agreement negotiated between the Dawes Commission and Choctaw and Chickasaw representatives in 1897. The following year, Congress enacted the Curtis Act, 30 Stat. 495, the relevant provisions of § 29 of which are as follows:

> "That the agreement made by the Commission to the Five Civilized Tribes with commissions repre-

> senting the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed . . . ." 30 Stat. 505.

The section then proceeds to set out *in haec verba* the full text of the Atoka Agreement.

Perrin v. *United States, supra,* involved the sale of liquor on ceded land, contrary to a prohibition contained in the cession agreement negotiated with the Sioux Indians in December 1892. That agreement was ratified by Congress in an Act of Aug. 15, 1894, 28 Stat. 286, 314, in which Congress used much the same method as it had employed in *Choate:*

> "SEC. 12. The following agreement, made by . . . is hereby accepted, ratified, and confirmed."

Then followed, within the text of the Act of Congress itself, the articles of agreement *in haec verba.* Likewise, ratification of the agreement involved in *Dick, supra,* was accomplished by explicit statutory language and *in haec verba* incorporation of the articles of agreement.

The Court today treats the Act of June 21, 1906, as simply another one of these instances in which Congress exercised its power to elevate mere agreements into the supreme law of the land. But it has done so with little attention to the critical issue, that of whether Congress actually exercised this power. Whereas the exercise was manifest in *Choate, Perrin,* and *Dick,* it is evidenced in the present case by nothing more than little scraps of language, ambiguous at best, in several Acts of Congress which contain not a word of the language of Art. 6 of the 1891 Agreement. I think consideration of all of the legislative materials, including the actual language used by Congress on the occasions when it spoke, rather than the elided excerpts relied upon by the Court, show that there was no ratification of Art. 6.

The original Colville Reservation was created by Executive Order in 1872. It consisted of over three million acres lying between the Okanogan and Columbia Rivers in the northern part of the State of Washington. In 1890 Congress created a Commission to "negotiate with said Colville and other bands of Indians on said reservation for the cession of such portion of said reservation as said Indians may be willing to dispose of, that the same may be open to white settlement." 26 Stat. 336, 355. The following year Commissioners appointed by the President met with representatives of the Colville Confederated Tribes. The Agreement of May 9, 1891, was executed to "go into effect from and after its approval by Congress."

Article 1 of the Agreement provided that the northern half of the Colville Reservation, as it existed under the Executive Order of 1872, should be vacated. Article 5 provided that "in consideration of the cession surrender and relinquishment to the United States" of the northern half of the reservation, the United States would pay to the members of the tribe the sum of $1,500,000. Article 6, quoted in the opinion of the Court, contained provisions respecting tax exemption and Indian hunting and fishing rights.

The Agreement was presented to the 52d Congress for ratification, but that body adamantly refused to approve it. The characterization in the Court's opinion of the Act of July 1, 1892, 27 Stat. 62, as the "first" in a series of statutes in which congressional approval was given to the Agreement of May 9, 1891, is a bit of historical legerdemain. Doubts were expressed as to whether the Indians had title to the reservation, since it had been created by Executive Order, thus again highlighting disagreement between the Executive and Legislative Branches as to how best to deal with the Indian tribes.

The Act of July 1, 1892, vacated the northern half of the Colville Reservation, as it had been established by President Grant, "notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians," and declared that "the same shall be open to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington." 27 Stat. 63. Section 4 of the Act tracked Art. 2 of the agreement, providing that each Indian then residing on the ceded portion of the reservation should be entitled to select 80 acres of the ceded land to be allotted to him in severalty. Section 5 of the Act tracked Art. 3 of the agreement, providing that Indians then residing in the ceded portion of the reservation should have a right to occupy and reside on its remaining parts, if they chose that in preference to receiving an allotment. Section 6 of the Act tracked Art. 4 of the agreement, and concerned various school and mill sites within the ceded portion.

But conspicuous by their absence from the Act of July 1, 1892, were any provision for the payment of the $1,500,000, and any reference whatsoever to the Agreement's provisions dealing with hunting and fishing rights and immunity from taxation. Far from being the "first" of a series of Acts ratifying the entirety of the 1891 Agreement, the Act provided, in § 8:

> "That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of the said Colville Reservation, whether that hereby restored to the public domain or that still reserved by the Government for their use and occupancy." 27 Stat. 64.

The Act of July 1, 1892, became law without the sig-

nature of President Harrison. Members of the Colville Confederated Tribes became justifiably alarmed that it had terminated the northern half of the reservation without authorizing the compensation for which they had bargained. After a 14-year campaign, described in detail in the report of *Butler and Vale* v. *United States*, 43 Ct. Cl. 497 (1908), they obtained congressional relief. But the relief embodied in the statutes enacted in 1906 and subsequent years did not amount to a full adoption and ratification of the 1891 Agreement. Rather, the description of the efforts to obtain relief, as well as the legislation which resulted, demonstrates that the Indians were concerned only with the compensation promised by the 1891 Agreement, and not with whatever ancillary rights were accorded by its Art. 6.

The following excerpts from the Court of Claims opinion, which would appear to have the added authenticity that is given by contemporaneity, describe some of the events:

> "In pursuance of the [1891] agreement the lands so ceded were by act of Congress thrown open to public settlement; but no appropriation of money was made, *and that part of the agreement providing for its payment was never complied with until the passage of the act of June 21, 1906. The Indians became anxious* and, justly, quite solicitous Their appeals to the Congress subsequent to their agreement was met in 1892 by an adverse report from the Senate Committee on Indian Affairs, in which *their right to compensation as per agreement was directly challenged* by a most positive denial of their title to the lands in question.
>
> "In May, 1894, the said Colville Indians entered into a contract with Levi Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia, attorneys and

counselors at law, by the terms of which *the said attorneys were to prosecute their said claim against the United States and receive as compensation therefor 15 per cent of whatever amount they might recover.* . . . Nothing was accomplished for the Indians under the Maish-Gordon contract. Notwithstanding its expiration, however, a number of attorneys claim to have rendered efficient services and to have accomplished, by the permission and authority of the Congress and the committees thereof, *the final compliance with the agreement of 1891 and secured by the act of June 21, 1906, an appropriation covering the money consideration mentioned in said agreement.*" 43 Ct. Cl., at 514–515 (emphasis added).

The agreement which formed the basis of the suit in *Butler and Vale* was, as just described, entered into between the Colvilles and two attorneys whom they retained to press their claim. It, too, recites that the Indians' concern was directed to the Government's failure to compensate them for the northern half of the reservation:

"'And whereas the principal consideration to said Indians for the cession and surrender of said portion of the reservation was the express agreement upon the part of the United States Government to pay to said Indians 'the sum of one million five hundred thousand dollars ($1,500,000) . . .;'

"'And *whereas the United States Government has failed to comply with the terms of said agreement, and no provision has been made to pay said Indians* the amount stipulated in the said agreement for the cession of said lands;

"'And whereas the said Indians entered into said agreement with an implicit trust in the good faith

> of the United States Government, and now *most earnestly protest that their lands should not be taken from them without the payment of the just compensation stipulated in said agreement;*
>
> . . . . .
>
> "'. . . The purpose of this agreement is to secure the presentation and prosecution of the claims of said Indians *for payment for their interest in said ceded lands* and to secure the services of said Maish and Gordon as counsel and attorneys for the prosecution and collection of said claims.'" *Id.*, at 502 (emphasis added).

Similarly, the letter of protest by the Chairman of the Colville Indian Commission, *ante*, at 199 n. 6, focused solely on Congress' failure to provide the Indians "the solace of compensation."

As a result of the efforts of the Indians, their friends, and their attorneys, Congress ultimately acceded to their claim for compensation. It did so in the Act of June 21, 1906, which is the Indian Department Appropriations Act of 1906. With respect to the Colville Confederated Tribes, the Act provided as follows:

> "To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, . . . there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand [1,500,000] acres of land opened to settlement by the Act of Congress, . . . approved July first, eighteen hundred and ninety-two, the sum of one million five hundred thousand dollars [$1,500,000] . . . ." 34 Stat. 377–378.

This Act is surely the major recognition by Congress of the claims of the Colvilles, and even with the most liberal construction I do not see how it can be read to do more than authorize the appropriation of $1,500,000 to effectuate the compensation article of the 1891 Agreement. Not a word is said about tax exemption, nor about hunting and fishing rights.

The Court also relies on language in the Indian Department Appropriations Act of 1907, 34 Stat. 1015, and substantially identical language in each of the succeeding four annual Indian Department Appropriation Acts. After the usual language of appropriation, the Act goes on to provide:

> "In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an Act of Congress . . . approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one, three hundred thousand dollars . . . ." 34 Stat. 1050–1051.

Thus the Court rests its decision in this case on two legislative pronouncements. The first is the 1906 Act authorizing payment of money to the Colvilles and reciting that the authorization was made to "carry into effect" the 1891 Agreement. The second is the series of Acts appropriating funds to cover the 1906 authorization and referring to the authorization as "ratifying the agreement ceding said land." On the basis of these Acts, both of which are part of the mechanism by which Congress ex-

pends public funds, the Court has concluded that provisions of the 1891 agreement utterly unrelated to the payment of money became the supreme law of the land, even though there is no indication that the Colvilles sought any relief other than with respect to the Government's failure to pay compensation, or that Congress intended any relief affecting the *use* of land it quite plainly had determined should be returned to the public domain.

A far more reasoned interpretation of these legislative materials would begin by placing them in the context of the Executive/Legislative dispute over Indian policy and authority. A year after the signing of the 1891 Agreement, Congress clearly indicated its doubt as to whether President Grant was justified in setting aside three million acres for the Colvilles, and as to whether his Executive Order actually conveyed title. In the Act of July 1, 1892, Congress chose to take what the Indians had expressed a willingness to surrender, but to give only part of what the Commissioners had agreed the Government should give in return. The Colvilles, after a 14-year battle in and around the legislative halls of Congress, obtained the monetary relief which they sought. Sympathy with their plight should not lead us now to distort what is on its face no more than congressional response to demands for payment into congressional enactment of the entire 1891 agreement.

I would affirm the judgment of the Supreme Court of Washington.

Syllabus

UNITED STATES *v.* ITT CONTINENTAL BAKING CO.

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

No. 73–1290. Argued November 13, 1974—
Decided February 19, 1975

The civil penalty provisions of the Clayton Act, 15 U. S. C. § 21 (*l*), and the Federal Trade Commission Act, 15 U. S. C. § 45 (*l*), similarly provide in part that each separate violation of a Federal Trade Commission (FTC) cease-and-desist order issued under the respective Acts shall be a separate offense, except that in the case of a violation through "continuing failure or neglect to obey" a final order of the FTC each day of continuance of such failure shall be deemed a separate offense. After the FTC had charged the Continental Baking Co. (Continental), a bakery which later merged with respondent, with violations of § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act by various acquisitions of other bakeries, the parties agreed to a consent order prohibiting Continental from "acquiring" other bakeries. Thereafter, alleging that Continental had acquired assets in other companies in violation of this order, the Government brought suit for civil penalties to be imposed daily from the date of the contract of acquisition to the date of filing of the complaint. The District Court, while holding that the order had been violated, declined to order daily penalties, finding that the order proscribed only the initial act of acquisition, that the violations did not constitute "a continuing failure or neglect to obey" within the meaning of §§ 21 (*l*) and 45 (*l*), and that therefore only a single penalty might be imposed. The Court of Appeals affirmed that holding. *Held:* "Acquiring" as used in the consent order means both the initial transaction and the maintaining of the rights obtained without resale, and therefore violation of the order is a "continuing failure or neglect to obey" an FTC order within the meaning of §§ 21 (*l*) and 45 (*l*) and thus subject to daily penalties thereunder. Pp. 230–243.

(a) The purpose of the "continuing failure or neglect to obey" provisions of §§ 21 (*l*) and 45 (*l*), as shown by their legislative

histories, to assure that the penalty provisions would meaningfully deter violations whose *effect* is continuing and whose detrimental *effect* could be terminated or minimized by the violator at some time after initiating the violation, would be undermined and the penalty would be converted into a minor tax if violation of an order prohibiting "acquiring" assets were treated as a single violation. Pp. 230–233.

(b) Since the consent order "as it is written" supports an interpretation that the act of acquisition continues until the assets are disgorged (see (c), *infra*), there is no need to determine whether §§ 21 (*l*) and 45 (*l*) would permit the imposition of daily penalties even if the consent order must be read, as respondent claims, to proscribe only the initial act of acquisition. Pp. 233–238.

(c) Under the consent order "as it is written," "acquiring" must mean both the act of first obtaining assets and the retention and use of those assets, since to conclude otherwise would be to ignore the flexibility of the English language, as well as the circumstances surrounding the order and the context in which the parties were operating. That conclusion is supported by both the "appendix" to the parties' agreement of which the order is a part and the complaint, as proper aids for construing the order which is to be construed basically as a contract. But even without the aid of these documents, "acquiring" as used in an antitrust decree or order continues until the assets are disgorged, since "acquiring" and related words as used in the antitrust context encompass the continuing act of obtaining certain rights and treating them as one's own. Pp. 238–243.

485 F. 2d 16, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, MARSHALL, WHITE, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 243.

Deputy Solicitor General Friedman argued the cause for the United States. On the briefs were *Solicitor General Bork, Assistant Attorney General Kauper, Howard E. Shapiro,* and *George Edelstein.*

John H. Schafer argued the cause for respondent. With him on the brief was *Michael Boudin.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether violations of the prohibition of a Federal Trade Commission (FTC) consent order against "acquiring" other companies constituted single violations within the meaning of the applicable civil penalty statutes, 38 Stat. 734, as amended, 15 U. S. C. § 21 (*l*); 38 Stat. 719, as amended, 15 U. S. C. § 45 (*l*), or whether such violations constituted a "continuing failure or neglect to obey" within the meaning of those statutes, authorizing imposition of daily penalties. The United States District Court for the District of Colorado interpreted the consent order to proscribe only the initial act of acquisition and held that therefore only a single penalty might be imposed. 1972 CCH Trade Cases ¶ 73,993, p. 92,127 (Aug. 2, 1971). The Court of Appeals for the Tenth Circuit affirmed the District Court to that extent, 485 F. 2d 16 (1973). A subsequent decision of the Court of Appeals for the Eighth Circuit is in conflict, *United States* v. *Beatrice Foods Co.*, 493 F. 2d 1259 (1974), cert. pending No. 73–1798. In interpreting a consent order worded in its pertinent terms similarly to that in this case, the Court of Appeals for the Eighth Circuit held that acquisition is a continuing offense until it is undone, noting that the construction of "acquiring" as a single rather than continuing violation "ignores the crucial effects of an acquisition and would render nonacquisition orders virtually meaningless." *Id.*, at 1270.

We granted certiorari in order to resolve this conflict between Courts of Appeals concerning the proper application of the "continuing" violation clauses of 15 U. S. C. §§ 21 (*l*) and 45 (*l*) to wording employed in a large number of FTC consent orders.[1] Since we inter-

[1] According to the Petition for Writ of Certiorari 18A–22A and

pret "acquiring" as used in the consent order in this case to mean both the initial transaction and the maintaining of the rights obtained without resale, we hold that violation of the consent order is a continuing violation subject to daily penalties, and reverse.[2]

Brief for United States 12 n. 12 in this case, there were in all as of June 18, 1974, 67 FTC orders, of which most are consent orders but some are litigated orders, which bar acquisitions in language similar to the language of the order in this case. All of these orders bar future acquisitions but do not expressly bar the "holding" or "retention" of stock or assets acquired in violation of their terms.

[2] The Petition for Certiorari of the United States presented the single question whether its prayer for daily penalties was properly denied. Respondent did not cross-petition, yet seeks to raise several issues not presented by the petition. Respondent contends that (1) the three transactions for which penalties have been or are to be imposed did not violate the consent order; (2) the consent order was not binding upon ITT Continental as successor after Continental ceased to exist, so that daily penalties could not accrue for the period after the merger; and (3) daily penalties could not be imposed because the FTC had not advised respondent of the alleged violations prior to the filing of the complaint. We do not address any of these issues in deciding this case.

Respondent recognizes that, not having cross-petitioned, it cannot attack the judgment insofar as it sustained the findings of violations and imposed penalties for such violations. *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924). Cf. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185 (1937). Respondent argues that it may nevertheless seek to sustain the Court of Appeals' limitation on the penalties on the theory that no penalty should have been awarded at all. Ordinarily, however, as a matter of practice and control of our docket, if not of our power, we do not entertain a challenge to a decision on the merits where the only petition for certiorari presents solely a question as to the remedy granted for a liability found to exist, even if the respondent is willing to accept whatever judgment has already been entered against him. *Strunk* v. *United States*, 412 U. S. 434, 437 (1973); *NLRB* v. *International Van Lines*, 409 U. S. 48, 52 n. 4 (1972); *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 431–432

I

The FTC alleged in 1960 that Continental Baking Co. (Continental),[3] a major producer of bread and other bakery products, had violated § 7 of the Clayton Act, 38 Stat. 731, 64 Stat. 1125, 15 U. S. C. § 18, and § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, by various acquisitions which "may have the effect of substantially lessening competition or tending to create a monopoly . . . ." Before any decision in the case, the parties agreed to a proposed consent order which was approved by the FTC in May 1962. The order, among

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(1941). Cf. *Langnes* v. *Green,* 282 U. S. 531, 538 (1931). But see *LeTulle* v. *Scofield,* 308 U. S. 415 (1940). We follow that rule of practice in this case, particularly because the issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not merit this Court's grant of a petition for certiorari.

The courts below did not decide the other two issues because they were not pertinent once it was determined that there was no continuing violation. (The District Court did express the opinion that "it would seem unreasonable to permit the Commission to knowingly let daily penalties accrue without giving notice of the Commission's position at the earliest reasonable time," 1972 CCH Trade Cases ¶ 73,-993, pp. 92,127, 92,129 (Aug. 2, 1971), but it said that this statement was "obiter dictum.") In the absence of decisions on these questions by the courts below, we decline to address them. *FTC* v. *Anheuser-Busch, Inc.,* 363 U. S. 536, 542 (1960); *Jaffke* v. *Dunham,* 352 U. S. 280 (1957); *Aetna Casualty & Surety Co.* v. *Flowers,* 330 U. S. 464, 468 (1947). Cf. *Dandridge* v. *Williams,* 397 U. S. 471, 476 n. 6. (1970).

[3] Continental was merged on September 13, 1968, with a wholly owned subsidiary of International Telephone and Telegraph Corp. called ITT Continental Baking Company (ITT Continental). While ITT Continental has never contested its liability under the merger agreement for any violations of the consent order committed by Continental before the merger, it continues to maintain in this Court, as it did below, that it is not itself bound by the consent order. See n. 2, *supra.*

other things, prohibited Continental for 10 years [4] from "acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition . . . ." Alleging that Continental had acquired assets in three companies in violation of this order, the Government brought suit in the District of Colorado under § 11 (*l*) of the Clayton Act, 15 U. S. C. § 21 (*l*) [5] and § 5 (*l*) of the Federal

[4] The consent order expired by its own terms on May 15, 1972. In April 1972, the FTC ordered ITT Continental to show cause why the order's ban on acquisitions should not be extended until April 1977. Although the administrative law judge recommended the extension, the FTC declined to approve the extension because of inadequate proof of increased concentration in the relevant local markets. *In re ITT Continental Baking Co.*, 84 F. T. C. 1349 (1974). However, the FTC did express a continuing concern with the levels of concentration in the baking industry. It issued an order requiring ITT Continental to inform the Commission "of any acquisitions of any interest in any concern engaged in the production and sale of bread and bread-type rolls, such report to be filed not less than sixty (60) days prior to each such acquisition." *Id.*, at 1400. ITT Continental and other members of the baking industry were informed that "[a]ny significant mergers in this industry, and particularly any that promise to raise concentration still higher in a metropolitan area that already appears to be dangerously close to the borderline between effective competition and effective monopoly, will receive the most searching attention from this agency." *Id.*, at 1399.

[5] Title 15 U. S. C. § 21 (*l*) provides:

"Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate

Trade Commission Act, 15 U. S. C. § 45 (*l*),[6] for civil penalties and other relief. The complaint prayed for penalties of $1,000 per day from the date of the contract of acquisition to the date of filing of the complaint on each of the three counts.

The District Court held that two of the three transactions were in fact in violation of the consent order. It declined, however, to order daily penalties, finding that "the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order . . . did not constitute a 'continuing failure or neglect to obey' [15 U. S. C. §§ 21 (*l*), 45 (*l*)] said

violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

[6] Title 15 U. S. C. § 45 (*l*) provides:

"Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

The maximum penalty for each violation under 15 U. S. C. § 45 (*l*) has since been increased from $5,000 to $10,000. Pub. L. 93–153, § 408 (c), 87 Stat. 591.

Although the Government requested $1,000 per day per violation, the statutes prescribe no minimum penalty, and the District Court has discretion to determine the amount of the penalty for each violation whether the transactions are construed as single or as continuing violations. Thus, while totaling the penalty as a series of daily violations rather than as a single violation could raise substantially the total penalty assessed, the statutory scheme does not require that result, and the trial judge's determination would prevail in the absence of an abuse of discretion.

order. . . . Once these two acquisitions were accomplished, the violations were complete." 1972 CCH Trade Cases, at 92,129. The District Court therefore entered a judgment against ITT Continental for $5,000 for each of the two violations found.[7]

The Court of Appeals reversed the District Court only insofar as it had held one of the three transactions not in violation of the consent order. It affirmed on the matter of daily penalties, holding that "whether the order was directed to the acquisition or to the acquisition and retention of assets or interests . . . [is] an interpretation of the consent order, and the result is in accordance with the prevailing standards." 485 F. 2d, at 21. Remand to the District Court was ordered only for imposition of a penalty for the third violation.

II

The basic question before us is whether there has been a "continuing failure or neglect to obey" an FTC order within the meaning of 15 U. S. C. §§ 21 (*l*) and 45 (*l*). The "continuing failure or neglect to obey" provision

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[7] The complaint also requested a permanent injunction commanding future compliance with the consent order. The District Court found that it was empowered in a civil penalty proceeding based on an FTC order to grant equitable relief, and it issued an injunction in the exact words of the FTC order. This injunction expired, as did the consent order, on May 15, 1972. See n. 4, *supra*. Since the Court of Appeals decision in this case, Congress has amended 15 U. S. C. § 45 (*l*) expressly to empower district courts in civil penalty proceedings to grant equitable relief. Pub. L. 93–153, § 408 (c), 87 Stat. 591.

Although the complaint did not request a divestiture order, the Government later requested divestiture, and this request was embodied in the District Court's pretrial order. App. 27. However, the District Court declined to order this relief, 1972 CCH Trade Cases, at 92,129, and the Court of Appeals affirmed this denial as within the discretion of the trial court. 485 F. 2d 16, 21 (CA10 1973).

of § 45 (*l*) was added to the Federal Trade Commission Act in 1950, and the like provision of § 21 (*l*) to the Clayton Act in 1959. Although the legislative history of these provisions is sparse, some examples of behavior intended to be covered by the "continuing" violation provisions do appear in the legislative history. These include continuing conspiracies to fix prices or control production, maintenance of a billboard in defiance of an order prohibiting false advertising, failure to dissolve an unlawful merger, and failure to eliminate an interlocking directorate. See letter from FTC General Counsel to Senator Fulbright, 96 Cong. Rec. 3026–3027 (1950); Hearings on H. R. 432, H. R. 2977, H. R. 6049, and S. 726 before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess., 21 (1959); H. R. Rep. No. 580, 86th Cong., 1st Sess., 7 (1959). These violations share two discernible characteristics: the detrimental effect to the public and the advantage to the violator continue and increase over a period of time, and the violator could eliminate the effects of the violation if it were motivated to do so, after it had begun. Without these characteristics, daily penalties for such violations would probably have no greater deterrent effect than a single penalty and accumulating daily penalties would therefore be unfair.

The legislative history also makes clear that Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation. For example, Senator Aiken, chief proponent of the 1950 amendment, said that if daily penalties for certain violations of the Federal Trade Commission Act were not permitted, "the fine would amount to a license in the amount of $5,000 for misrepresentation, which would be a very cheap fine, indeed." 96 Cong. Rec. 3025 (1950).

Similarly, the House of Representatives Judiciary Committee said in its report on the 1959 amendments:

> "Although the maximum penalty may be severe, in certain cases it would be appropriate. In the absence of the maximum penalty for a continuing offense, for example, commission and board orders with respect to mergers and interlocking directorships would be ineffective. In such cases, unless the maximum penalty applied and each day of a continuing violation considered a separate offense, an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine." H. R. Rep. No. 580, 86th Cong., 1st Sess., 7 (1959).

See also Hearings on H. R. 432, H. R. 2977, H. R. 6049, and S. 726, *supra,* at 30 (letter from FTC General Counsel).

Thus, the "continuing failure or neglect to obey" provisions of 15 U. S. C. §§ 21 (*l*) and 45 (*l*) were intended to assure that the penalty provisions would provide a meaningful deterrence against violations whose *effect* is continuing and whose detrimental *effect* could be terminated or minimized by the violator at some time after initiating the violation. It seems apparent that acquisition in violation of an FTC order banning "acquiring" certain assets could be such a violation. Any anticompetitive effect of an acquisition continues as long as the assets obtained are retained, and the violator could undo or minimize any such effect by disposing of the assets at any time after the initial transaction. On the other hand, if violation of an order prohibiting "acquiring" assets were treated as a single violation, any deterrent effect of the penalty provisions would be entirely undermined, and the penalty would be converted into a minor tax upon a violation which could reap large financial benefits to the perpetrator. As we have seen, Congress

added the continuing-penalty provisions precisely to avoid such a result.

III

Respondent insists, however, that the underlying FTC order was a consent order proscribing only the initial act of acquisition, and that therefore the imposition of daily penalties which might otherwise be mandated cannot be permitted. Its argument is that "acquiring" in the consent order unambiguously refers only to the initial transaction, and that to read it otherwise is to add the words "holding" or "retaining" assets to the literal language of the order. This addition to the language of the order, ITT Continental contends, violates the principle of a line of cases culminating in *United States* v. *Armour & Co.,* 402 U. S. 673 (1971), that any command of a consent decree or order must be found "within its four corners," *id.,* at 682, and not by reference to any "purposes" of the parties or of the underlying statutes. See *United States* v. *Atlantic Refining Co.,* 360 U. S. 19 (1959); *Hughes* v. *United States,* 342 U. S. 353 (1952). Respondent asks us to conclude that the "acquirings" prohibited by the consent order are not capable of persisting over time, and that therefore there can be no "continuing failure or neglect to obey" the order. The Government, on the other hand, contends that the parties meant "acquiring" to include both purchase and retention of assets, and that therefore it is unnecessary to depart from the "four corners" rule of *Armour* to conclude that there has been a continuing violation.

In *Armour,* it was first determined that the construction of the consent decree urged by the Government was inconsistent with the express terms of the consent decree it was seeking to enforce.[8] The decree involved in

[8] The Court in *Armour* noted that the Government might be able to obtain the relief sought in ways other than by construction of the

Armour was the Meat Packers Consent Decree of 1920, entered in settlement of an antitrust case filed in District Court. Paragraph fourth of the decree enjoined Armour from engaging in certain businesses. The Greyhound Corporation, which was engaged in some of those businesses, acquired control of Armour. The Government claimed that this acquisition was in violation of the consent decree, contending that the purpose of the decree was structurally to separate the meatpackers from the retail food business entirely, and that the relationship between Armour and Greyhound was therefore prohibited.

The Court noted that the language of the decree "*taken in its natural sense,* bars only active conduct on the part of the defendants. . . . [T]he decree does not speak in terms of relationships in general, but, rather, prohibits certain behavior, and in doing so prohibits some but not all economic interrelationship between Armour and the retail food business. . . . In short, we do not find in the decree a structural separation such as the Government claims. . . . [T]he decree leaves gaps *inconsistent* with so complete a separation." 402 U. S., at 678, 680. (Emphasis supplied.)

Similarly, in both *Atlantic Refining* and *Hughes* the Court first undertook to determine whether the language of the decree could support the construction urged by

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consent decree. First, it could have brought a new action to enjoin the acquisition under § 7 of the Clayton Act. Second, "if the Government believed that changed conditions warranted further relief against the acquisition, it could have sought modification of the Meat Packers Decree itself." 402 U. S., at 674–675 Respondent argues that these alternatives are also present in this case, and that it is therefore unnecessary to adopt the construction of the order urged by the Government. However, the possible availability of other means of obtaining sanctions against the acquisitions challenged here cannot preclude the Government from obtaining whatever penalties may be proper for violations of the consent order.

the Government and concluded that it could not. In *Hughes,* the decree provided that Hughes was *either* to dispose of his stock in a certain corporation *or* commit the voting rights of his stock to a trustee "until [he] shall have sold his holdings of stock." 342 U. S., at 355 n. The Court said: "A reading of the either/or wording *would make most persons believe* that Hughes was to have a choice of two different alternatives. Hughes would have no choice if the first 'alternative' was to sell the stock and the second 'alternative' was also to sell the stock." *Id.,* at 356. (Emphasis supplied.) Therefore, the Court concluded, the consent decree could not be construed, as the Government desired, to require Hughes to sell his stock.

In *Atlantic Refining,* the Court concluded that the construction urged by the Government was a "strained construction," 360 U. S., at 22, inconsistent with the "normal meaning," *id.,* at 23, of the language used. It commented that if the parties had intended the meaning urged by the Government, "one can hardly think of less appropriate language." *Id.,* at 22.

In all three of these cases, it was only *after* concluding that the language, fairly read, could not support the Government's construction that the Court turned to the contention that the restrictive reading was inconsistent with the purposes of the decree and of the antitrust laws assertedly violated. It was in this context that the Court noted that, because consent decrees are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation, it is inappropriate to search for the "purpose" of a consent decree and construe it on that basis. "[T]he *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing

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purposes as the respective parties have the bargaining power and skill to achieve. . . . [T]he instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." [9] *Armour*, 402 U. S., at 681–682. Thus, the basic import of *Armour, Atlantic Refining*, and *Hughes* is that, since consent decrees and orders have many of the attributes of ordinary contracts,[10] they should be construed basically as con-

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[9] In *Hughes* v. *United States*, 342 U. S. 353 (1952), the Court likewise rejected an invitation to further the asserted "purposes" of the consent decree by approving an interpretation the "language cannot support." *Id.*, at 356. It noted that evidence might show that the sale requirement was justified, but it regarded the construction urged by the Government as effecting "a substantial *modification* of the original decree." *Id.*, at 357. (Emphasis supplied.) While it believed this modification could be had after a proper hearing proving the need for such modification under applicable standards, it would not sanction such modification in the guise of construing a consent decree. *Id.*, at 357–358.

Similarly, in *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 (1959), while the Court agreed that the interpretation offered by the Government might better effectuate the purposes of the acts assertedly violated, this "does not warrant our substantially *changing* the terms of a decree to which the parties consented without any adjudication of the issues. And we agree with the District Court that accepting the Government's present interpretation would do just that." *Id.*, at 23. (Emphasis supplied.) Again, the Court noted that modification might be appropriate, but modification disguised as construction was not. See also *Liquid Carbonic Corp.* v. *United States*, 350 U. S. 869 (1955), rev'g 123 F. Supp. 653 (EDNY 1954); *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927).

[10] Consent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency. Compare *United States* v. *Swift & Co.*, 286 U. S. 106, 115

tracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation.

We note that this case differs from *Armour, Hughes,* and *Atlantic Refining* in a most important respect. In each of those cases the question of whether or not the consent decree was violated was the question for decision; in this case respondent was found to have committed violations, and the issue before us affects only the manner of assigning penalties for each violation found. Thus, respondent is subject to some penalty, and there is no possibility as there was in *Armour, Atlantic Refining,* and *Hughes* that respondent will be penalized for behavior not prohibited at all by the order "within its four corners," *Armour,* 402 U. S., at 682. Nothing in the consent order suggests that although the parties agreed that Continental would refrain from "acquiring," they also agreed to limit the penalties which would otherwise apply if Continental did not refrain from that behavior. Such an agreement would be exceedingly odd, for it would undermine whatever prohibitions were imposed. As we have seen, Part II, *supra,* it is quite possible that under §§ 21 (*l*) and 45 (*l*) violation of an FTC adjudicated order against "acquiring" would be subject to daily penalties. It is not clear that *Armour* would require a different result merely because we are dealing with a consent order, since the parties reached no agreement at all concerning penalties to be applied in case of violation of the order.

(1932), with the language in *Armour* cited in the text, *supra,* at 235–236. Because of this dual character, consent decrees are treated as contracts for some purposes but not for others. See Jinkinson, Negotiation of Consent Decrees, 9 Antitrust Bull. 673, 675–676 (1964); Handler, Twenty-fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 33–34 (1972).

We need not, however, determine whether §§ 21 (*l*) and 45 (*l*) would permit the imposition of daily penalties even if the consent order must be read as respondent maintains to proscribe only the initial act of acquisition. For we agree with the Government that the order "as it is written" does support an interpretation that the act of acquisition continues until the assets acquired are disgorged.

IV

Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.[11] Such reliance does not in any way depart from the "four corners" rule of *Armour*.

In this case, the consent order was part of an agreement between the parties entitled "Agreement Containing Consent Order to Divest and to Cease and Desist." The agreement incorporates by reference an "appendix," which sets forth at length the background leading to the complaint and the proposed order. In addition, the agreement provides that "[t]he complaint may be used in construing the terms of the order." Since the parties themselves so provided, both the appendix and the complaint are proper aids to the construction of the order and of the agreement of which it is part.[12]

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[11] "Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence." Handler, *supra*, n. 10, at 23 n. 148.

[12] Respondent argues that even if the complaint and appendix can be used as aids to construction, they only show that the parties could use broader language than that in the order itself, making

The complaint alleged that Continental had pursued "a continuous practice of *acquiring* various bakeries throughout the United States" (emphasis supplied), which were thereby "eliminated . . . as independent competitive factors in the manufacture, sale and distribution of bread and bread-type rolls . . . ." If the "acquiring" against which the order and the complaint incorporated in it were directed were limited to the single transaction by which Continental obtained rights in another company, it is hard to see why the effect which the complaint alleged followed from acquisitions would necessarily occur. For if Continental had sold the companies acquired as soon as the initial transactions were completed to other, independent companies, the bakeries would not have been "eliminated . . . as independent competitive factors."

Reference to the appendix also supports the conclusion that "acquiring" as used in the order means both the initial transaction granting Continental rights in an independent bakery and the maintaining of those rights without resale. The appendix notes: "One of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies *through acquisition.* Such *acquisitional growth* and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition . . . . If this order is

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the limited language actually used highly significant and controlling. One Court of Appeals has used similar reasoning to approve a strict reading of a consent decree which was accompanied by a collateral agreement. *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F. 2d 283 (CA2 1962). However, this reasoning is erroneous as applied to this case. Where parties in one agreement include both a consent order and an explanation of that order, and also provide that the complaint is to be used to construe the order, it seems logical to conclude that, at least as to interpretations not precluded by the words of the order itself, the collateral documents can and should be used to give meaning to the words of the order.

adopted by the Commission, the respondent's alleged continuous practice of *acquiring* companies baking and selling bread and bread-type rolls will be brought to a halt . . . ." (Emphasis supplied.) It is apparent that the "acquisitional growth" referred to in the appendix cannot be achieved merely by discrete transactions without reference to what is done with the assets obtained after those transactions. If Continental were merely a speculator in baking companies, buying assets in them and selling them soon thereafter, it would not necessarily create "through acquisition" a "tendency towards concentration" giving it the "means to set the pattern of competition." Thus, "acquiring" in both the appendix and the order, parts of the same agreement, must mean obtaining and retaining assets, not merely the former.

Even without the aid of these explanatory documents properly usable to construe this particular order, we would have to conclude that "acquiring" as used in an antitrust decree or order continues until the assets obtained are disgorged. As the foregoing analysis of the ancillary documents here illustrates, "acquiring" and related words do not, as respondent insists, unambiguously refer to a single transaction. Rather, as a matter of ordinary usage they can, and in the antitrust context they do, encompass the continuing act of obtaining certain rights and treating them as one's own. We must assume that the parties here used the words with the specialized meaning they have in the antitrust field, since they were composing a legal document in settlement of an antitrust complaint.

We need not go beyond the Clayton Act itself to conclude that "acquisition" as used in § 7 of the Act means holding as well as obtaining assets. The Act provides that the FTC, if it finds a violation of § 7, can require a party to "divest itself of the stock, or other share capital, or assets, *held . . . contrary to the provisions* of [§ 7]."

15 U. S. C. § 21 (b). (Emphasis supplied.) Thus, the framers of the Act did not regard the terms "acquire" and "acquisition" as unambiguously banning only the initial transaction of acquisition; rather, they read the ban against "acquisition" to include a ban against holding certain assets.

This Court's opinions reflect the same understanding. For example, in *FTC* v. *Western Meat Co.,* 272 U. S. 554 (1926), the Court, in discussing an FTC order based on a violation of § 7, said: "The order here questioned was entered when respondent actually *held and owned* the stock *contrary to law.* The Commission's duty was to prevent the *continuance of this unlawful action* by an order directing that it cease and desist therefrom and divest itself of *what it had no right to hold." Id.,* at 559. (Emphasis supplied.) See also *Arrow-Hart & Hegeman Elec. Co.* v. *FTC,* 291 U. S. 587, 596–599 (1934).

Similarly, this Court's opinion in *United States* v. *Du Pont,* 353 U. S. 586 (1957), rests upon the conclusion that "acquisition" can mean, and in the context of § 7 of the Clayton Act does mean, both the purchase of rights in another company and the retention of those rights.

In *Du Pont,* a § 7 case was brought in 1949 but based on a purchase of stock by Du Pont in 1917–1919. It was argued that "the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding or subsequent use of stock." 353 U. S., at 596–597. Thus, Du Pont was seeking to interpret "acquire" as used in § 7 [13] much as

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[13] The first paragraph of § 7, at the time the *Du Pont* case was brought, provided:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share

respondent here seeks to read "acquiring" in the consent decree.

The Court in *Du Pont* rejected the interpretation urged upon it. Instead, the Court held that there is a violation "any time when the acquisition threatens to ripen into a prohibited effect. . . . To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." *Id.*, at 597. Thus, there can be a violation at some time later even if there was clearly no violation—no realistic threat of restraint of commerce or creation of a monopoly—at the time of the initial acts of acquisition. Clearly, this result can obtain only because "acquisition" under § 7 is not a discrete transaction but a status which continues until the transaction is undone.[14]

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capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 15 U. S. C. § 18 (1946 ed.).

The statute was amended in 1950 to provide:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U. S. C. § 18.

While the change in the wording is substantial, no reason suggests itself why the meaning of "acquire" and "acquisition" should differ in the two versions. *Du Pont* was decided several years after the 1950 amendments and makes not the slightest suggestion that the result pertinent here would not obtain under the new version.

[14] The dissent in *Du Pont* recognized that this was the import of

Thus, under the order "as it is written," "acquiring" must mean both the act of first obtaining assets and the retention and use of those assets. To conclude otherwise would be to ignore the flexibility of the English language, as well as the circumstances surrounding the order and the context in which the parties were operating. And, since the order bans the continuing act of obtaining and retaining certain assets, a violation of the order is a "continuing failure or neglect to obey" it, and daily penalties may be imposed under 15 U. S. C. §§ 21 (*l*) and 45 (*l*).

Because the Court of Appeals erred in concluding that daily penalties could not be imposed, we reverse and remand for proceedings consistent with this opinion.

It is so ordered.

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

The respondent's predecessor, Continental, made corporate acquisitions in violation of a 1962 consent order that, in pertinent part, prohibited Continental from "acquiring" described baking companies. The Government

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this holding, with which it disagreed. 353 U. S. 586, 619–621 (1957) (Burton, J., dissenting).

Some lower federal courts have also recognized that the status approach to acquisition is the proper one. See *Gottesman* v. *General Motors Corp.*, 414 F. 2d 956, 965 (CA2 1969): "[T]he very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 [in *Du Pont*] continued through 1961. . . . [W]hat was unlawful was du Pont's *status* as stockholder in General Motors, and that status continued until divestiture." (Emphasis supplied.) See also *United States* v. *Schine*, 260 F. 2d 552, 555–556 (CA2 1958): "[I]t is the *maintenance* of conditions in violation of the decree [prohibiting acquisitions, among other things] which is the charge against the respondents." Therefore, the court in *Schine* concluded, it was irrelevant that the initial transactions occurred prior to the statutory limitations period.

sought to impose daily penalties upon Continental for the continued holding of those assets. The Government's theory was that daily penalties were appropriate because Continental's retention of the assets was a "continuing failure or neglect to obey a final order," within the meaning of the relevant civil penalties statutes, 15 U. S. C. §§ 21 (*l*), 45 (*l*).[1] The issue in this case is whether the consent order can be so construed.[2] The District Court and the Court of Appeals ruled that the consent order prohibited only the distinct acts of "acquiring" the bakeries, not the "retaining" or the "holding" of the assets after acquisition. The Court of Appeals indicated that an order to divest would have been an appropriate remedy for the unlawful acquisitions, but held that the retention of the assets was not in itself a continuing refusal to obey the consent order such as would support the sanction of daily penalties. I think that under our controlling precedents, the District Court and the Court of Appeals were clearly correct.

The governing rule of construction, and its rationale, were stated plainly and aptly by this Court in *United States* v. *Armour & Co.*, 402 U. S. 673, 681–682 (1971):

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk,

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[1] These provisions are set out in full in the Court's opinion, *ante*, at 228–229, nn. 5, 6.

[2] For the reasons stated by the Court, I agree that the other issues that the respondent seeks to raise in this case need not and should not be addressed.

> the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. *For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.* Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." (Emphasis added; footnote omitted.)

See also *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 (1959); *Hughes* v. *United States*, 342 U. S. 353 (1952).

The application of this straightforward standard to the consent order here is hardly a difficult task. The order literally prohibits only the "acquiring" of the forbidden assets. Once an acquisition was consummated, the violation was complete. A prohibition on the retention of assets cannot be found in any provision of the order. Because the order is a compromise agreement negotiated without any adjudication of antitrust liability, we are not at liberty under *Armour* to construe the unambiguous term "acquiring" in the light of conjecture or argument about the "purposes" of the decree or of the parties. We may not, consistent with *Armour*, conclude that the Government intended that the order should prohibit as a continuing offense the retention of unlawfully acquired

assets, when the Government did not insist upon language objectively manifesting that intention. Nor may we conclude that Continental agreed to restrict its future business conduct or become subject to penalties in any manner not clearly delineated in the order itself. The provisions of the order are something less than the Government could have sought and might have obtained. The rule of construction of consent decrees, however, depends, not upon an expedient construct of what the parties are thought to have intended, but upon the explicit provisions to which the parties have agreed.

After giving a casual nod in the direction of the standard of construction required by *Armour*, the Court embarks upon a laborious search for "purposes" that are "incorporated in" the consent order in order to change the meaning of the unambiguous term "acquiring." We are led through the antecedent complaint, through an appendix to the consent order, through the intricacies of an opinion of this Court construing the term "acquisition" in light of the policies underlying the Clayton Act, and through the legislative history of the statutory provisions that impose daily penalties for continuing refusals to obey Commission orders. Drawing upon these disparate sources, the Court determines that the consent order, despite its literal language, must be construed to prohibit not only the proscribed acquisitions but also the "retention" of unlawfully acquired assets.[3] One is re-

[3] Upon this premise, the Court then proceeds to hold that the conjured-up "continuing offense" of retaining these assets is a "continuing failure or neglect to obey a final order" within the meaning of the daily-penalty statutes. 15 U. S. C. §§ 21 (*l*) and 45 (*l*). But even if the consent order could be correctly read to prohibit not only the acquisition of the described assets but also the retention of assets unlawfully acquired, it is far from crystal clear that the "continuing offense" of retaining the assets would be a "continuing failure or neglect to obey a final order" within the meaning of the

minded of an observation once made by Mr. Justice Grier in a somewhat different context: "[T]he fact that it required so ingenious and labored an argument by my learned brother to vindicate such a construction . . . seems to me, of itself, conclusive evidence that the construction should not be given to it." *The Binghamton Bridge,* 3 Wall. 51, 83 (dissenting opinion).

What the Court does today is to proclaim a new rule of construction for consent orders or decrees totally at odds with our previous decisions:

> "Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree." *Ante,* at 238.

This novel approach, for which the Court cites not a single supporting precedent, is directly contrary to the "four corners" rule of *Armour.* For an inquiry into the *purpose* of a consent decree is precisely what that rule forecloses: "[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." 402 U. S., at 682. The Court today thus indulges in precisely the exercise that *Armour* sought to preclude:

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daily-penalty statutes. Penalty provisions must be strictly construed, and due process requires that such provisions must give fair warning of the conduct that invokes their extraordinary sanction. Cf. *Giaccio* v. *Pennsylvania,* 382 U. S. 399. The legislative history of the daily-penalty statutes, as recited in the Court's opinion, shows that the mischief sought to be remedied was precisely the mischief to which Congress addressed its language: a "continuing failure or neglect to obey a final order," as, for example, the refusal to divest after a specific order of divestiture has been entered.

a wide-ranging search for a "purpose" in a decree that, as explained in *Armour*, cannot be said to have a purpose except to delineate explicitly the terms and provisions of the settlement that the parties negotiated.[4]

Before straining to pull the Government's chestnuts out of the fire, the Court should count with greater care the costs of abandoning the rule stated in *Armour*. Until today, the parties to any consent decree could have confidence that its explicit terms alone would control the judicial construction of its prohibitory language. Now, otherwise unambiguous terms of a consent decree may be construed in light of such considerations as the ante-

[4] Whatever the utility of extrinsic aids in construing a typical commercial contract, this technique is singularly inappropriate in an area where certainty of prohibition is necessary and where, as *Armour* makes clear, there can be found no guiding purpose underlying a negotiated decree. Moreover, even assuming, *arguendo*, that such aids might be admissible to construe borderline issues of application—for example, whether a particular acquired company was engaged in the production of "bread-type" rolls within the meaning of the consent order—such aids must not be used to impose a wholly separate prohibitory requirement upon a company that consented to be bound only by the plain language of the consent order. This is demonstrably not a case of ambiguity or of borderline construction. It is a case, instead, where the Court has used extrinsic aids to alter a term that is, on its face, wholly unambiguous.

The Court relies upon the decision in *United States* v. *Du Pont*, 353 U. S. 586, for the proposition that the term "acquire" in a consent order is a term of art that prohibits a "status which continues until the transaction is undone." *Ante*, at 242. But the Court's reliance on the policy considerations discussed in the *Du Pont* opinion is wholly inconsistent with the *Armour* rule. The opinion in *United States* v. *Du Pont* does not, in any event, render the term "acquiring" in a consent decree a term of art. That case addressed the positive reach of the Clayton Act under certain circumstances. The Court fails to explain how its opinion there has served to transform the plain term "acquiring" into a "term of art" that would by common understanding have the meaning that the Court today ascribes to it.

cedent complaint, the "meaning" of antitrust decisions, and the policies said to underlie the statutory provision for daily penalties. Certainty and reasoned reliance have always been the *sine qua non* of the consent orders that terminate about 70% to 80% of the antitrust complaints that are filed by the Justice Department.[5] But after today's decision that kind of certainty will no longer exist. For there will be no apparent limit on the power of the judiciary to alter the plain language of an order in light of the "circumstances surrounding the order and the context in which the parties were operating." *Ante,* at 243. If a negotiated consent decree fails to leave a dispute clearly and firmly settled, the necessary result will be that those charged with antitrust violations will be less inclined to settle their cases and more apt to insist upon time-consuming and costly litigation. Today's decision will also pose serious difficulties for the enforcement of all existing and all future consent decrees. For, as Mr. Justice Jackson once observed, "the validity of a doctrine does not depend on whose ox it gores." [6] The same purpose-oriented techniques of construction that the Court today serves up to expand this consent order beyond its terms can be expected to be availed of by alleged violators of consent orders who will seek to narrow and thereby to evade the plain language of any prohibition.

The Court concludes that "if violation of an order prohibiting 'acquiring' assets were treated as a single violation, any deterrent effect of the penalty provisions would be entirely undermined, and the penalty would be converted into a minor tax upon a violation which could reap large financial benefits to the perpetrator." *Ante,*

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[5] Note, 73 Col. L. Rev. 594 (1973).

[6] *Wells* v. *Simonds Abrasive Co.,* 345 U. S. 514, 525 (dissenting opinion).

at 232. This is not merely overstatement; it is incorrect. Both the parties agree, and the Court of Appeals held, that an order to divest unlawfully acquired assets is an appropriate remedy for violation of a consent order barring acquisition. Moreover, the *Armour* rule of construction would not impair in any way the power of the Government, in future cases, to obtain through negotiations consent orders that contain a clear and explicit description of the conduct that is prohibited.[7]

In my view, the Court's departure from precedent threatens to retard significantly the effective use of consent decrees in the administration of the antitrust laws. I would adhere to the rule stated in *Armour* that "the scope of a consent decree must be discerned within its four corners, *and not by reference to what might satisfy the purposes of one of the parties to it.*" 402 U. S., at 682 (emphasis added). Applying this standard, I would affirm the considered judgments of the District Court and the Court of Appeals.

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[7] The Government informs us that as of May 1974 there were outstanding 54 consent orders with language that prohibits acquiring certain assets but does not expressly prohibit the retaining of these assets. This Court need not assume that flagrant violations of consent orders will occur or that the remedies of divestiture and fine for the single offense of acquisition will not adequately deter unlawful conduct.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* J. WEINGARTEN, INC.

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

No. 73–1363. Argued November 18, 1974—
Decided February 19, 1975

During the course of an investigatory interview at which an employee of respondent was being interrogated by a representative of respondent about reported thefts at respondent's store, the employee asked for but was denied the presence at the interview of her union representative. The union thereupon filed an unfair labor practice charge with the National Labor Relations Board (NLRB). In accordance with its construction in *Mobil Oil Corp.*, 196 N. L. R. B. 1052, enforcement denied, 482 F. 2d 842, and *Quality Mfg. Co.*, 195 N. L. R. B. 197, enforcement denied, 481 F. 2d 1018, rev'd, *post,* p. 276, the NLRB held that the employer had committed an unfair labor practice and issued a cease-and-desist order, which, however, the Court of Appeals subsequently refused to enforce, concluding that an employee has no "need" for union assistance at an investigatory interview. *Held:* The employer violated § 8 (a) (1) of the National Labor Relations Act because it interfered with, restrained, and coerced the individual right of an employee, protected by § 7, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ," when it denied the employee's request for the presence of her union representative at the investigatory interview that the employee reasonably believed would result in disciplinary action. Pp. 256–268.

(a) The NLRB's holding is a permissible construction of "concerted activities for . . . mutual aid or protection" by the agency charged by Congress with enforcement of the Act. Pp. 260–264.

(b) The NLRB has the "special function of applying the general provisions of the Act to the complexities of industrial life," *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236, and its special competence in this field is the justification for the deference accorded its determination. Pp. 264–267.

485 F. 2d 1135, reversed and remanded.

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BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 268. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 269.

Patrick Hardin argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Peter G. Nash, John S. Irving, Norton J. Come,* and *Linda Sher.*

Neil Martin argued the cause and filed a brief for respondent.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Board held in this case that respondent employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8 (a)(1) of the National Labor Relations Act,[1] as amended, 61 Stat. 140, because it interfered with, restrained, and coerced the individual right of the employee, protected by § 7 of the Act, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ." [2] 202 N. L. R. B. 446 (1973).

**Jerry Kronenberg* and *Milton Smith* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

[1] Section 8 (a)(1), 29 U. S. C. § 158 (a)(1), provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

[2] Section 7, 29 U. S. C. § 157, provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be

The Court of Appeals for the Fifth Circuit held that this was an impermissible construction of § 7 and refused to enforce the Board's order that directed respondent to cease and desist from requiring any employee to take part in an investigatory interview without union representation if the employee requests representation and reasonably fears disciplinary action. 485 F. 2d 1135 (1973).[3] We granted certiorari and set the case for oral argument with No. 73–765, *Garment Workers* v. *Quality Mfg. Co.*, *post*, p. 276. 416 U. S. 969 (1974). We reverse.

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affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

[3]Accord: *NLRB* v. *Quality Mfg. Co.*, 481 F. 2d 1018 (CA4 1973), rev'd, *Garment Workers* v. *Quality Mfg. Co.*, *post*, p. 276; *Mobil Oil Corp.* v. *NLRB*, 482 F. 2d 842 (CA7 1973). The issue is a recurring one. In addition to this case and *Garment Workers* v. *Quality Mfg. Co.*, *post*, p. 276, see *Western Electric Co.*, 205 N. L. R. B. 46 (1973); *New York Telephone Co.*, 203 N. L. R. B. 180 (1973); *National Can Corp.*, 200 N. L. R. B. 1116 (1972); *Western Electric Co.*, 198 N. L. R. B. 82 (1972); *Mobil Oil Corp.*, 196 N. L. R. B. 1052 (1972), enforcement denied, 482 F. 2d 842 (CA7 1973); *Lafayette Radio Electronics*, 194 N. L. R. B. 491 (1971); *Illinois Bell Telephone Co.*, 192 N. L. R. B. 834 (1971); *United Aircraft Corp.*, 179 N. L. R. B. 935 (1969), aff'd on another ground, 440 F. 2d 85 (CA2 1971); *Texaco, Inc., Los Angeles Terminal*, 179 N. L. R. B. 976 (1969); *Wald Mfg. Co.*, 176 N. L. R. B. 839 (1969), aff'd on other grounds, 426 F. 2d 1328 (CA6 1970); *Dayton Typographic Service, Inc.*, 176 N. L. R. B. 357 (1969); *Jacobe-Pearson Ford, Inc.*, 172 N. L. R. B. 594 (1968); *Chevron Oil Co.*, 168 N. L. R. B. 574 (1967); *Texaco, Inc., Houston Producing Division*, 168 N. L. R. B. 361 (1967), enforcement denied, 408 F. 2d 142 (CA5 1969); *Electric Motors & Specialties, Inc.*, 149 N. L. R. B. 1432 (1964); *Dobbs Houses, Inc.*, 145 N. L. R. B. 1565 (1964); *Ross Gear & Tool Co.*, 63 N. L. R. B. 1012 (1945), enforcement denied, 158 F. 2d 607 (CA7 1947). See generally Brodie, Union Representation and the Disciplinary Interview, 15 B. C. Ind. & Com. L. Rev. 1 (1973); Comment, Union Presence in Disciplinary Meetings, 41 U. Chi. L. Rev. 329 (1974).

I

Respondent operates a chain of some 100 retail stores with lunch counters at some, and so-called lobby food operations at others, dispensing food to take out or eat on the premises. Respondent's sales personnel are represented for collective-bargaining purposes by Retail Clerks Union, Local 455. Leura Collins, one of the sales personnel, worked at the lunch counter at Store No. 2 from 1961 to 1970 when she was transferred to the lobby operation at Store No. 98. Respondent maintains a companywide security department staffed by "Loss Prevention Specialists" who work undercover in all stores to guard against loss from shoplifting and employee dishonesty. In June 1972, "Specialist" Hardy, without the knowledge of the store manager, spent two days observing the lobby operation at Store No. 98 investigating a report that Collins was taking money from a cash register. When Hardy's surveillance of Collins at work turned up no evidence to support the report, Hardy disclosed his presence to the store manager and reported that he could find nothing wrong. The store manager then told him that a fellow lobby employee of Collins had just reported that Collins had purchased a box of chicken that sold for $2.98, but had placed only $1 in the cash register. Collins was summoned to an interview with Specialist Hardy and the store manager, and Hardy questioned her. The Board found that several times during the questioning she asked the store manager to call the union shop steward or some other union representative to the interview, and that her requests were denied. Collins admitted that she had purchased some chicken, a loaf of bread, and some cake which she said she paid for and donated to her church for a church dinner. She explained that she purchased four pieces of chicken for which the price was $1, but that because the lobby department

was out of the small-size boxes in which such purchases were usually packaged she put the chicken into the larger box normally used for packaging larger quantities. Specialist Hardy left the interview to check Collins' explanation with the fellow employee who had reported Collins. This employee confirmed that the lobby department had run out of small boxes and also said that she did not know how many pieces of chicken Collins had put in the larger box. Specialist Hardy returned to the interview, told Collins that her explanation had checked out, that he was sorry if he had inconvenienced her, and that the matter was closed.

Collins thereupon burst into tears and blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch. This revelation surprised the store manager and Hardy because, although free lunches had been provided at Store No. 2 when Collins worked at the lunch counter there, company policy was not to provide free lunches at stores operating lobby departments. In consequence, the store manager and Specialist Hardy closely interrogated Collins about violations of the policy in the lobby department at Store No. 98. Collins again asked that a shop steward be called to the interview, but the store manager denied her request. Based on her answers to his questions, Specialist Hardy prepared a written statement which included a computation that Collins owed the store approximately $160 for lunches. Collins refused to sign the statement. The Board found that Collins, as well as most, if not all, employees in the lobby department of Store No. 98, including the manager of that department, took lunch from the lobby without paying for it, apparently because no contrary policy was ever made known to them. Indeed, when company headquarters advised Specialist Hardy by telephone during the interview that

headquarters itself was uncertain whether the policy against providing free lunches at lobby departments was in effect at Store No. 98, he terminated his interrogation of Collins. The store manager asked Collins not to discuss the matter with anyone because he considered it a private matter between her and the company, of no concern to others. Collins, however, reported the details of the interview fully to her shop steward and other union representatives, and this unfair labor practice proceeding resulted.[4]

II

The Board's construction that § 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline was announced in its decision and order of January 28, 1972, in *Quality Mfg. Co.*, 195 N. L. R. B. 197, considered in *Garment Workers* v. *Quality Mfg. Co., post,* p. 276. In its opinions in that case and in *Mobil Oil Corp.*, 196 N. L. R. B. 1052, decided May 12, 1972, three months later, the Board shaped the contours and limits of the statutory right.

First, the right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection. In *Mobil Oil,* the Board stated:

> "An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for

[4] The charges also alleged that respondent had violated § 8 (a) (5) by unilaterally changing a condition of employment when, the day after the interview, respondent ordered discontinuance of the free lunch practice. Because respondent's action was an arbitrable grievance under the collective-bargaining agreement, the Board, pursuant to the deferral-to-arbitration policy adopted in *Collyer Insulated Wire,* 192 N. L. R. B. 837 (1971), "dismissed" the § 8 (a) (5) allegation. No issue involving that action is before us.

'mutual aid and protection.' The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8 (a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action." *Ibid.*

Second, the right arises only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.[5] Thus the Board stated in *Quality:*

"We would not apply the rule to such run-of-the-

[5] The Board stated in *Quality:* "'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." 195 N. L. R. B. 197, 198 n. 3. In *NLRB* v. *Gissel Packing Co.,* 395 U. S. 575, 608 (1969), the Court announced that it would "reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry," and we reaffirm that view today as applicable also in the context of this case. Reasonableness, as a standard, is prescribed in several places in the Act itself. For example, an employer is not relieved of responsibility for discrimination against an employee

mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." 195 N. L. R. B., at 199.

Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one. As stated in *Mobil Oil:*

"The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview

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"if he has reasonable grounds for believing" that certain facts exist, §§ 8 (a)(3)(A), (B), 29 U. S. C. §§ 158 (a)(3)(A), (B); also, preliminary injunctive relief against certain conduct must be sought if "the officer or regional attorney to whom the matter may be referred has reasonable cause to believe" such charge is true, § 10 (*l*), 29 U. S. C. § 160 (*l*). See also *Congoleum Industries, Inc.,* 197 N. L. R. B. 534 (1972); *Cumberland Shoe Corp.,* 144 N. L. R. B. 1268 (1963), enforced, 351 F. 2d 917 (CA6 1965).

The key objective fact in this case is that the only exception to the requirement in the collective-bargaining agreement that the employer give a warning notice prior to discharge is "if the cause of such discharge is dishonesty." Accordingly, had respondent been satisfied, based on its investigatory interview, that Collins was guilty of dishonesty, Collins could have been discharged without further notice. That she might reasonably believe that the interview might result in disciplinary action is thus clear.

unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources." 196 N. L. R. B., at 1052.

The Board explained in *Quality:*

"This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview." 195 N. L. R. B., at 198–199.

Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in *Mobil,* "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations." 196 N. L. R. B., at 1052 n. 3. The Board thus adhered to its decisions distinguishing between discipli-

nary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview. *Texaco, Inc., Houston Producing Division,* 168 N. L. R. B. 361 (1967); *Chevron Oil Co.,* 168 N. L. R. B. 574 (1967); *Jacobe-Pearson Ford, Inc.,* 172 N. L. R. B. 594 (1968). The employer has no duty to bargain with the union representative at an investigatory interview. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Brief for Petitioner 22.

III

The Board's holding is a permissible construction of "concerted activities for . . . mutual aid or protection" by the agency charged by Congress with enforcement of the Act, and should have been sustained.

The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." *Mobil Oil Corp.* v. *NLRB,* 482 F. 2d 842, 847 (CA7 1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing pun-

ishment unjustly.[6] The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore as present here as it was held to be in *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505–506 (CA2 1942), cited with approval by this Court in *Houston Contractors Assn.* v. *NLRB*, 386 U. S. 664, 668–669 (1967):

> " 'When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.' "

The Board's construction plainly effectuates the most fundamental purposes of the Act. In § 1, 29 U. S. C. § 151, the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom

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[6] "The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering [a] foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected. The presence of a union steward allows protection of this interest by the bargaining representative." Comment, Union Presence in Disciplinary Meetings, 41 U. Chi. L. Rev. 329, 338 (1974).

of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." *Ibid.* Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." *American Ship Building Co.* v. *NLRB,* 380 U. S. 300, 316 (1965). Viewed in this light, the Board's recognition that § 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section " 'read in the light of the mischief to be corrected and the end to be attained.' " *NLRB* v. *Hearst Publications, Inc.,* 322 U. S. 111, 124 (1944).

The Board's construction also gives recognition to the right when it is most useful to both employee and employer.[7] A single employee confronted by an employer

[7] See, *e. g., Independent Lock Co.,* 30 Lab. Arb. 744, 746 (1958): "[Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising . . . . [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at

investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined.[8] At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the

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this stage with as much intelligence as they are capable of bringing to bear on the problem."

See also *Caterpillar Tractor Co.*, 44 Lab. Arb. 647, 651 (1965):

"The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion."

[8] 1 CCH Lab. L. Rep., Union Contracts, Arbitration ¶ 59,520, pp. 84,988–84,989.

value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

IV

The Court of Appeals rejected the Board's construction as foreclosed by that court's decision four years earlier in *Texaco, Inc., Houston Producing Division* v. *NLRB,* 408 F. 2d 142 (1969), and by "a long line of Board decisions, each of which indicates—either directly or indirectly—that no union representative need be present" at an investigatory interview. 485 F. 2d, at 1137.

The Board distinguishes *Texaco* as presenting not the question whether the refusal to allow the employee to have his union representative present constituted a violation of § 8 (a)(1) but rather the question whether § 8 (a)(5) precluded the employer from refusing to deal with the union. We need not determine whether *Texaco* is distinguishable. Insofar as the Court of Appeals there held that an employer does not violate § 8 (a)(1) if he denies an employee's request for union representation at an investigatory interview, and requires him to attend the interview alone, our decision today reversing the Court of Appeals' judgment based upon *Texaco* supersedes that holding.

In respect of its own precedents, the Board asserts that even though some "may be read as reaching a contrary conclusion," they should not be treated as impairing the validity of the Board's construction, because "[t]hese decisions do not reflect a considered analysis of the issue." Brief for Petitioner 25.[9] In that circumstance, and in the

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[9] The precedents cited by the Court of Appeals are: *Illinois Bell Telephone Co.,* 192 N. L. R. B. 834 (1971); *Texaco, Inc., Los Angeles Terminal,* 179 N. L. R. B. 976 (1969); *Wald Mfg. Co.,* 176 N. L. R. B. 839 (1969), aff'd, 426 F. 2d 1328 (CA6 1970); *Dayton*

light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question,[10] the Board argues that the case is one where "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience." *Electrical Workers* v. *NLRB,* 366 U. S. 667, 674 (1961).

We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section. The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect

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Typographic Service, Inc., 176 N. L. R. B. 357 (1969); *Jacobe-Pearson Ford, Inc.,* 172 N. L. R. B. 594 (1968); *Chevron Oil Co.,* 168 N. L. R. B. 574 (1967); *Dobbs Houses, Inc.,* 145 N. L. R. B. 1565 (1964). See also *NLRB* v. *Ross Gear & Tool Co.,* 158 F. 2d 607 (CA7 1947).

[10] "There has been a recent growth in the use of sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees' conduct at their place of work. See, *e. g., Warwick Electronics, Inc.,* 46 L. A. 95, 97–98 (1966); *Bowman Transportation, Inc.,* 56 L. A. 283, 286–292 (1972); *FMC Corp.,* 46 L. A. 335, 336–338 (1966). These techniques increase not only the employees' feelings of apprehension, but also their need for experienced assistance in dealing with them. Thus, often, as here and in *Mobil, supra,* an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. These developments in industrial life warrant a concomitant reappraisal by the Board of their impact on statutory rights. Cf. *Boys Markets, Inc.* v. *Retail Clerks, Local 770,* 398 U. S. 235, 250." Brief for Petitioner 27 n. 22.

of the national labor law would misconceive the nature of administrative decisionmaking. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *NLRB* v. *Seven-Up Co.*, 344 U. S. 344, 349 (1953).

The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. "While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview." 485 F. 2d, at 1138. It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life," *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963); see *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 798 (1945); *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 196–197 (1941), and its special competence in this field is the justification for the deference accorded its determination. *American Ship Building Co.* v. *NLRB*, 380 U. S., at 316. Reviewing courts are of course not "to stand aside and rubber stamp" Board determinations that run contrary to the language or tenor of the Act, *NLRB* v. *Brown*, 380 U. S. 278, 291 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible

under it, and insofar as the Board's application of that meaning engages in the "difficult and delicate responsibility" of reconciling conflicting interests of labor and management, the balance struck by the Board is "subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957). See also *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *NLRB* v. *Brown, supra; Republic Aviation Corp.* v. *NLRB, supra.* In sum, the Board has reached a fair and reasoned balance upon a question within its special competence, its newly arrived at construction of § 7 does not exceed the reach of that section, and the Board has adequately explicated the basis of its interpretation.

The statutory right confirmed today is in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews.[11] Even where such a right is not explicitly provided in the agreement a "well-established current of arbitral authority" sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him. *Chevron Chemical Co.*, 60 Lab. Arb. 1066, 1071 (1973).[12]

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[11] 1 BNA Collective Bargaining Negotiations and Contracts 21:22 (General Motors Corp. and Auto Workers, ¶ 76a); 27:6 (Goodyear Tire & Rubber Co. and Rubber Workers, Art. V (5)); 29:15–29:16 (United States Steel Corp. and United Steelworkers, §§ 8 B [8.4] and [8.7]). See, *e. g.*, the Bethlehem Steel Corp. and United Steelworkers Agreement of 1971, Art. XI, § 4 (d), which provided:

"Any Employee who is summoned to meet in an enclosed office with a supervisor for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by the Assistant Grievance Committeeman designated for the area if he requests such representation, provided such representative is available during the shift."

[12] See also *Universal Oil Products Co.*, 60 Lab. Arb. 832, 834 (1973): "[A]n employee is entitled to the presence of a Committeeman at

The judgment is reversed and the case is remanded with direction to enter a judgment enforcing the Board's order.

It is so ordered.

MR. CHIEF JUSTICE BURGER, dissenting.*

Today the Court states that, in positing a new § 7 right for employees, the "Board has adequately explicated the basis of its interpretation." *Ante,* at 267. I agree that the Board has the power to change its position, but since today's cases represent a major change in policy and a departure from Board decisions spanning almost 30 years the change ought to be justified by a reasoned Board opinion. The brief but spectacular evolution of the right, once recognized, illustrates the problem. In *Quality Mfg. Co.,* 195 N. L. R. B. 197, 198 (1972), the Board distinguished its prior cases on the ground, *inter alia,* that "none of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview." Yet, soon after-

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an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him." *Allied Paper Co.,* 53 Lab. Arb. 226 (1969); *Thrifty Drug Stores Co., Inc.,* 50 Lab. Arb. 1253, 1262 (1968); *Waste King Universal Products Co.,* 46 Lab. Arb. 283, 286 (1966); *Dallas Morning News,* 40 Lab. Arb. 619, 623–624 (1963); *The Arcrods Co.,* 39 Lab. Arb. 784, 788–789 (1962); *Valley Iron Works,* 33 Lab. Arb. 769, 771 (1960); *Schlitz Brewing Co.,* 33 Lab. Arb. 57, 60 (1959); *Singer Mfg. Co.,* 28 Lab. Arb. 570 (1957); *Braniff Airways, Inc.,* 27 Lab. Arb. 892 (1957); *John Lucas & Co.,* 19 Lab. Arb. 344, 346–347 (1952). Contra, *e. g., E. I. duPont de Nemours & Co.,* 29 Lab. Arb. 646, 652 (1957); *United Air Lines, Inc.,* 28 Lab. Arb. 179, 180 (1956).

*[This opinion applies also to No. 73–765, *International Ladies' Garment Workers' Union, Upper South Department, AFL–CIO* v. *Quality Manufacturing Co. et al., post,* p. 276.]

wards the Board extended the right without explanation to situations where no discipline or discharge resulted. *Mobil Oil Corp.*, 196 N. L. R. B. 1052 (1972); *J. Weingarten Inc.*, 202 N. L. R. B. 446 (1973).

The tortured history and inconsistency of the Board's efforts in this difficult area suggest the need for an explanation by the Board of why the new rule was adopted. However, a much more basic policy demands that the Board explain its new construction. The integrity of the administrative process requires that "[w]hen the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 197." *NLRB* v. *Metropolitan Ins. Co.,* 380 U. S. 438, 443 (1965). Here, there may be very good reasons for adopting the new rule, and the Court suggests some. See *ante,* at 260–261; 262–264; 265 n. 10. But these reasons are not to be found in the Board's cases. In *Metropolitan Ins. Co., supra,* at 444, we made it clear that " 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action.' " The Court today gives lip service to the rule that courts are not " 'to stand aside and rubber stamp' " Board determinations. *Ante,* at 266.

I would therefore remand the cases to the Court of Appeals with directions to remand to the Board so that it may enlighten us as to the reasons for this marked change in policy rather than leave with this Court the burden of justifying the change for reasons which we arrive at by inference and surmise.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

Section 7 of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 157, guarantees to

employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Court today construes that right to include union representation or the presence of another employee [1] at any interview the employee reasonably fears might result in disciplinary action. In my view, such an interview is not *concerted activity* within the intendment of the Act. An employee's right to have a union representative or another employee present at an investigatory interview is a matter that Congress left to the free and flexible exchange of the bargaining process.

The majority opinion acknowledges that the NLRB has only recently discovered the right to union representation in employer interviews. In fact, as late as 1964—after almost 30 years of experience with § 7—the Board flatly rejected an employee's claim that she was entitled to union representation in a "discharge conversation" with the general manager, who later admitted that he had already decided to fire her. The Board adopted the Trial Examiner's analysis:

> "I fail to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or to otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. An employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems

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[1] While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act "in concert" in employer interviews, also exists in the absence of a recognized union. Cf. *NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962).

to me that only exceptional circumstances should warrant any interference with this right." *Dobbs Houses, Inc.*, 145 N. L. R. B. 1565, 1571 (1964).[2]

The convoluted course of litigation from *Dobbs Houses* to *Quality Mfg.* hardly suggests that the Board's change of heart resulted from a logical "evolutional approach." *Ante,* at 265. The Board initially retreated from *Dobbs Houses,* deciding that it only applied to "investigatory" interviews and holding that if the employer already had decided on discipline the union had a § 8 (a)(5) right to attend the interview. *Texaco, Inc., Houston Producing Division,* 168 N. L. R. B. 361 (1967), enforcement denied, 408 F. 2d 142 (CA5 1969). It reasoned that employee discipline sufficiently affects a "term or condition of employment" to implicate the employer's obligation to consult with the employee's bargaining representative, and that direct dealing with an employee on an issue of discipline violated § 8 (a)(5).[3] For several years, the Board adhered to its distinction between "investigative" and "disciplinary" interviews, dismissing claims under both

[2] In one earlier case the Board had found a § 8 (a)(1) violation in the employer's refusal to admit a union representative to an interview. *Ross Gear & Tool Co.,* 63 N. L. R. B. 1012, 1033–1034 (1945), enforcement denied, 158 F. 2d 607, 611–614 (CA7 1947). In that case, however, the Board found that the employee, a union committee member, was called in to discuss a pending union issue. The Board found that discharging her for insisting on the presence of the entire committee was a discriminatory discharge under § 8 (a)(1). The opinion in *Dobbs Houses* distinguished *Ross Gear* on the ground that the matter under investigation was protected union activity. 145 N. L. R. B., at 1571.

[3] The Board has not been called upon to pursue its § 8 (a)(5) theory to its logical conclusion. Its determination that all disciplinary decisions are matters that invoke the employer's mandatory duty to bargain would seem to suggest that, absent some qualification of the duty contained in the collective-bargaining agreement, federal law will now be read to require that the employer bargain

§ 8 (a)(1) and § 8 (a)(5) in the absence of evidence that the employer had decided to discipline the employee.[4]

Quality Mfg. Co. was the first case in which the Board perceived any greater content in § 7. It did so, not by relying on "significant developments in industrial life," *ante,* at 265, but by stating simply that in none of the earlier cases had a worker been fired for insisting on union representation. The Board also asserted, for the first time, that its earlier decisions had disposed of only the union's right to bargain with the employer over the discipline to be imposed, and had not dealt with the employee's right under § 7 to insist on union presence at meetings that he reasonably fears would lead to disciplinary action. 195 N. L. R. B. 197, 198. Even this distinction was abandoned some four months later in *Mobil Oil Corp.,* 196 N. L. R. B. 1052 (1972), enforcement denied, 482 F. 2d 842 (CA7 1973). There the Board followed *Quality Mfg.,* even though the employees in *Mobil Oil* had not been fired for insisting on union representation and their only claim was that the employer had excluded the union from an investigatory interview. Thus, the Board has turned its back on *Dobbs Houses* and now finds a § 7 right to insist on union presence in the absence of any evidence that the employer has decided to embark on a course of discipline.

Congress' goal in enacting federal labor legislation was to create a framework within which labor and manage-

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to impasse before initiating unilateral action on disciplinary matters. It is difficult to believe that Congress intended such a radical restriction of the employer's power to discipline employees. See *Fibreboard Corp.* v. *NLRB,* 379 U. S. 203, 217, 218, 223 (1964) (STEWART, J., concurring).

[4] *Lafayette Radio Electronics,* 194 N. L. R. B. 491 (1971); *Illinois Bell Telephone Co.,* 192 N. L. R. B. 834 (1971); *Texaco, Inc., Los Angeles Terminal,* 179 N. L. R. B. 976 (1969); *Jacobe-Pearson Ford, Inc.,* 172 N. L. R. B. 594 (1968); *Chevron Oil Co.,* 168 N. L. R. B. 574 (1967).

ment can establish the mutual rights and obligations that govern the employment relationship. "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937). The National Labor Relations Act only creates the structure for the parties' exercise of their respective economic strengths; it leaves definition of the precise contours of the employment relationship to the collective-bargaining process. See *Porter Co.* v. *NLRB*, 397 U. S. 99, 108 (1970); *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 402 (1952).

As the Court noted in *Emporium Capwell Co.* v. *Western Addition Community Organization*, § 7 guarantees employees' basic rights of industrial self-organization, rights which are for the most part "collective rights . . . to act in concert with one's fellow employees, [which] are protected, not for their own sake, but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" *Ante*, at 62. Section 7 protects those rights that are essential to employee self-organization and to the exercise of economic weapons to exact concessions from management and demand a voice in defining the terms of the employment relationship.[5] It does not define those terms itself.

The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management. Absent specific limitations

[5] By contrast, the employee's § 7 right announced today may prove to be of limited value to the employee or to the stabilization of labor relations generally. The Court appears to adopt the Board's view that investigatory interviews are not bargaining sessions and

imposed by statute [6] or through the process of collective bargaining,[7] management remains free to discharge employees at will. See *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 583 (1960). An employer's need to consider and undertake disciplinary action will arise in a wide variety of unpredictable situations. The appropriate disciplinary response also will vary significantly, depending on the nature and severity of the employee's conduct. Likewise, the nature and amount of information required for determining the appropriateness of disciplinary action may vary with the severity of the possible sanction and the complexity of the problem. And in some instances, the employer's legitimate need to maintain discipline and security may require an immediate response.

This variety and complexity necessarily call for flexible and creative adjustment. As the Court recognizes, *ante*, at 267, the question of union participation in investigatory

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that the employer legitimately can insist on hearing only the employee's version of the facts. Absent employer invitation, it would appear that the employee's § 7 right does not encompass the right to insist on the participation of the person he brings with him to the investigatory meeting. The new right thus appears restricted to the privilege to insist on the mute and inactive presence of a fellow employee or a union representative; a witness to the interview, perhaps.

[6] Section 8 (a)(1) forbids employers to take disciplinary actions that "interfere with, restrain, or coerce" the employee's exercise of § 7 rights. Other federal statutes also limit in certain respects the employer's basic power to discipline and discharge employees. See, *e. g.*, § 706 of the Civil Rights Act of 1964, 78 Stat. 259, 42 U. S. C. § 2000e–5; Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U. S. C. § 623.

[7] The Board and the courts have recognized that union demands for provisions limiting the employer's power to discharge can be the subject of mandatory bargaining. See *Fibreboard Corp.* v. *NLRB*, 379 U. S., at 217, 221–223 (STEWART, J., concurring).

interviews is a standard topic of collective bargaining.[8] Many agreements incorporate provisions that grant and define such rights, and arbitration decisions increasingly have begun to recognize them as well. Rather than vindicate the Board's interpretation of § 7, however, these developments suggest to me that union representation at investigatory interviews is a matter that Congress left to the bargaining process. Even after affording appropriate deference to the Board's meandering interpretation of the Act, I conclude that the right announced today is not among those that Congress intended to protect in § 7. The type of personalized interview with which we are here concerned is simply not "concerted activity" within the meaning of the Act.

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[8] The history of a similar case, *Mobil Oil*, 196 N. L. R. B. 1052 (1972), enforcement denied, 482 F. 2d 842 (CA7 1973), illustrates how the Board has substituted its judgment for that of the collective-bargaining process. During negotiations leading to the establishment of a collective-bargaining agreement in that case, the union advanced a demand that existing provisions governing suspension and discharge be amended to provide for company-union discussions prior to disciplinary action. The employer refused to accede to that demand and ultimately prevailed, only to find his efforts at the bargaining table voided by the Board's interpretation of the statute.

Chairman Miller subsequently suggested that the union can waive the employee's § 7 right to the presence of a union representative. See *Western Electric Co.*, 198 N. L. R. B. 82 (1972). The Court today provides no indication whether such waivers in the collective-bargaining process are permissible. Cf. *NLRB* v. *Magnavox Co.*, 415 U. S. 322 (1974).

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL–CIO *v.* QUALITY MANUFACTURING CO. ET AL.

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

No. 73–765. Argued November 18, 1974—Decided February 19, 1975

Respondent employer's denial of employee's request that her union representative be present at investigatory interview that the employee reasonably believed might result in disciplinary action constituted unfair labor practice violative of § 8 (a) (1) of the National Labor Relations Act because it interfered with, restrained, and coerced the individual right of the employees protected by § 7 of the Act. *NLRB* v. *Weingarten, Inc., ante,* p. 251. P. 281.

481 F. 2d 1018, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a dissenting opinion, *ante,* p. 268. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined, *post,* p. 282.

Bernard Dunau argued the cause for petitioner. With him on the briefs were *Max Zimny, Bernard Rubenstein,* and *Bernard P. Jeweler.*

John E. Jenkins, Jr., argued the cause and filed a brief for respondent Quality Manufacturing Co. *Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin, Norton J. Come,* and *Linda Sher* filed a brief for respondent National Labor Relations Board.*

**Jerry Kronenberg* and *Milton Smith* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We set this case for argument with No. 73–1363, *NLRB* v. *Weingarten, Inc., ante,* p. 251, 416 U. S. 968 (1974). The National Labor Relations Board held in this case, as it held in *Weingarten,* that the denial by respondent employer (hereinafter respondent) of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action, constituted an unfair labor practice in violation of § 8 (a)(1) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 158 (a)(1), because it interfered with, restrained, and coerced the individual right of the employee, protected by § 7 of the Act, 29 U. S. C. § 157, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ," 195 N. L. R. B. 197 (1972). The Court of Appeals for the Fourth Circuit held, as the Court of Appeals for the Fifth Circuit held in *Weingarten,* that this was an impermissible construction of § 7 and denied enforcement of so much of the Board's order as directed respondent to cease and desist from requiring an employee requesting such representation to take part in such an interview without that representation if the employee reasonably feared disciplinary action, and also refused enforcement of provisions that directed respondent to offer reinstatement, with backpay, to the employees who were discharged for asserting this right. 481 F. 2d 1018 (1973). We reverse.

Respondent, a manufacturer of women's clothing, discharged Catherine King on October 16, 1969, after she refused to attend an interview with the company president without union representation. That same day, the company discharged shop chairlady Delila Mulford for her persistence in seeking to represent King at the inter-

view, and assistant chairlady Martha Cochran for filing grievances on behalf of King and Mulford.

The events leading to the discharges began on October 10, 1969, when Mulford, King, and two other employees met with Lawrence Gerlach, Sr., the company president; Mary Kathryn Gerlach, his wife and company production manager; and Lawrence Gerlach, Jr., their son and general manager, to complain that they were unable to make a satisfactory wage under the piecework system then in effect. The meeting ended on an acrimonious note when Gerlach, Jr., ordered the employees to return to work and told them that they were free to "go elsewhere" if they were dissatisfied with the company. Later that day, Mrs. Gerlach noticed that King had shut off her machine and was speaking to several other workers who had also stopped their machines. When ordered to resume production, King told Mrs. Gerlach to mind her own business. Thereupon Mrs. Gerlach directed King to report to Gerlach, Sr.'s office. King complied, but on her way to the office asked union chairlady Mulford to accompany her. Gerlach, Sr., met King and Mulford in the anteroom to his office. He told Mulford to return to work, and ordered King into his office alone. Neither woman complied, and King stated that she would not submit to an interview in the absence of her union representative. At this, Gerlach, Sr., told both women to return to their work stations. That Sunday, October 12, Mrs. Gerlach phoned Mulford and told her that she was suspended for two days. The Board found that the suspension was motivated by Mulford's attempt to represent King at the interview with Gerlach, Sr. 195 N. L. R. B., at 199.

On Monday, October 13, when King reported for work her timecard was missing from the rack, indicating under plant practice that she was wanted in the president's of-

fice. Before going to the office, however, King asked assistant chairlady Cochran to accompany her. They were met at the president's office by Mrs. Gerlach who told Cochran to go directly to work if she wanted to keep her job because the president wanted to take up with King where they left off on Friday. Cochran replied: "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is Union business and she has asked me to represent her." Gerlach, Sr., told King he would not return her timecard until she met with him alone in his office. King and Cochran then waited outside the president's office all day, and during this time Cochran's timecard was also removed from the rack.

Again on the morning of October 14, Gerlach, Sr., told King he would not return her timecard until she agreed to meet with him alone. When Cochran asked about her timecard, Gerlach replied that she was suspended for two days for being away from her machine. The Board termed this reason "pretextual," and found that in fact Cochran's attempt to represent King was the reason for the suspension. Neither King nor Cochran worked that day. Much the same transpired the next day, but this time Mulford, whose two-day suspension had expired, was also present. After King refused to meet in private with Gerlach, Sr., she and Cochran left the plant, and Mulford returned to work.

Finally, on October 16, all three women went to the president's office. Mrs. Gerlach gave Cochran her timecard and she returned to work. Gerlach, Sr., told King if she refused again to meet with him alone she would be fired. King walked out. Mulford then asked if she could return to work, and Gerlach, Sr., replied: "No, you've abandoned your job. You're finished." Later that same day, Cochran attempted to present grievances on behalf of King, Mulford, and herself to Gerlach, Jr. He stated

he was about to leave town and had no time for such things. When she put the list of grievances on his desk, he picked them up and threw them into the wastebasket. He then pulled Cochran's timecard and told her: "You worked this morning, but you're not working this afternoon." When Cochran asked Gerlach, Sr., if she had been fired he replied: "Just go home. You wanted to draw unemployment now go on and draw it." [1]

The Board found that "[t]here can be no doubt that under the facts and circumstances of this case King had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct." 195 N. L. R. B., at 199. King, therefore, had a reasonable basis for desiring union representation, and the Board found that respondent discharged her for insisting on that right. The Board found further that Mulford and Cochran were suspended, and Mulford discharged, because they insisted on representing King at the interview. Since Mulford and Cochran were engaging in a protected concerted activity, the suspensions and Mulford's discharge violated § 8 (a)(1). Finally, the Board determined that respondent discharged Cochran because she sought to file grievances on behalf of King, Mulford, and herself, and that this discharge was in violation of §§ 8 (a)(1) and (3).[2]

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[1] Later that day, Cochran telephoned Gerlach, Sr.'s secretary to learn whether Gerlach wanted her to report to work the next day. The secretary told her: "He said no." Cochran then asked the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran was never notified to return to work. The Trial Examiner found, and the Board agreed, that Cochran was discharged, and that she did not abandon her job. 195 N. L. R. B. 197, 199 n. 9.

[2] The Court of Appeals enforced that portion of the Board's order relating to Cochran's discharge. The court determined that there was substantial evidence to support the Board's finding that she was discharged because she sought to engage in the protected union activ-

On these facts, our decision today in No. 73–1363, *NLRB* v. *Weingarten, Inc., ante,* p. 251, clearly requires reversal of the judgment of the Court of Appeals insofar as enforcement of the Board's order was denied.[3] The judgment is accordingly reversed and the case remanded to the Court of Appeals with direction to enter a new judgment enforcing the Board's order in its entirety.

It is so ordered.

[For dissenting opinion of Mr. Chief Justice Burger, see *ante,* p. 268.]

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ity of filing grievances on behalf of King, Mulford, and herself. The company has not filed a cross-petition, and that aspect of the Court of Appeals' decision is not before us. *Brennan* v. *Arnheim & Neely, Inc.,* 410 U. S. 512, 516 (1973); *NLRB* v. *International Van Lines,* 409 U. S. 48, 52 n. 4 (1972); *Alaska Ind. Bd.* v. *Chugach Assn.,* 356 U. S. 320, 325 (1958).

[3] We do not address respondent's objection that it was denied procedural due process because the Board based its order upon a theory of liability under § 8 (a) (1) allegedly not charged or litigated before the Board. The argument is that respondent participated in the proceedings upon the premise that the issue for decision was whether respondent had decided upon discipline prior to the interview, so as to constitute the interview disciplinary and not investigatory in nature, and had no prior notice that, instead of deciding that question, the Board's decision would turn upon a finding that the employee had "reasonable grounds to fear . . . discipline" at the interview. But respondent failed to file a petition for reconsideration as permitted by Board Rules and Regulations § 102.48 (d) (1), 29 CFR § 102.48 (d) (1), that provides that any material error in the Board's decision may be asserted through a motion for "reconsideration, rehearing, or reopening of the record." Respondent therefore cannot assert its objection on appeal "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U. S. C. § 160 (e). Respondent did not suggest any "extraordinary circumstances" in either the Court of Appeals or in this Court. The objection therefore may not be considered. *NLRB* v. *Mine Workers,* 355 U. S. 453, 463–464 (1958); *Glaziers' Local No. 558* v. *NLRB,* 132 U. S. App. D. C. 394, 399–400, 408 F. 2d 197, 202–203 (1969).

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

For the reasons stated in my dissent in *NLRB* v. *Weingarten, Inc., ante,* p. 269, I dissent.

Syllabus

LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK *v.* NEWSOME

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

No. 73–1627. Argued December 11, 1974—
Decided February 19, 1975

When state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, such as the lawfulness of a search or the voluntariness of a confession, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding. Pp. 288–293.

(a) Thus, here where a New York statute permitted an appeal from an adverse decision on a motion to suppress evidence allegedly obtained as a result of unlawful search and seizure though the conviction was based on a guilty plea, respondent, who had been convicted in state court on a guilty plea to a drug charge and who had unsuccessfully presented to the state courts on direct appeal his federal constitutional claim that evidence seized incident to an unlawful arrest should have been suppressed, was not precluded from raising such claim in a federal habeas corpus proceeding. Pp. 288–292.

(b) To hold otherwise not only would deprive respondent of a federal forum despite his having satisfied all the requirements for invoking federal habeas corpus jurisdiction, but would also frustrate the State's policy in providing for post-guilty plea appellate review of pretrial motions to suppress. Pp. 292–293.

492 F. 2d 1166, affirmed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., *post*, p. 294, and POWELL, J., *post*, p. 302, filed dissenting opinions, in which BURGER, C. J., and REHNQUIST, J., joined.

Robert S. Hammer, Assistant Attorney General of New York, argued the cause for petitioner. With him on the brief were *Louis J. Lefkowitz,* Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Irving Galt,* Assistant Attorney General.

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Stanley Neustadter argued the cause for respondent. With him on the brief was *William E. Hellerstein.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent Leon Newsome was arrested pursuant to N. Y. Penal Law § 240.35 (6) for loitering in the lobby of a New York City Housing Authority apartment building. A search of Newsome conducted at the time of his arrest produced a small quantity of heroin and related narcotics paraphernalia. Consequently, in addition to the offense of loitering, he was also charged with possession of a dangerous drug, fourth degree, N. Y. Penal Law § 220.05 (now codified, as modified, as N. Y. Penal Law § 220.03), and criminally possessing a hypodermic instrument. N. Y. Penal Law § 220.45.

The New York City Criminal Court conducted a nonjury trial on the loitering charge and a hearing on Newsome's motion to suppress the evidence seized at the time of his arrest. Newsome argued that the arresting officer did not have probable cause for the loitering arrest, that there was insufficient evidence to support a loitering conviction, and that the loitering statute was unconstitutional and therefore could not serve as the basis for either a loitering conviction or a lawful search incident to arrest. The court rejected these arguments, found Newsome guilty of loitering, and denied the motion to suppress.

One month later, on the date scheduled for trial on the drug charges, Newsome withdrew his prior pleas of not guilty and pleaded guilty to the lesser charge of attempted possession of dangerous drugs. N. Y. Penal Law § 110. He was immediately sentenced to 90 days' imprisonment on the attempted-possession conviction and received an unconditional release on the loitering conviction.

At the sentencing proceeding Newsome indicated his intention to appeal both the loitering conviction and the denial of his motion to suppress the drugs and related paraphernalia seized at the time of his arrest. Appeal of the adverse decision on the motion to suppress was authorized by N. Y. Code Crim. Proc. § 813–c (now recodified as N. Y. Crim. Proc. Law §§ 710.20 (1), 710.70 (2)), which provided that an order denying a motion to suppress evidence alleged to have been obtained as a result of unlawful search and seizure "may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty." [1]

On direct appeal to the Appellate Term of the New York Supreme Court, the loitering conviction was reversed for insufficient evidence and a defective information. Because the court held that there was probable cause to arrest Newsome for loitering, however, the search incident to that arrest was upheld and the drug conviction affirmed. Newsome sought further review of the drug conviction, but leave to appeal to the New York Court of Appeals was denied. This Court denied a petition for a writ of certiorari. *Newsome* v. *New York,* 405 U. S. 908.

Newsome then filed a petition for a writ of habeas corpus in the District Court for the Eastern District of

[1] Section 813–c was directed to the right to appeal an adverse ruling on a claim of an unlawful search and seizure after a plea of guilty. N. Y. Code Crim. Proc. § 813–g (recodified as N. Y. Crim. Proc. Law §§ 710.20 (3), 710.70 (2)), permitted similar appeals from denials of motions to suppress allegedly coerced confessions. See *McMann* v. *Richardson,* 397 U. S. 759, 766 n. 11. New York now also provides by statute for post-guilty plea appeals from denials of motions to suppress identification testimony claimed to be tainted by improper pretrial identifications. N. Y. Crim. Proc. Law §§ 710.20 (5), 710.70 (2).

New York. The petition reiterated the claim that the loitering statute was unconstitutional, that Newsome's arrest was therefore invalid, and that as a result the evidence seized incident to that arrest should have been suppressed. Prior to the District Court's decision on the merits of Newsome's petition,[2] the New York Court of Appeals declared New York's loitering statute unconstitutional. *People* v. *Berck,* 32 N. Y. 2d 567, 300 N. E. 2d 411. In light of the *Berck* decision, the District Court granted Newsome's application for a writ of habeas corpus.

The petitioner, the Attorney General of New York, who had been granted leave by the District Court to intervene as a respondent in the habeas corpus proceeding, appealed. The Court of Appeals for the Second Circuit affirmed the judgment of the District Court, *United States ex rel. Newsome* v. *Malcolm,* 492 F. 2d 1166, adhering to its earlier rulings that a New York defendant who has utilized state procedures to appeal the denial of a motion to suppress may pursue his constitutional claim on a federal habeas corpus petition although the conviction was based on a plea of guilty. *Id.,* at 1169–1171. The court held that New York's loitering statute violated due process because it failed to specify adequately the conduct it proscribed and failed to provide sufficiently clear guidance for police, prosecutors, and the courts so that they could enforce the statute in a manner consistent with the constitutional requirement that arrests be based on probable cause. *Id.,* at 1171–1174.

[2] The District Court initially dismissed the petition because Newsome, who had been released on bail pending final disposition of his case, was not "in custody" as required by 28 U. S. C. § 2241. Newsome appealed the dismissal, and, in light of this Court's holding on the custody question in *Hensley* v. *Municipal Court,* 411 U. S. 345, the Court of Appeals for the Second Circuit remanded the case to the District Court for a decision on the merits.

Accordingly, the court held that because Newsome was searched incident to an arrest for the violation of a statute found to be unconstitutional on the ground that it substituted mere suspicion for probable cause as the basis for arrest, the search of Newsome was also constitutionally invalid. The court concluded that the evidence seized should have been suppressed, and affirmed the District Court's judgment granting the writ of habeas corpus. *Id.*, at 1174–1175.

The Attorney General of New York sought review here of both the Court of Appeals' decision that Newsome had not waived his right to file a federal habeas corpus petition by pleading guilty and its decision as to the constitutionality of New York's loitering statute. Because of a conflict between the judgment in the present case and a decision of the Court of Appeals for the Ninth Circuit,[3] we granted certiorari limited to the question of a defendant's right to file a federal habeas corpus petition challenging the lawfulness of a search or the voluntariness of a confession or presenting other constitutional claims when a State provides for appellate review of those issues after a guilty plea. 417 U. S. 967.[4]

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[3] California, like New York, permits a defendant to appeal specified adverse pretrial rulings even though he subsequently pleads guilty. Cal. Penal Code § 1538.5 (m). Unlike the Court of Appeals for the Second Circuit, however, the Court of Appeals for the Ninth Circuit by a divided vote held that such a defendant may not pursue his constitutional claim on a federal habeas corpus petition. *Mann* v. *Smith*, 488 F. 2d 245, 247.

[4] Certiorari was granted limited to Question 1 in Attorney General Lefkowitz' petition: "Does a state defendant's plea of guilty waive federal habeas corpus review of his conviction, even though under state law he has been permitted review in the state appellate courts of the denial of his motion, on constitutional grounds, to suppress the evidence that would have been offered against him had there been a trial?" 417 U. S. 967.

I

In contending that Newsome is precluded from raising his constitutional claims in this federal habeas corpus proceeding, the petitioner relies primarily on this Court's decisions in the guilty-plea trilogy of *Brady* v. *United States,* 397 U. S. 742, *McMann* v. *Richardson,* 397 U. S. 759, and *Parker* v. *North Carolina,* 397 U. S. 790, and on our decision in *Tollett* v. *Henderson,* 411 U. S. 258. The *Brady* trilogy announced the general rule that a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings. This principle was reaffirmed in *Tollett* v. *Henderson, supra,* at 267: "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

But the Court also suggested in the *Brady* trilogy that an exception to this general rule might be proper when a State decides to permit a defendant to appeal from an adverse ruling in a pretrial hearing despite the fact that his conviction is based on a guilty plea. See *McMann* v. *Richardson, supra,* at 766, and n. 11, 770 n. 13.[5] The justification for such an exception lies in the special

[5] Since the guilty pleas in *McMann* v. *Richardson* were entered prior to the effective date of New York's statutory scheme permitting a defendant pleading guilty to challenge on appeal the admissibility of evidence allegedly seized improperly or of an allegedly coerced confession, the Court in *McMann* expressly reserved ruling on the question presented by the judgment now before us. 397 U. S., at 770 n. 13. That express reservation unquestionably belies the argument advanced in the dissenting opinion of Mr. Justice White, *post,* at 297–298, that the question before us was answered in *Parker* v. *North Carolina,* 397 U. S. 790, a case decided together with *McMann.*

nature of the guilty plea of a New York defendant like Newsome.

In most States a defendant must plead not guilty and go to trial to preserve the opportunity for state appellate review of his constitutional challenges to arrest, admissibility of various pieces of evidence, or the voluntariness of a confession. A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. *McMann* v. *Richardson, supra,* at 768. Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained. Cf. *Fay* v. *Noia,* 372 U. S. 391, 438. It is in this sense, therefore, that ordinarily "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett* v. *Henderson, supra,* at 267.

New York, however, has chosen not to treat a guilty plea as such a "break in the chain of events" with regard to certain types of constitutional claims raised in pretrial proceedings. For a New York defendant whose basic defense consists of one of those constitutional claims and who has already lost a pretrial motion to suppress based on that claim, there is no practical difference in terms of appellate review between going to trial and pleading guilty. In neither event does the State assert any claim of finality because of the judgment of conviction. In either event under New York procedure the defendant has available the full range of state appellate review of his constitutional claims. As to those claims, therefore, there is no "break" at all in the usual state procedure for adjudicating constitutional issues. The guilty plea operates simply as a procedure by which the constitutional issues can be litigated without the necessity of

going through the time and effort of conducting a trial, the result of which is foreordained if the constitutional claim is invalid. The plea is entered with the clear understanding and expectation by the State, the defendant, and the courts that it will not foreclose judicial review of the merits of the alleged constitutional violations.[6]

In sum, although termed by the New York Criminal Procedure Law a "guilty plea," the same label given to the pleas entered by the defendants in the *Brady* trilogy of cases and *Tollett* v. *Henderson,* Newsome's plea had legal consequences quite different from the consequences of the pleas entered in traditional guilty-plea cases. Far from precluding review of independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of his "guilty plea," Newsome's plea carried with it the guarantee that judicial review of his constitutional claims would continue to be available to him. In this respect there is no meaningful difference between Newsome's conviction and a New York conviction entered after a trial.[7]

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[6] The petitioner concedes that this review ultimately includes the certiorari or appellate jurisdiction of this Court. Indeed, in *Sibron* v. *New York,* 392 U. S. 40, we reversed a state-court conviction on the ground that the appellant's motion to suppress evidence should have been granted, notwithstanding the fact that the appellant had pleaded guilty and pursued his appeal under § 813–c. See *id.,* at 45 n. 2. If Newsome's guilty plea is not a sufficient "break in the chain of events [that] preceded it" to prevent review of his constitutional claims in this Court, then *a fortiori* the plea cannot rationally foreclose resort to federal habeas relief. For even when state procedural grounds are adequate to bar direct review of a conviction in this Court, federal habeas corpus relief is nonetheless available to litigate the defendant's constitutional claims unless there has been a deliberate bypass of the state procedures. See *Fay* v. *Noia,* 372 U. S. 391, 428–431.

[7] New York could easily have provided that, rather than pleading

Because of the entirely different expectations surrounding Newsome's plea and the completely different legal consequences flowing from it, earlier guilty-plea cases holding that "[t]he focus of federal habeas inquiry is the nature of the advice [of counsel] and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity," *Tollett* v. *Henderson, supra,* at 266, are simply inapposite. Newsome has satisfied all the prerequisites for invoking the habeas corpus jurisdiction of the federal courts.[8] He is no less entitled to federal review of his constitutional claim than is any other defendant who raises his claim in a timely fashion, in accordance with state procedure, and who pursues his

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"guilty," a defendant who intends to appeal his pretrial claim of an involuntary confession or an unlawful seizure but has no desire to impose upon the State the burden of going to trial should plead "not guilty" and at the same time stipulate to all the evidence the State can introduce to prove his guilt. Upon the inevitable entry of a judgment of conviction based on the stipulation, the defendant would then be able to pursue his state appellate remedies. And, presumably, because there would then be no "solemn admission of guilt," all would concede that the defendant would not be foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding. But the only difference between such a procedure and the one New York has chosen is that the plea entered is labeled a plea of "not guilty" rather than "guilty" and there is a stipulation by the defendant as to the facts the State would prove demonstrating his guilt rather than a recitation by the defendant in court. The availability of federal habeas corpus depends upon functional reality, not upon an infatuation with labels. See *Fay* v. *Noia, supra.*

[8] Newsome is "in custody" within the meaning of 28 U. S. C. § 2241. See n. 2, *supra.* His petition for a writ of habeas corpus alleged that this custody was in violation of the laws of the United States. § 2241 (c)(3). And he has satisfied the exhaustion requirement of 28 U. S. C. § 2254 by presenting his federal claims to the state courts on direct appeal. See *Francisco* v. *Gathright,* 419 U. S. 59.

claim through all available levels of state appellate review.[9]

II

Denying Newsome the right to file a federal habeas corpus petition raising his claim of an unconstitutional seizure would not only deprive him of a federal forum despite the fact that he has satisfied all the requirements for invoking federal habeas corpus jurisdiction, it would also frustrate the State's policy in providing for post-guilty plea appellate review of pretrial motions to suppress.

Many defendants recognize that they cannot prevail at trial unless they succeed in suppressing either evidence seized by the police or an allegedly involuntary confession. Such defendants in States with the generally prevailing rule of finality of guilty pleas will often insist on proceeding to trial for the sole purpose of preserving their claims of illegal seizures or involuntary confessions for potential vindication on direct appellate review or in collateral proceedings. Recognizing the completely unnecessary waste of time and energy consumed in such trials, New York has chosen to discourage them by creating a procedure which permits a defendant to

[9] In *Fay* v. *Noia, supra,* the Court held that a federal habeas judge may deny relief to an applicant who has deliberately bypassed the orderly state-court procedures for reviewing his constitutional claim. 372 U. S., at 438. But the Court also held that if the state courts have entertained the federal constitutional claims on the merits in a subsequent proceeding, notwithstanding the deliberate bypass, the federal courts have no discretion to deny the applicant habeas relief to which he is otherwise entitled. *Id.,* at 439. It would seem to follow necessarily that when there is no bypass of state appellate procedures, deliberate or otherwise, and the state courts entertained the federal claims on the merits, a federal habeas corpus court must also determine the merits of the applicant's claim.

obtain appellate review of certain pretrial constitutional claims without imposing on the State the burden of going to trial.

To deny federal habeas corpus relief to those in Newsome's position would make New York's law a trap for the unwary.[10] On the other hand, it is safe to predict that those New York defendants who knew that federal habeas corpus would be foreclosed would again be dissuaded from pleading guilty and instead would insist on a trial solely to preserve the right to an ultimate federal forum in which to litigate their constitutional claims. Such a result would eviscerate New York's commendable efforts to relieve the problem of congested criminal trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution.[11]

Accordingly, we hold that when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding. The judgment of the Court of Appeals for the Second Circuit is affirmed.

It is so ordered.

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[10] At the time Newsome pleaded guilty the Court of Appeals for the Second Circuit had repeatedly held that a New York defendant who has utilized § 813–c in the state courts may pursue his constitutional claim on a federal habeas corpus petition. *E. g., United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209; *United States ex rel. Molloy* v. *Follette,* 391 F. 2d 231.

[11] The Uniform Rules of Criminal Procedure would create an even broader right of appeal than is currently provided for in New York, permitting post-guilty-plea appeal of any order denying a pretrial motion which, if granted, would be dispositive of the case. Uniform Rule Crim. Proc. 444 (d).

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

Because I believe that *federal* law provides respondent Newsome no right to set aside his plea of guilty—a solemn, counseled admission in open court that he is in fact guilty—even assuming that he had previously been the victim of a search which did not measure up to federal standards, I respectfully dissent.

I

The federal habeas corpus statute, pursuant to which Newsome sought to have the courts below set aside his plea of guilty, provides relief only if the petitioner can establish that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254 (a). It is common ground, I take it, that the Federal Constitution does not itself entitle a defendant who has pleaded guilty to have that plea set aside upon a showing that he has previously been the victim of an unconstitutional search, even if he can also show that he pleaded guilty only because the prosecution planned to use the fruits of the search against him at trial.[1] *Blackledge* v. *Perry*, 417 U. S. 21 (1974); *Tollett* v. *Henderson*, 411 U. S. 258 (1973); *Brady* v. *United States*, 397 U. S. 742 (1970); *McMann* v. *Richardson*, 397 U. S.

[1] Indeed, not only does the United States Constitution grant no such entitlement, but the federal courts have for the most part refused to create such an entitlement in the exercise of their supervisory powers over the administration of criminal justice in the federal system. See *United States* v. *Sepe*, 474 F. 2d 784 (CA5), aff'd en banc, 486 F. 2d 1044 (1973); *United States* v. *Cox*, 464 F. 2d 937 (CA6 1972); *United States* v. *Mizell*, 488 F. 2d 97 (CA5 1973), and cases there cited. But see *United States* v. *Doyle*, 348 F. 2d 715, 719 (CA2), cert. denied, 382 U. S. 843 (1965).

759 (1970); *Parker* v. *North Carolina,* 397 U. S. 790 (1970). In *Tollett,* we said:

> "We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. *When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged,* he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*" 411 U. S., at 267. (Emphasis added.)

This "principle" is a rule of substantive constitutional law limiting the federal constitutional grounds upon which a defendant may attack a judicial admission of guilt. It is not, as the majority assumes, *ante,* at 289, a rule of procedure, disentitling a defendant to raise a Fourth Amendment claim which was not properly "preserved" under state law. If it were such a rule of procedure, both *McMann* and *Tollett* would have come out differently: both were federal habeas corpus proceedings; as the majority points out, *ante,* at 290 n. 6, federal issues are "preserved" for habeas corpus purposes unless state procedures for litigating them have been "deliberately bypassed"; and neither the petitioner in *McMann* nor the petitioner in *Tollett* had "deliberately bypassed" state procedures for raising the coerced-confession or grand-jury-discrimination claims there involved.[2] Indeed, the entire majority

[2] *McMann* was a case involving a coerced-confession claim in which the plea was entered before *Jackson* v. *Denno,* 378 U. S. 368 (1964), and therefore at a time when the defendant believed the jury would

opinion rests on the erroneous notion that we refused to hear antecedent constitutional claims in *McMann* and *Tollett* because the defendants had "bypassed" those claims by pleading guilty. In fact, those decisions were based on the substantive proposition that the defendants' guilt in those cases, and the State's consequent absolute right to incarcerate them, was established by their voluntary and intelligent pleas of guilty.[3]

The question raised in this case, therefore, is whether, if a State chooses to open its appellate courts to hear claims of constitutional deprivations preceding entry of a guilty plea and to set aside the plea if the antecedent violation is established, the State thereby creates a *fed-*

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hear his confession regardless. *Tollett* involved a guilty plea entered in ignorance of the facts underlying the defendant's later attack on the grand jury.

[3] It is true that Fourth Amendment claims are never attacks on the accuracy of the finding of factual guilt, *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Under our legal system, reversal of a conviction on Fourth Amendment grounds is perfectly consistent with a recognition that the defendant is, in fact, guilty. Thus, it may be argued that, unlike some other claims, Fourth Amendment claims are not undercut by a guilty plea in which guilt is solemnly admitted. The short answer to this argument is that it applies as well in the case of States which do *not* permit appeals from guilty pleas as in the case of those which do, and the argument has therefore already been rejected. *Tollett* v. *Henderson*, 411 U. S. 258 (1973); *Brady* v. *United States*, 397 U. S. 742 (1970); *McMann* v. *Richardson*, 397 U. S. 759 (1970); *Parker* v. *North Carolina*, 397 U. S. 790 (1970); *United States* v. *Sepe*, *supra*. More to the point, the deterrent purpose of the exclusionary rule should be furthered at the lowest possible cost to society in terms of freeing the guilty. By precluding defendants who plead guilty from litigating Fourth Amendment issues, we do not seriously detract from the deterrent purpose of the rule (a policeman about to improperly invade someone's privacy can hardly rely upon the erroneous pretrial denial of a suppression motion by a trial judge *and* the defendant's mistaken decision to plead guilty) and we avoid unnecessarily freeing the guilty.

eral constitutional right to set aside the guilty plea where none would have existed otherwise. The question almost answers itself. More importantly, however, it has already been answered by this Court in *Parker* v. *North Carolina, supra.*

In *Parker,* the defendant sought to set aside his guilty plea in a state habeas corpus proceeding alleging, *inter alia,* that a confession had been unconstitutionally coerced from him and that he pleaded guilty only because of the confession. The state trial court held a hearing on the merits of the coerced-confession claim and found both the confession and the subsequent plea to have been voluntary. On appeal, the North Carolina Court of Appeals clearly accepted the proposition that Parker's plea should be set aside if the confession was involuntary, and if it was the but-for cause of the plea. *Parker* v. *State,* 2 N. C. App. 27, 32, 162 S. E. 2d 526, 529. It concluded, however, that Parker's confession was voluntary and his plea not the product of it. On certiorari, we did not feel compelled—by the fact that North Carolina gave Parker a right to set aside his plea if it was based upon a confession coerced in violation of federal standards—to give him a similar right. Instead, assuming that the confession was inadmissible and that he pleaded guilty in the contrary belief, we held that Parker was not entitled "to disavow his admission in open court that he committed the offense with which he was charged." 397 U. S., at 797.[4] Like Newsome in New York, a defendant who loses a pretrial suppression motion in North Carolina and then pleads guilty may assume, by reading the North Carolina Court of Appeals opinion in *Parker* v.

[4] We did hold that a plea entered upon advice of counsel with regard to the admissibility of the confession, which advice was not "within the range of competence required of attorneys representing defendants in criminal cases," 397 U. S., at 797–798, would warrant vacation of the plea on Sixth Amendment grounds.

State, supra, that state appellate courts will hear the merits of his claim (in a state habeas corpus proceeding, if he can establish that his guilty plea was entered because the suppression motion was denied). However, our decision in *Parker* would preclude any claim that this Court or any federal court would do likewise. Similarly, here, Newsome's guilt has been established by as reliable a method as is known to the criminal law—his solemn admission of guilt, made in open court. The Federal Constitution entitles him to set aside that plea only upon a showing that it was involuntary or unintelligent. The fact that New York State has nonetheless chosen to set aside his conviction upon a showing that he was the victim of a previous illegal seizure does not and cannot alter substantive federal constitutional law.[5]

II

The majority contends, however, that since state law provides a defendant with a "guarantee" that he may plead guilty and still litigate his Fourth Amendment claim, it cannot possibly be said that he has chosen to bypass that claim by pleading guilty. Moreover, the majority asserts that the New York guilty plea involved here is a "guilty plea" in name only, and is something else in reality in light of the "different expectations" surrounding it and the different "legal consequences" flowing from it. There are two things wrong with these contentions.

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[5] *Sibron* v. *New York,* 392 U. S. 40 (1968), in which we heard a Fourth Amendment claim on direct appeal after a guilty plea, was decided before the Court created the relevant constitutional rule in the *Brady* trilogy; and in *Sibron* the Court never addressed the question whether the Federal Constitution entitled the defendant to set aside his guilty plea upon establishing the antecedent Fourth Amendment violation.

First, the contentions assume that the *Brady* trilogy was based upon notions of waiver. In other words, it assumes that this Court has in the past refused to set aside "guilty pleas" on the basis of antecedent violations of constitutional rights only because the plea was deemed to have "waived" those rights. This assumption finds some support in the language of those cases, but waiver was not their basic ingredient. In any event, the Court squarely and conclusively rejected the waiver rationale in *Tollett* v. *Henderson, supra.* We said there:

> "If the issue were to be cast solely in terms of 'waiver,' the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here." 411 U. S., at 266.

Nonetheless, the Court of Appeals' decision in *Tollett* was reversed. Under *Tollett*'s interpretation of the trilogy, and under *Tollett* itself, federal constitutional principles simply preclude the setting aside of a state conviction by a federal court where the defendant's guilt has been conclusively established by a voluntary and intelligent plea of guilty. Labels aside, a guilty plea for federal purposes is a judicial admission of guilt conclusively establishing a defendant's factual guilt. Newsome's plea plainly qualifies.[6]

[6] The majority argues that Newsome would have had a right to set aside his conviction on the basis of a Fourth Amendment claim if he had pleaded not guilty and permitted his attorney to stipulate that, if called, certain government witnesses would testify to certain facts, and introduce certain exhibits, among them the allegedly illegally seized evidence; and that, therefore, he should be permitted to set aside his functionally equivalent plea of guilty on the basis of the same Fourth Amendment claim. The premise is correct; the conclusion is not. In the first place, if the conclusion were correct, it should apply equally to States which do not permit appeals from guilty pleas. As our decisions in the *Brady* trilogy and *Tollett* establish, however, guilty pleas in those States are not infirm on

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Second, the contentions assume that New York State intended to create the expectation and has the power to create the expectation on the part of defendants who plead guilty that they will be able to litigate their antecedent Fourth Amendment claims not only in state courts, but also in federal courts. There is absolutely no reason to suppose that New York intended to create such expectations and, if it had so intended, it would have been acting plainly beyond its power. New York State may, of course, give its defendants as a matter of state law the right to set aside guilty pleas on the basis of antecedent violations of federal constitutional search standards. If they do, it cannot be said that a defendant who pleads guilty has "waived" that state-law right. But, it is for Congress or this Court to decide whether *federal* law gives a defendant the right to set aside his plea under such circumstances. The "legal circumstances" in federal courts which will flow from a state plea, and the "expectations" which a defendant should have about what will occur in federal courts following the plea are not matters to be decided by the New York

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the basis of antecedent constitutional violations, even though convictions in uncontested trials are. The majority offers no reason why this distinction should be ignored for federal purposes just because New York ignores it for state purposes. Moreover, a conviction based upon the defendant's solemn admission of factual guilt is *not* the functional equivalent of a conviction on uncontested evidence. In the latter case, the conviction is not based on the defendant's admission but on the evidence: the trial judge may always acquit, if unpersuaded, and an appellate court may find the illegally seized evidence not to have contributed to the verdict. See discussion of the differences for appeal purposes between a plea of guilty and a stipulation to evidence in *United States* v. *Mizell,* 488 F. 2d, at 99–101 (guilty plea not appealable), and *United States* v. *Mendoza,* 491 F. 2d 534, 536–538 (CA5 1974) (conviction on stipulated evidence appealable). See also *United States* v. *Cox,* 464 F. 2d, at 944–945.

Legislature and surely not finally by the Court of Appeals for the Second Circuit. If this Court had followed its prior decisions and reiterated in the present context that Newsome may not litigate his Fourth Amendment claim in federal court, then once those who counsel defendants in the New York court system read the opinion, it would be incontestable that a guilty plea in New York would foreclose federal habeas corpus relief based on already rejected Fourth Amendment claims and that no defendant might legitimately harbor "expectations" to the contrary.[7]

Thus, even under a waiver theory, counseled defendants waive all rights by pleading guilty, which the applicable law says they waive; and, since the applicable law in this case is federal, it is for us, and not the New York State Legislature, to say whether Fourth Amendment claims such as those involved here will or will not be waived by a guilty plea. To illustrate, suppose instead of passing the statute involved here New York had sought to achieve substantially the same result by permitting *pretrial* appeals from denials of suppression motions in all cases in which the trial judge certified that the seized evidence was likely to be determinative of the outcome of the trial. Suppose further that a defendant avails himself of this opportunity, loses on the merits of his Fourth Amendment claim in the highest state court, and subsequently pleads guilty. Suppose, finally, the

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[7] Because of the possibility that prior Second Circuit law, *e. g.*, *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209 (1967), and *United States ex rel. Molloy* v. *Follette,* 391 F. 2d 231 (1968), affirmatively misled respondent's lawyer into believing that federal law does permit collateral relitigation of the antecedent Fourth Amendment violation after a New York guilty plea, the best course would have been to permit all those, including Newsome, who pleaded guilty *before* the date of this decision in reliance on Second Circuit law to replead. *United States* v. *Mizell, supra,* at 101. Cf. *Santobello* v. *New York,* 404 U. S. 257 (1971).

State passed a second statute permitting a defendant who pleads guilty under the circumstances just described to appeal his conviction directly to this Court or to bring directly a federal habeas corpus proceeding attacking the constitutionality of the search—the statute expressly stating that the Fourth Amendment right is deemed *not* waived by the plea of guilty. The second statute would, obviously, be of no effect whatever, since it would be a plain effort by the State to legislate federal law. However, so far as the federal courts are concerned, the hypothesized statute is the functional equivalent of the statute at issue in this case as construed and effectuated by the majority. The only difference is that, in the case of the real statute, the state appeals follow the plea rather than precede it.

Finally, the majority argues that a contrary decision by this Court would interfere with the State's policy of avoiding unnecessary trials by permitting appeals from guilty pleas. New York, whose policy this Court is seeking to further, has appeared here through its Attorney General and argued precisely to the contrary. Obviously, New York believes that its policy is adequately served by the state appeals. There is no reason for the Court to decide the case one way for New York's benefit, when New York is arguing strenuously that we should decide the case the other way.

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

I would reverse the judgment of the Court of Appeals for the reasons set forth in my concurring opinion in *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 250 (1973). This case is even more inappropriate for federal collateral review of a state prisoner's Fourth Amendment claim. The prisoner here, with advice of counsel,

pleaded guilty in open court. He does not question the voluntariness of his plea nor does he assert innocence. Rather, he argues that his conviction is reviewable in federal habeas corpus because of an uncommon New York statute which allows appeal from an adverse suppression ruling notwithstanding the guilty plea.

Yet the Court today holds that respondent is entitled to seek *federal* habeas corpus relief. This ruling distorts beyond recognition the writ of habeas corpus. The historic and honored purpose of habeas corpus, and indeed its only justification, is to provide the added assurance to a free society that no innocent person will suffer an unconstitutional deprivation of liberty. The great writ was not designed as a means for freeing persons who have voluntarily confessed guilt under procedures comporting with due process of law.

Apart from my views as to the inappropriateness of federal habeas corpus review of Fourth Amendment claims duly adjudicated by state courts, *Bustamonte, supra,* I also agree with MR. JUSTICE WHITE'S dissent, *ante,* p. 294. As *federal* law is invoked by respondent, his guilty plea is determinative under *Tollett* v. *Henderson,* 411 U. S. 258 (1973).

UTAH *v.* UNITED STATES

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT

No. 31, Orig. Argued December 17, 1974—Decided February 19, 1975

In this dispute between Utah and the United States over certain waters and shorelands of the Great Salt Lake, the United States' exceptions to the Special Master's report are overruled, and the proposed decree, except as modified by agreement of the parties, is adopted and entered.

Danny J. Boggs argued the cause for the United States on exceptions to the Report of the Special Master. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Johnson,* and *John E. Lindskold.*

Richard L. Dewsnup, Special Assistant Attorney General of Utah, argued the cause for plaintiff in support of the Report of the Special Master. With him on the brief were *Vernon B. Romney,* Attorney General, *Robert B. Hansen,* Deputy Attorney General, *Dallin W. Jensen* and *Paul E. Reimann,* Assistant Attorneys General, and *Clifford L. Ashton* and *Edward W. Clyde,* Special Assistant Attorneys General.

PER CURIAM and DECREE.

We heard oral argument upon the exceptions to the Report of the Special Master filed by the United States. 419 U. S. 814 (1974). We overrule the exceptions and adopt, and direct the entry of, the decree proposed by the Special Master except that, as agreed by the parties, paragraph No. 1 of the proposed decree is modified in form by revising the phrasing of the opening paragraph to read as follows:

> "1. Subject to any federal regulatory authority that may extend to the Great Salt Lake or its shorelands, the United States of America, its departments

and agencies, are enjoined from asserting against the State of Utah any claim of right, title and interest:"

Further, Finding of Fact No. 10 is adjusted, as agreed by the parties, by inserting 4200.8 in lieu of 4200.2, and by inserting 396,000 in lieu of 325,000.

For the purpose of giving effect to the above, the following decree is hereby entered.

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

"1. Subject to any federal regulatory authority that may extend to the Great Salt Lake or its shorelands, the United States of America, its departments and agencies, are enjoined from asserting against the State of Utah any claim of right, title and interest:

"(a) to any of the exposed shorelands situated between the edge of the waters of the Great Salt Lake on June 15, 1967, and the bed of the Lake on January 4, 1896, when Utah became a State, with the exception of any lands within the Bear River Migratory Bird Refuge and the Weber Basin federal reclamation project;

"(b) to the natural resources and living organisms in or beneath any of the exposed shorelands of the Great Salt Lake delineated in (a) above; and

"(c) to the natural resources and living organisms either within the waters of the Great Salt Lake, or extracted therefrom, as delineated in (a) above.

"2. The State of Utah is not required to pay the United States, through the Secretary of the Interior, for the exposed shorelands, including any minerals, delineated in paragraph 1 above of this decree.

"3. There remains the question whether any lands within the meander line of the Great Salt Lake (as duly surveyed prior to or in accordance with section 1 of the Act of June 3, 1966, 80 Stat. 192), and conveyed by quitclaim deed to the State of Utah, in-

cluded any federally owned uplands above the bed of the Lake on the date of statehood (January 4, 1896) which the United States still owned prior to the conveyance to Utah.* In the absence of agreement between the parties disposing of the above question or of the necessity for further proceedings with respect thereto, the Special Master is directed to hold such hearings, take such evidence, and conduct such proceedings with respect to that question as he deems appropriate and, in due course, to report his recommendations to the Court.

"4. The prayer of the United States of America in its answer to the State of Utah's Complaint that this Court 'confirm, declare and establish that the United States is the owner of all right, title and interest in all of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended,' is denied."

It is so ordered.

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

*As appears from p. 4 of the Special Master's Report the parties have reserved their position with respect to this question.

ROE ET AL. *v.* DOE

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 73–1446. Argued December 18, 1974—
Decided February 19, 1975

33 N. Y. 2d 902, 307 N. E. 2d 823, certiorari dismissed as improvidently granted.

Marvin M. Karpatkin argued the cause for petitioners. With him on the briefs was *Michael N. Pollet.*

Ephraim S. London argued the cause for respondent. With him on the brief were *Franklin S. Bonem, Bonnie P. Winawer,* and *Helen L. Buttenwieser.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

**Ira M. Millstein* filed a brief for the Association of American Publishers, Inc., as *amicus curiae* urging reversal.

Joseph Onek filed a brief for the American Psychiatric Assn. et al. as *amici curiae* urging affirmance.

WOOD ET AL. *v.* STRICKLAND ET AL.

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

No. 73–1285. Argued October 16, 1974—Decided February 25, 1975

Respondent Arkansas high school students, who had been expelled from school for violating a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities, brought suit under 42 U. S. C. § 1983 against petitioner school officials, claiming that such expulsions infringed respondents' rights to due process and seeking damages and injunctive and declaratory relief. The District Court directed verdicts for petitioners on the ground that they were immune from damages suits absent proof of malice in the sense of ill will toward respondents. The Court of Appeals, finding that the facts showed a violation of respondents' rights to "substantive due process," since the decisions to expel respondents were made on the basis of no evidence that the regulation had been violated, reversed and remanded for appropriate injunctive relief and a new trial on the question of damages. *Held:*

1. While on the basis of common-law tradition and public policy, school officials are entitled to a qualified good-faith immunity from liability for damages under § 1983, they are not immune from such liability if they knew or reasonably should have known that the action they took within their sphere of official responsibility would violate the constitutional rights of the student affected, or if they took the action with the malicious intention to cause a deprivation of such rights or other injury to the student. But a compensatory award will be appropriate only if the school officials acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that their action cannot reasonably be characterized as being in good faith. Pp. 313–322.

2. When the regulation in question is construed, as it should have been and as the record shows it was construed by the responsible school officials, to prohibit the use and possession of beverages containing any alcohol, rather than as erroneously construed by the Court of Appeals to refer only to beverages containing in excess of a certain alcoholic content, there was no absence of evidence to prove the charge against respondents, and hence the

Court of Appeals' contrary judgment is improvident. Section 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations and was not intended to be a vehicle for federal-court correction of errors in the exercise of school officials' discretion that do not rise to the level of violations of specific constitutional guarantees. Pp. 322–326.

3. Since the District Court did not discuss whether there was a procedural due process violation, and the Court of Appeals did not decide the issue, the Court of Appeals, rather than this Court, should consider that question in the first instance. Pp. 326–327.

485 F. 2d 186, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in Parts I, III, and IV of which all other Members joined, and in Part II of which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 327.

G. Ross Smith argued the cause for petitioners. With him on the brief was *Herschel H. Friday*.

Ben Core argued the cause and filed a brief for respondents.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Respondents Peggy Strickland and Virginia Crain brought this lawsuit against petitioners, who were members of the school board at the time in question, two school administrators, and the Special School District of Mena, Ark.,[1] purporting to assert a cause of action

*F. Raymond Marks filed a brief for the Childhood and Government Project as *amicus curiae*.

[1] The Court of Appeals affirmed the directed verdicts awarded by the District Court to P. T. Waller, the principal of Mena Public High School at the time in question, S. L. Inlow, then superintendent of schools, and the Mena Special School District. 485 F. 2d 186, 191 (CA8 1973). Since respondents have not cross-petitioned, the cases of these three parties are not before the Court.

under 42 U. S. C. § 1983, and claiming that their federal constitutional rights to due process were infringed under color of state law by their expulsion from the Mena Public High School on the grounds of their violation of a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. The complaint as amended prayed for compensatory and punitive damages against all petitioners, injunctive relief allowing respondents to resume attendance, preventing petitioners from imposing any sanctions as a result of the expulsion, and restraining enforcement of the challenged regulation, declaratory relief as to the constitutional invalidity of the regulation, and expunction of any record of their expulsion. After the declaration of a mistrial arising from the jury's failure to reach a verdict, the District Court directed verdicts in favor of petitioners on the ground that petitioners were immune from damages suits absent proof of malice in the sense of ill will toward respondents. 348 F. Supp. 244 (WD Ark. 1972). The Court of Appeals, finding that the facts showed a violation of respondents' rights to "substantive due process," reversed and remanded for appropriate injunctive relief [2] and a new trial on the question of damages. 485 F. 2d 186 (CA8 1973). A petition for rehearing en banc was denied, with three judges dissenting. See *id.*, at 191. Certiorari was granted to consider whether this application of due process by the Court of Appeals was warranted and whether that court's expression of a standard governing immunity for school board members from lia-

[2] The Court of Appeals noted that reinstatement was no longer possible since the term of expulsion had ended, but that the respondents were entitled to have the records of the expulsions expunged and to be relieved of any other continuing punishment, if any. *Id.*, at 190.

bility for compensatory damages under 42 U. S. C. § 1983 was the correct one. 416 U. S. 935 (1974).

I

The violation of the school regulation [3] prohibiting the use or possession of intoxicating beverages at school or school activities with which respondents were charged concerned their "spiking" of the punch served at a meeting of an extracurricular school organization attended by parents and students. At the time in question, respondents were 16 years old and were in the 10th grade. The relevant facts begin with their discovery that the punch had not been prepared for the meeting as previously planned. The girls then agreed to "spike" it. Since the county in which the school is located is "dry," respondents and a third girl drove across the state border into Oklahoma and purchased two 12-ounce bottles of "Right Time," a malt liquor. They then bought six 10-ounce bottles of a soft drink, and, after having mixed the contents of the eight bottles in an empty milk carton, returned to school. Prior to the meeting, the girls experienced second thoughts about the wisdom of their prank, but by then they were caught up in the force of events and the intervention of other girls prevented them from disposing of the illicit punch. The punch was served at the meeting, without apparent effect.

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[3] "3. Suspension

. . . . .

"b. Valid causes for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

. . . . .

"(4) The use of intoxicating beverage or possession of same at school or at a school sponsored activity." App. 102.

Ten days later, the teacher in charge of the extracurricular group and meeting, Mrs. Curtis Powell, having heard something about the "spiking," questioned the girls about it. Although first denying any knowledge, the girls admitted their involvement after the teacher said that she would handle the punishment herself. The next day, however, she told the girls that the incident was becoming increasingly the subject of talk in the school and that the principal, P. T. Waller, would probably hear about it. She told them that her job was in jeopardy but that she would not force them to admit to Waller what they had done. If they did not go to him then, however, she would not be able to help them if the incident became "distorted." The three girls then went to Waller and admitted their role in the affair. He suspended them from school for a maximum two-week period, subject to the decision of the school board. Waller also told them that the board would meet that night, that the girls could tell their parents about the meeting, but that the parents should not contact any members of the board.

Neither the girls nor their parents attended the school board meeting that night. Both Mrs. Powell and Waller, after making their reports concerning the incident, recommended leniency. At this point, a telephone call was received by S. L. Inlow, then the superintendent of schools, from Mrs. Powell's husband, also a teacher at the high school, who reported that he had heard that the third girl involved had been in a fight that evening at a basketball game. Inlow informed the meeting of the news, although he did not mention the name of the girl involved. Mrs. Powell and Waller then withdrew their recommendations of leniency, and the board voted to expel the girls from school for the remainder of the semester, a period of approximately three months.

The board subsequently agreed to hold another meet-

ing on the matter, and one was held approximately two weeks after the first meeting. The girls, their parents, and their counsel attended this session. The board began with a reading of a written statement of facts as it had found them.[4] The girls admitted mixing the malt liquor into the punch with the intent of "spiking" it, but asked the board to forgo its rule punishing such violations by such substantial suspensions. Neither Mrs. Powell nor Waller was present at this meeting. The board voted not to change its policy and, as before, to expel the girls for the remainder of the semester.[5]

II

The District Court instructed the jury that a decision for respondents had to be premised upon a finding that

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[4] "FACTS FOUND BY SCHOOL BOARD

"1. That Virginia Crain, Peggy Strickland and Jo Wall are students of Mena High School and subject to the governing rules and policies of Mena High School.

"2. That on or about February 7, 1972 these three girls were charged with the responsibility of providing refreshments for a school function, being a gathering of students of the Home Economic class and some of their parents, on school premises, being the auditorium building of Mena High School, and being under the direction of Mrs. Curtis Powell.

"3. That the three girls in question traveled to Oklahoma, purchased a number of bottles of malt liquor, a beer type beverage, and later went onto school premises with the alcoholic beverage and put two or more of the bottles of the drink into the punch or liquid refreshment which was to be served to members of the class and parents." App. 137.

The Court of Appeals in its statement of the facts observed that the malt liquor and soft drinks were mixed by the girls prior to their return to school, 485 F. 2d, at 187, and petitioners in their brief recite the facts in this manner. Brief for Petitioners 5. This discrepancy in the board's findings of fact is not material to any issue now before the Court.

[5] By taking a correspondence course and an extra course later, the girls were able to graduate with their class. Tr. of Oral Arg. 38–39.

petitioners acted with malice in expelling them and defined "malice" as meaning "ill will against a person—a wrongful act done intentionally without just cause or excuse." 348 F. Supp., at 248. In ruling for petitioners after the jury had been unable to agree, the District Court found "as a matter of law" that there was no evidence from which malice could be inferred. *Id.*, at 253.

The Court of Appeals, however, viewed both the instruction and the decision of the District Court as being erroneous. Specific intent to harm wrongfully, it held, was not a requirement for the recovery of damages. Instead, "[i]t need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective, one." 485 F. 2d, at 191 (footnote omitted).

Petitioners as members of the school board assert here, as they did below, an absolute immunity from liability under § 1983 and at the very least seek to reinstate the judgment of the District Court. If they are correct and the District Court's dismissal should be sustained, we need go no further in this case. Moreover, the immunity question involves the construction of a federal statute, and our practice is to deal with possibly dispositive statutory issues before reaching questions turning on the construction of the Constitution. Cf. *Hagans* v. *Lavine,* 415 U. S. 528, 549 (1974).[6] We essentially sustain the position of the Court of Appeals with respect to the immunity issue.

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[6] In their original complaint, respondents sought only injunctive and declaratory relief. App. 11–12. In their amended complaint, they added a prayer for compensatory and punitive damages. *Id.*, at 92. Trial was to a jury; and the District Court in ruling on motions after declaring a mistrial appears to have treated the case as having developed into one for damages only since it entered judgment for petitioners and dismissed the complaint on the basis of their good-faith defense. In a joint motion for a new trial, respondents specifically argued that the District Court had erred in treating the case as one

The nature of the immunity from awards of damages under § 1983 available to school administrators and school board members is not a question which the lower federal courts have answered with a single voice. There is general agreement on the existence of a "good faith" immunity, but the courts have either emphasized different factors as elements of good faith or have not given specific content to the good-faith standard.[7]

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for the recovery of damages only and in failing to give them a trial and ruling on their claims for injunctive and declaratory relief. *Id.*, at 131. The District Court denied the motion. *Id.*, at 133. Upon appeal, respondents renewed these contentions, and the Court of Appeals, after finding a substantive due process violation, directed the District Court to give respondents an injunction requiring expunction of the expulsion records and restraining any further continuing punishment. 485 F. 2d, at 190. Petitioners urge that we reverse the Court of Appeals and order the complaint dismissed. Brief for Petitioners 48. Respondents, however, again stress that the relief they sought included equitable relief. Brief for Respondents 47–48, 50.

In light of the record in this case, we are uncertain as to the basis for the District Court's judgment, for immunity from damages does not ordinarily bar equitable relief as well. The opinion of the Court of Appeals does not entirely dispel this uncertainty. With the case in this posture, it is the better course to proceed directly to the question of the immunity of school board members under § 1983.

[7] In *McLaughlin* v. *Tilendis*, 398 F. 2d 287, 290–291 (CA7 1968), a case relied upon by the Court of Appeals below, the immunity was extended to school board members and the superintendent of schools only to the extent that they could establish that their decisions were founded on "justifiable grounds." Cf. *Scoville* v. *Board of Ed. of Joliet Township*, 425 F. 2d 10, 15 (CA7), cert. denied, 400 U. S. 826 (1970). In *Smith* v. *Losee*, 485 F. 2d 334, 344 (CA10 1973) (en banc), cert. denied, 417 U. S. 908 (1974), the immunity protecting university officials was described as one of good faith and the absence of malice where the facts before the officials "showed a good and valid reason for the decision although another reason or reasons advanced for nonrenewal or discharge may have been constitutionally impermissible." The District Court in *Kirstein* v. *Rector and Visitors of University of Virginia*, 309 F. Supp. 184, 189 (ED Va.

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This Court has decided three cases dealing with the scope of the immunity protecting various types of governmental officials from liability for damages under § 1983. In *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), the question was found to be one essentially of statutory construction.[8] Noting that the language of § 1983 is silent with

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1970), extended the immunity to action taken in good faith and in accordance with "long standing legal principle." See also *Skehan* v. *Board of Trustees of Bloomsburg State College,* 501 F. 2d 31, 43 (CA3 1974); *Handverger* v. *Harvill,* 479 F. 2d 513, 516 (CA9), cert. denied, 414 U. S. 1072 (1973); *Wood* v. *Goodman,* 381 F. Supp. 413, 419 (Mass. 1974); *Thonen* v. *Jenkins,* 374 F. Supp. 134, 140 (EDNC 1974); *Taliaferro* v. *State Council of Higher Education,* 372 F. Supp. 1378, 1382–1383 (ED Va. 1974); *Vanderzanden* v. *Lowell School District No. 71,* 369 F. Supp. 67, 72 (Ore. 1973); *Jones* v. *Jefferson County Board of Education,* 359 F. Supp. 1081, 1083–1084 (ED Tenn. 1972); *Adamian* v. *University of Nevada,* 359 F. Supp. 825, 834 (Nev. 1973); *Boyd* v. *Smith,* 353 F. Supp. 844, 845–846 (ND Ind. 1973); *Hayes* v. *Cape Henlopen School District,* 341 F. Supp. 823, 829 (Del. 1972); *Schreiber* v. *Joint School District No. 1, Gibraltar, Wis.,* 335 F. Supp. 745, 748 (ED Wis. 1972); *Endicott* v. *Van Petten,* 330 F. Supp. 878, 885–886 (Kan. 1971); *Holliman* v. *Martin,* 330 F. Supp. 1, 13 (WD Va. 1971); *McDonough* v. *Kelly,* 329 F. Supp. 144, 150–151 (NH 1971); *Cordova* v. *Chonko,* 315 F. Supp. 953, 964 (ND Ohio 1970); *Gouge* v. *Joint School District No. 1,* 310 F. Supp. 984, 990, 992–993 (WD Wis. 1970).

[8] "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute . . . were not spelled out in debate. We cannot believe that Congress—itself a

respect to immunities, the Court concluded that there was no basis for believing that Congress intended to eliminate the traditional immunity of legislators from civil liability for acts done within their sphere of legislative action. That immunity, "so well grounded in history and reason . . . ," 341 U. S., at 376, was absolute and consequently did not depend upon the motivations of the legislators. In *Pierson* v. *Ray,* 386 U. S. 547, 554 (1967), finding that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities" in enacting § 1983, we concluded that the common-law doctrine of absolute judicial immunity survived. Similarly, § 1983 did not preclude application of the traditional rule that a policeman, making an arrest in good faith and with probable cause, is not liable for damages, although the person arrested proves innocent. Consequently the Court said: "Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." 386 U. S., at 555 (footnote omitted). Finally, last Term we held that the chief executive officer of a State, the senior and subordinate officers of the State's National Guard, and the president of a state-controlled university were not absolutely immune from liability under § 1983, but instead were entitled to immunity, under prior precedent and in light of the obvious need to avoid discouraging effective official action by public officers charged with a considerable range of responsibility

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staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U. S., at 376.

and discretion, only if they acted in good faith as defined by the Court:

> "[I]n 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." *Scheuer* v. *Rhodes,* 416 U. S. 232, 247–248 (1974).

Common-law tradition, recognized in our prior decisions, and strong public-policy reasons also lead to a construction of § 1983 extending a qualified good-faith immunity to school board members from liability for damages under that section. Although there have been differing emphases and formulations of the common-law immunity of public school officials in cases of student expulsion or suspension, state courts have generally recognized that such officers should be protected from tort liability under state law for all good-faith, nonmalicious action taken to fulfill their official duties.[9]

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[9] See *Donahoe* v. *Richards,* 38 Me. 379 (1854); *Dritt* v. *Snodgrass,* 66 Mo. 286 (1877); *McCormick* v. *Burt,* 95 Ill. 263 (1880); *Board of Education of Cartersville* v. *Purse,* 101 Ga. 422, 28 S. E. 896 (1897); *Board of Ed. of City of Covington* v. *Booth,* 110 Ky. 807, 62 S. W. 872 (1901); *Morrison* v. *City of Lawrence,* 181 Mass. 127, 63 N. E. 400 (1902); *Sorrels* v. *Matthews,* 129 Ga. 319, 58 S. E. 819 (1907); *Douglass* v. *Campbell,* 89 Ark. 254, 116 S. W. 211 (1909); *Barnard* v. *Shelburne,* 216 Mass. 19, 102 N. E. 1095 (1913); *Sweeney* v. *Young,* 82 N. H. 159, 131 A. 155 (1925) (absolute immunity for acts taken within range of general authority). See

As the facts of this case reveal, school board members function at different times in the nature of legislators and adjudicators in the school disciplinary process. Each of these functions necessarily involves the exercise of discretion, the weighing of many factors, and the formulation of long-term policy.[10] "Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act." *Scheuer* v. *Rhodes, supra,* at 246 (footnote omitted). As with executive officers faced with instances of civil disorder, school officials, confronted with student behavior causing or threatening disruption, also have an "obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others." *Ibid.*

Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties. School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray, supra,* at 554. The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the

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also 68 Am. Jur. 2d, Schools § 268, pp. 592–593 (1973); 79 C. J. S., Schools and School Districts § 503 (d), p. 451 (1952); W. Prosser, Law of Torts § 132, p. 989 (4th ed. 1971); R. Hamilton & E. Reutter, Legal Aspects of School Board Operation 190–191 (1958).

[10] See generally R. Campbell, L. Cunningham, & R. McPhee, The Organization and Control of American Schools 177–182 (1965).

most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.[11]

These considerations have undoubtedly played a prime role in the development by state courts of a qualified immunity protecting school officials from liability for damages in lawsuits claiming improper suspensions or expulsions.[12] But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.

Tenney v. *Brandhove*, *Pierson* v. *Ray*, and *Scheuer* v. *Rhodes* drew upon a very similar background and were

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[11] The overwhelming majority of school board members are elected to office. See A. White, Local School Boards: Organization and Practices 8 (U. S. Office of Education, OE–23023, Bulletin No. 8, 1962); National School Boards Association, Survey of Public Education in the Member Cities of the Council of Big City Boards of Education 3 (Nov. 1968); Campbell, Cunningham, & McPhee, *supra*, n. 10, at 164–170. Most of the school board members across the country receive little or no monetary compensation for their service. White, *supra*, at 67–79; National School Boards Association, *supra*, at 3, 15–21; Campbell, Cunningham, & McPhee, *supra*, at 172.

[12] "[School directors] are authorized, and it is their duty to adopt reasonable rules for the government and management of the school, and it would deter responsible and suitable men from accepting the position, if held liable for damages to a pupil expelled under a rule adopted by them, under the impression that the welfare of the school demanded it, if the courts should deem it improper." *Dritt* v. *Snodgrass*, 66 Mo., at 293.

animated by a very similar judgment in construing § 1983. Absent legislative guidance, we now rely on those same sources in determining whether and to what extent school officials are immune from damage suits under § 1983. We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity.

> "Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when 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. 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." *Scheuer* v. *Rhodes,* 416 U. S., at 241–242 (footnote omitted).

The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." *Pierson* v. *Ray*, 386 U. S., at 557. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

III

The Court of Appeals, based upon its review of the facts but without the benefit of the transcript of the testimony given at the four-day trial to the jury in the Dis-

trict Court,[13] found that the board had made its decision to expel the girls on the basis of *no* evidence that the school regulation had been violated:

> "To justify the suspension, it was necessary for the Board to establish that the students possessed or used an 'intoxicating' beverage at a school-sponsored activity. No evidence was presented at either meeting to establish the alcoholic content of the liquid brought to the campus. Moreover, the Board made no finding that the liquid was intoxicating. The only evidence as to the nature of the drink was that supplied by the girls, and it is clear that they did not know whether the beverage was intoxicating or not." 485 F. 2d, at 190.

Although it did not cite the case as authority, the Court of Appeals was apparently applying the due process rationale of *Thompson* v. *City of Louisville,* 362 U. S. 199, 206 (1960),[14] to the public school disciplinary process. The applicability of *Thompson* in this setting, however, is an issue that need not be reached in this case.[15] The record reveals that the decision of the Court of Appeals

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[13] At the time of the Court of Appeals decision, the testimony at the trial to the jury had not been transcribed because of counsel's concern with limiting litigation costs. Tr. of Oral Arg. 23. The transcript was filed in the District Court after certiorari was granted. App. 120 n. 2.

[14] See also *Vachon* v. *New Hampshire,* 414 U. S. 478, 480 (1974); *Gregory* v. *Chicago,* 394 U. S. 111, 112 (1969); *Johnson* v. *Florida,* 391 U. S. 596, 598–599 (1968); *Shuttlesworth* v. *City of Birmingham,* 382 U. S. 87, 94–95 (1965); *Garner* v. *Louisiana,* 368 U. S. 157 (1961). Cf. *Boilermakers* v. *Hardeman,* 401 U. S. 233, 246 (1971).

[15] That is not to say that the requirements of procedural due process do not attach to expulsions. Over the past 13 years the Courts of Appeals have without exception held that procedural due process requirements must be satisfied if a student is to be expelled. See *Goss* v. *Lopez,* 419 U. S. 565, 576–578, n. 8 (1975).

was based upon an erroneous construction of the school regulation in question. Once that regulation is properly construed, the *Thompson* issue disappears.

The Court of Appeals interpreted the school regulation prohibiting the use or possession of intoxicating beverages as being linked to the definition of "intoxicating liquor" under Arkansas statutes [16] which restrict the term to beverages with an alcoholic content exceeding 5% by weight.[17] Testimony at the trial, however, established convincingly that the term "intoxicating beverage" in the school regulation was not intended at the time of its adoption in 1967 to be linked to the definition in the state statutes or to any other technical definition of "intoxicating." [18] The adop-

[16] See Ark. Stat. Ann. §§ 48–107, 48–503 (1964).

[17] The Court of Appeals referred to comments which seemed also to adopt this construction made by the District Court in its findings of fact when it denied respondents' motion for a preliminary injunction. 485 F. 2d, at 190; App. 80. After noting the District Court's initial view that petitioners would find it difficult to prove the requisite alcoholic content, the Court of Appeals expressed puzzlement at the failure of the lower court to discuss the absence of such evidence in its final opinion. The District Court, however, indicated in its instructions that the question of the proper construction of the regulation would not be relevant if the jury found that the school officials in good faith considered the malt liquor and punch to fall within the regulation. 348 F. Supp., at 248. The District Court's ultimate conclusion apparently made unnecessary a final decision on the coverage of the regulation.

Despite its construction of the present regulation, the Court of Appeals indicated that the school board had the authority to prohibit the use and possession of *alcoholic* beverages or to continue its policy of proscribing only *intoxicating* beverages. 485 F. 2d, at 191.

[18] Two members of the school board at the time that the regulation was adopted testified that there had been no discussion of tying the regulation to the State Alcohol Control Act and that the intent of the board members was to cover beer. Tr. 466–467 (testimony of petitioner Wood); *id.*, at 589–590 (testimony of Mrs. Gerald Goforth).

tion of the regulation was at a time when the school board was concerned with a previous beer-drinking episode.[19] It was applied prior to respondents' case to another student charged with possession of beer.[20] In its statement of facts issued prior to the onset of this litigation, the school board expressed its construction of the regulation by finding that the girls had brought an "alcoholic beverage" onto school premises.[21] The girls themselves admitted knowing at the time of the incident that they were doing something wrong which might be punished.[22] In light of this evidence, the Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement. Cf. *Grayned* v. *City of Rockford,* 408 U. S. 104, 110 (1972).

When the regulation is construed to prohibit the use and possession of beverages containing alcohol, there was no absence of evidence before the school board to prove the charge against respondents. The girls had admitted that they intended to "spike" the punch and that they had mixed malt liquor into the punch that was served. The third girl estimated at the time of their admissions to Waller that the malt liquor had an alcohol content of 20%. After the expulsion decision had been made and this

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[19] See the minutes of the board meeting at which the regulation was adopted in App. 103–104. See also Tr. 431–432 (testimony of Mrs. Mary L. Spencer, also a board member when the regulation was adopted); *id.*, at 587–588 (Mrs. Goforth).

[20] The student was suspended in October 1971 for the possession of beer at a school activity. There is no indication in the record of the alcoholic content of the beer. See Tr. 258–259, 268–269 (testimony of former Superintendent Inlow).

[21] See n. 4, *supra.* Soon after this litigation had begun, the board issued a statement which said that the regulation "prohibits the use and possession of alcoholic beverage on school premises . . . ." App. 139.

[22] See Tr. 75 (Strickland); *id.*, at 119, 121 (Crain).

litigation had begun, it was conclusively determined that the malt liquor in fact had an alcohol content not exceeding 3.2% by weight.[23] Testimony at trial put the alcohol content of the punch served at 0.91%.[24]

Given the fact that there *was* evidence supporting the charge against respondents, the contrary judgment of the Court of Appeals is improvident. It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. See *Tinker* v. *Des Moines Independent Community School District,* 393 U. S. 503 (1969); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943); *Goss* v. *Lopez,* 419 U. S. 565 (1975). But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. See *Epperson* v. *Arkansas,* 393 U. S. 97, 104 (1968); *Tinker, supra,* at 507.

IV

Respondents' complaint alleged that their procedural due process rights were violated by the action taken by petitioners. App. 9. The District Court did not discuss

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[23] This percentage content was established through the deposition of an officer of the company that produces "Right Time" malt liquor. App. 93–94.

[24] Tr. 205 (testimony of Dr. W. F. Turner).

this claim in its final opinion, but the Court of Appeals viewed it as presenting a substantial question. It concluded that the girls were denied procedural due process at the first school board meeting, but also intimated that the second meeting may have cured the initial procedural deficiencies. Having found a substantive due process violation, however, the court did not reach a conclusion on this procedural issue. 485 F. 2d, at 190.

Respondents have argued here that there was a procedural due process violation which also supports the result reached by the Court of Appeals. Brief for Respondents 27–28, 36. But because the District Court did not discuss it, and the Court of Appeals did not decide it, it would be preferable to have the Court of Appeals consider the issue in the first instance.

The judgment of the Court of Appeals is vacated and the case remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I join in Parts I, III, and IV of the Court's opinion, and agree that the judgment of the Court of Appeals should be vacated and the case remanded. I dissent from Part II which appears to impose a higher standard of care upon public school officials, sued under § 1983, than that heretofore required of any other official.

The holding of the Court on the immunity issue is set forth in the margin.[1] It would impose personal

[1] "The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an 'objective' versus a 'subjective' test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that

liability on a school official who acted sincerely and in the utmost good faith, but who was found—after the fact—to have acted in "ignorance . . . of settled, indisputable law." *Ante,* at 321. Or, as the Court also puts it, the school official must be held to a standard of conduct based not only on good faith "but also on knowledge of the basic, unquestioned constitutional rights of his charges." *Ante,* at 322. Moreover, ignorance of the law is explicitly equated with "actual malice." *Ante,* at 321.

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he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson* v. *Ray,* 386 U. S. [547, 557 (1967).] A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Ante,* at 321–322.

This harsh standard, requiring knowledge of what is characterized as "settled, indisputable law," leaves little substance to the doctrine of qualified immunity. The Court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights. These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable.[2]

The Court states the standard of required knowledge in two cryptic phrases: "settled, indisputable law" and "unquestioned constitutional rights." Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member. One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are "unquestioned constitutional rights." Consider, for example, the recent five-to-four decision in *Goss* v. *Lopez*, 419 U. S. 565 (1975), holding that a junior high school pupil routinely suspended for as much as a single day is entitled to due process. I suggest that most lawyers and judges would have thought, prior to that decision, that the law to the *contrary* was settled, indisputable, and unquestioned.[3]

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[2] The opinion indicates that actual malice is presumed where one acts in ignorance of the law; thus it would appear that even good-faith reliance on the advice of counsel is of no avail.

[3] The Court's rationale in *Goss* suggests, for example, that school officials may infringe a student's right to education if they place him in a noncollege-preparatory track or deny him promotion with his class without affording a due process hearing. See 419 U. S., at 597–599 (POWELL, J., dissenting). Does this mean that school officials who fail to provide such hearings in the future will be

Less than a year ago, in *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), and in an opinion joined by all participating members of the Court, a considerably less demanding standard of liability was approved with respect to two of the highest officers of the State, the Governor and Adjutant General. In that case, the estates of students killed at Kent State University sued these officials under § 1983. After weighing the competing claims, the Court concluded:

> "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.*" 416 U. S., at 247–248. (Emphasis added.)

The italicized sentence from *Scheuer* states, as I view it, the correct standard for qualified immunity of a government official: whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith. This was the standard

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liable under § 1983 if a court subsequently determines that they were required?

For another current example of how unsettled constitutional law, deemed by some at least to be quite settled, may turn out to be, see the decision and opinions in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601 (1975), and compare with MR. JUSTICE STEWART's dissent in *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 629 (1974).

applied to the Governor of a State charged with maliciously calling out National Guardsmen who killed and wounded Kent State students.[4] Today's opinion offers no reason for imposing a more severe standard on school board members charged only with wrongfully expelling three teenage pupils.

There are some 20,000 school boards, each with five or more members, and thousands of school superintendents and school principals. Most of the school board members are popularly elected, drawn from the citizenry at large, and possess no unique competency in divining the law. Few cities and counties provide any compensation for service on school boards, and often it is difficult to persuade qualified persons to assume the burdens of this important function in our society. Moreover, even if counsel's advice constitutes a defense, it may safely be assumed that few school boards and school officials have ready access to counsel or indeed have deemed it necessary to consult counsel on the countless decisions that necessarily must be made in the operation of our public schools.

In view of today's decision significantly enhancing the possibility of personal liability, one must wonder whether qualified persons will continue in the desired numbers to volunteer for service in public education.

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[4] The decision of the Court in *Scheuer* with respect to qualified immunity is consistent with Mr. Chief Justice Warren's opinion for the Court in *Pierson* v. *Ray*, 386 U. S. 547 (1967), where it was said: "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 unconstitutional." *Id.*, at 557.

As in *Scheuer*, the standard prescribed is one of acting in good faith in accordance with reasonable belief that the action was lawful and justified. Not even police officers were held liable for ignorance of "settled, indisputable law."

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UNITED STATES *v.* WILSON

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

No. 73–1395. Argued December 9, 1974—Decided February 25, 1975

The jury entered a guilty verdict against respondent for a federal offense, but on one of respondent's postverdict motions the District Court dismissed the indictment on the ground that the delay between the offense and the indictment prejudiced respondent's right to a fair trial. The Court of Appeals dismissed the Government's appeal on the ground that the Double Jeopardy Clause barred review of the District Court's ruling. Because the ruling was based on facts brought out at the trial, the Court of Appeals held it was in effect an acquittal. *Held:* When a trial judge rules in favor of the defendant after a guilty verdict has been entered by the trier of fact, the Government may appeal from that ruling without contravening the Double Jeopardy Clause. Pp. 335–353.

(a) That Clause protects against Government appeals only where there is a danger of subjecting the defendant to a second trial for the same offense, and hence such protection does not attach to a trial judge's postverdict correction of an error of law which would not grant the prosecution a new trial or subject the defendant to multiple prosecutions. Pp. 339–353.

(b) Here the District Court's ruling in respondent's favor could be disposed of on appeal without subjecting him to a second trial at the Government's behest. If he prevails on appeal, the matter will become final, and the Government will not be permitted to bring a second prosecution for the same offense, whereas if he loses, the case must return to the District Court for disposition of his remaining motions. P. 353.

492 F. 2d 1345, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion in which BRENNAN, J., joined, *post*, p. 353.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor*

General Bork, Assistant Attorney General Petersen, and *Edward R. Korman.*

Philip D. Lauer argued the cause and filed a brief for respondent.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent George J. Wilson, Jr., was tried in the Eastern District of Pennsylvania for converting union funds to his own use, in violation of § 501 (c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 536, 29 U. S. C. § 501 (c). The jury entered a guilty verdict, but on a postverdict motion the District Court dismissed the indictment. The court ruled that the delay between the offense and the indictment had prejudiced the defendant, and that dismissal was called for under this Court's decision in *United States* v. *Marion,* 404 U. S. 307 (1971). The Government sought to appeal the dismissal to the Court of Appeals for the Third Circuit, but that court held that the Double Jeopardy Clause barred review of the District Court's ruling. 492 F. 2d 1345 (1973). We granted certiorari to consider the applicability of the Double Jeopardy Clause to appeals from postverdict rulings by the trial court. 417 U. S. 908 (1974). We reverse.

I

In April 1968 the FBI began an investigation of respondent Wilson, the business manager of Local 367 of the International Brotherhood of Electrical Workers. The investigation focused on Wilson's suspected conversion in 1966 of $1,233.15 of union funds to pay part of the expenses of his daughter's wedding reception. The payment was apparently made by a check drawn on union funds and endorsed by the treasurer and the presi-

dent of the local union. Respondent contended at trial that he had not authorized the two union officials to make the payment on his behalf and that he did not know the bill for the reception had been paid out of union funds. In June 1970 the FBI completed its investigation and reported to the Organized Crime Strike Force and the local United States Attorney's Office.[1] There the matter rested for some 16 months until, three days prior to the running of the statute of limitations, respondent was indicted for illegal conversion of union funds.

Wilson made a pretrial motion to dismiss the indictment on the ground that the Government's delay in filing the action had denied him the opportunity for a fair trial. His chance to mount an effective defense was impaired, Wilson argued, because the two union officers who had signed the check for the reception were unavailable to testify. One had died in 1968, and the other was suffering from a terminal illness. After a hearing, the court denied the pretrial motion, and the case proceeded to trial. The jury returned a verdict of guilty, after which the defendant filed various motions including a motion for arrest of judgment, a motion for a judgment of acquittal, and a motion for a new trial.

The District Court reversed its earlier ruling and dismissed the indictment on the ground that the preindictment delay was unreasonable and had substantially prejudiced the defendant's right to a fair trial. The union treasurer had died prior to 1970, the court noted, so the loss of his testimony could not be attributed to

[1] The Court of Appeals noted that the portion of the investigation that focused on Wilson was completed by June 1969. 492 F. 2d 1345, 1346. The FBI agent who conducted the investigation testified that he had communicated with representatives of the Strike Force and the United States Attorney's Office about the case as early as December 1969. App. 28.

the preindictment delay. The union president, however, had become unavailable during the period of delay. The court ruled that since he was the only remaining witness who could explain the circumstances of the payment of the check, the preindictment delay violated the respondent's Fifth Amendment right to a fair trial. This disposition of the *Marion* claim made it unnecessary to rule on the defendant's other postverdict motions.

The Government sought to appeal the District Court's ruling pursuant to the Criminal Appeals Act, 18 U. S. C. § 3731, but the Court of Appeals dismissed the appeal in a judgment order, citing our decision in *United States* v. *Sisson,* 399 U. S. 267 (1970). On the Government's petition for rehearing, the court wrote an opinion in which it reasoned that since the District Court had relied on facts brought out at trial in finding prejudice from the preindictment delay, its ruling was in effect an acquittal. Under the Double Jeopardy Clause, the Court of Appeals held, the Government could not constitutionally appeal the acquittal, even though it was rendered by the judge after the jury had returned a verdict of guilty.

II

The Government argues that the Court of Appeals read the Double Jeopardy Clause too broadly and that it mischaracterized the District Court's ruling in terming it an acquittal. In the Government's view, the constitutional restriction on governmental appeals is intended solely to protect against exposing the defendant to multiple trials, not to shield every determination favorable to the defendant from appellate review. Since a new trial would not be necessary where the trier of fact has returned a verdict of guilty, the Government argues that it should be permitted to appeal from any adverse postverdict ruling. In the alternative, the Government urges

that even if the Double Jeopardy Clause is read to bar appeal of any judgment of acquittal, the District Court's order in this case was not an acquittal and it should therefore be appealable. The respondent argues that under our prior cases the Double Jeopardy Clause prohibits appeal of any order discharging the defendant when, as here, that order is based on facts outside the indictment. Because we agree with the Government that the constitutional protection against Government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense, we have no occasion to determine whether the ruling in Wilson's favor was actually an "acquittal" even though the District Court characterized it otherwise.

A

This Court early held that the Government could not take an appeal in a criminal case without express statutory authority. *United States* v. *Sanges,* 144 U. S. 310 (1892). Not reaching the underlying constitutional issue, the Court held only that the general appeals provisions of the Judiciary Act of 1891, 26 Stat. 827, 828, were not sufficiently explicit to overcome the common-law rule that the State could not sue out a writ of error in a criminal case unless the legislature had expressly granted it that right. 144 U. S., at 318, 322–323.

Fifteen years later, Congress passed the first Criminal Appeals Act, which conferred jurisdiction on this Court to consider criminal appeals by the Government in limited circumstances. 34 Stat. 1246. The Act permitted the Government to take an appeal from a decision dismissing an indictment or arresting judgment where the decision was based on "the invalidity, or construction of the statute upon which the indictment is founded," and from a decision sustaining a special plea in bar, when the

defendant had not been put in jeopardy.[2] The Act was construed in accordance with the common-law meaning of the terms employed, and the rules governing the conditions of appeal became highly technical.[3] This Court had a number of occasions to struggle with the vagaries of the Act;[4] in one of the last of these unhappy efforts, we concluded that the Act was "a failure . . . a most unruly child that has not improved with age." *United States* v. *Sisson,* 399 U. S., at 307.

Congress finally disposed of the statute in 1970 and replaced it with a new Criminal Appeals Act intended to broaden the Government's appeal rights.[5] While the language of the new Act is not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.

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[2] Significantly, the statute expressly provided that the Government could not have a writ of error "in any case where there has been a verdict in favor of the defendant." The legislative history indicates that this provision was added to ensure that the statute would not conflict with the principles of the Double Jeopardy Clause. See 41 Cong. Rec. 2749–2762, 2819.

[3] The statute was amended several times, but the amendments did not render its construction any simpler. The most significant change in the statute was the 1942 amendment, 56 Stat. 271, in which Congress provided that some dismissals should be reviewed in the courts of appeals and that the Supreme Court's appellate jurisdiction should extend to prosecutions by information. In 1968, the statute was further amended to authorize Government appeals from pretrial rulings granting motions to suppress or to return seized property. 82 Stat. 237.

[4] See, *e. g., United States* v. *Weller,* 401 U. S. 254 (1971); *United States* v. *Sisson,* 399 U. S. 267 (1970); *United States* v. *Mersky,* 361 U. S. 431 (1960); *United States* v. *Borden Co.,* 308 U. S. 188 (1939).

[5] The new statute, 18 U. S. C. § 3731, was passed as Title III of the Omnibus Crime Control Act of 1970, Pub. L. 91–644, 84 Stat. 1890.

A bill proposed by the Department of Justice would have permitted an appeal by the United States "from a decision, judgment or order of a district court dismissing an indictment or information or terminating a prosecution in favor of a defendant as to any one or more counts, except that no appeal [would] lie from a judgment of acquittal." S. 3132; H. R. 14588. The Senate Report on this bill indicated that the Judiciary Committee intended to extend the Government's appeal rights to the constitutional limits. S. Rep. No. 91–1296, p. 18 (1970). Both the report and the wording of the bill, however, suggested that the Committee thought the Double Jeopardy Clause would bar appeal of any acquittal, whether a verdict of acquittal by a jury or a judgment of acquittal entered by a judge. *Id.*, at 2, 8–12. At the same time, the Committee appears to have thought that the Constitution would permit review of any other ruling by a judge that terminated a prosecution, even if the ruling came in the midst of a trial. *Id.*, at 11.

The Conference Committee made two important changes in the bill, although it offered no explanation for them. H. R. Conf. Rep. No. 91–1768, p. 21 (1970). The Committee omitted the language purporting to permit an appeal from an order "terminating a prosecution in favor of a defendant," and it removed the phrase that would have barred appeal of an acquittal. In place of that provision, the Committee substituted the language that was ultimately enacted, under which an appeal was authorized "from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

These changes are consistent with the Senate Committee's desire to authorize appeals whenever constitutionally

permissible, but they suggest that Congress decided to rely upon the courts to define the constitutional boundaries rather than to create a statutory scheme that might be in some respects narrower or broader than the Fifth Amendment would allow. In light of this background it seems inescapable that Congress was determined to avoid creating nonconstitutional bars to the Government's right to appeal. The District Court's order in this case is therefore appealable unless the appeal is barred by the Constitution.

B

The statutory restrictions on Government appeals long made it unnecessary for this Court to consider the constitutional limitations on the appeal rights of the prosecution except in unusual circumstances. Even in the few relevant cases, the discussion of the question has been brief. Now that Congress has removed the statutory limitations and the Double Jeopardy Clause has been held to apply to the States, see *Benton* v. *Maryland,* 395 U. S. 784 (1969), it is necessary to take a closer look at the policies underlying the Clause in order to determine more precisely the boundaries of the Government's appeal rights in criminal cases.

As has been documented elsewhere, the idea of double jeopardy is very old. See *Bartkus* v. *Illinois,* 359 U. S. 121, 151–155 (1959) (Black, J., dissenting); *United States* v. *Jenkins,* 490 F. 2d 868, 870–873 (CA2 1973). The early development of the principle can be traced through a variety of sources ranging from legal maxims to casual references in contemporary commentary. Although the form and breadth of the prohibition varied widely, the underlying premise was generally that a defendant should not be twice tried or punished for the same offense.

J. Sigler, Double Jeopardy 2–16 (1969).[6] Writing in the 17th century, Lord Coke described the protection afforded by the principle of double jeopardy as a function of three related common-law pleas: *autrefois acquit, autrefois convict,* and pardon. With some exceptions, these pleas could be raised to bar the second trial of a defendant if he could prove that he had already been convicted of the same crime. 3 E. Coke, Institutes 212–213 (6th ed. 1680). Blackstone later used the ancient term "jeopardy" in characterizing the principle underlying the two pleas of *autrefois acquit* and *autrefois convict.* That principle, he wrote, was a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 W. Blackstone, Commentaries *335–336.

The history of the adoption of the Double Jeopardy Clause sheds some light on what the drafters thought Blackstone's "universal maxim" should mean as applied in this country. At the time of the First Congress, only one State had a constitutional provision embodying anything resembling a prohibition against double jeopardy.[7] In the course of their ratification proceedings, however, two other States suggested that a double jeopardy clause be included among the first amendments to the Federal Constitution.[8] Apparently attempting to accommodate

[6] Expressions of the principle can be found in English law from the time of the Year Books, and as early as the 15th century the English courts had begun to use the term "jeopardy" in connection with the principle against multiple trials. See Kirk, "Jeopardy" During the Period of the Year Books, 82 U. Pa. L. Rev. 602 (1934).

[7] Part I, Art. XVI, of New Hampshire's Constitution of 1784 read: "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." It contained no prohibition, however, against retrial after conviction. 4 F. Thorpe, The Federal and State Constitutions 2455 (1909).

[8] Among the suggested amendments that New York sent to the Congress with its ratification declaration was one that read: "That

these suggestions, James Madison added a ban against double jeopardy to the proposed version of the Bill of Rights that he presented to the House of Representatives in June 1789. Madison's provision read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 434 (1789). Several members of the House challenged Madison's wording on the ground that it might be misconstrued to prevent a defendant from seeking a new trial on appeal of his conviction. *Id.*, at 753. One of Madison's supporters assured the doubters that the proposed clause merely stated the current law, and that this protection for defendants was implicit in the language as it stood.[9] Madison's wording survived in the House, but in the Senate, his proposal was rejected in favor of the more traditional language employing the familiar concept of "jeopardy." S. Jour., 1st Cong., 1st Sess., 71, 77 (1820 ed.). The Senate's choice of language that tracked Blackstone's statement of the

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no person ought to be put twice in jeopardy of life or limb, for one and the same offence; nor, unless in case of impeachment, be punished more than once for the same offence." 1 J. Elliott, Debates on the Federal Constitution 328 (1876). This language borrowed heavily from Blackstone's formulation. Maryland also sent a proposed version of the Double Jeopardy Clause, which read: "That there shall be . . . no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces." 2 Elliott, *supra*, at 550.

[9] From the brief report of the debate it appears that both sides agreed that a defendant could have a second trial after a conviction, but the Government could not have a new trial after an acquittal. Representative Sherman commented: "If the [defendant] was acquitted on the first trial, he ought not to be tried a second time; but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him." 1 Annals of Cong. 753 (1789).

principles of *autrefois acquit* and *autrefois convict* was adopted by the Conference Committee and approved by both Houses with no apparent dissension. *Id.*, at 87–88; H. R. Jour., 1st Cong., 1st Sess., 121 (1826 ed.).

In the course of the debates over the Bill of Rights, there was no suggestion that the Double Jeopardy Clause imposed any general ban on appeals by the prosecution. The only restriction on appeal rights mentioned in any of the proposed versions of the Clause was in Maryland's suggestion that "there shall be . . . no appeal from matter of fact," which was apparently intended to apply equally to the prosecution and the defense. Nor does the common-law background of the Clause suggest an implied prohibition against state appeals. Although in the late 18th century the King was permitted to sue out a writ of error in a criminal case under certain circumstances,[10] the principles of *autrefois acquit* and *autrefois convict* imposed no apparent restrictions on this right. It was only when the defendant was indicted for a second time after either a conviction or an acquittal that he could seek the protection of the common-law pleas. The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial.

C

This Court's cases construing the Double Jeopardy Clause reinforce this view of the constitutional guarantee. In *North Carolina* v. *Pearce*, 395 U. S. 711

[10] The prosecution's appeal rights were generally limited to cases in which the error appeared on the face of the record, or in which the defendant had obtained his acquittal by fraud or treachery. See M. Friedland, Double Jeopardy 287 (1969).

(1969), we observed that the Double Jeopardy Clause provides three related protections:

> "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Id.*, at 717.

The interests underlying these three protections are quite similar. When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense. *Ex parte Lange,* 18 Wall. 163 (1874); *In re Nielsen,* 131 U. S. 176 (1889). When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U. S. 184, 187–188 (1957).

The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have been only grudgingly allowed. Initially, a new trial was thought to be unavailable after appeal, whether requested by the prosecution or the defendant. See *United States* v. *Gibert,* 25 F. Cas. 1287 (No. 15,204) (CCD Mass. 1834) (Story, J.). It was not until 1896 that it was made clear that a defendant could seek a new trial after conviction, even though the Government enjoyed no similar right. *United States* v. *Ball,* 163 U. S. 662.[11]

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[11] This exception to the "one trial" rule has been explained on the conclusory theories that the defendant waives his double

Following the same policy, the Court has granted the Government the right to retry a defendant after a mistrial only where "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States* v. *Perez,* 9 Wheat. 579, 580 (1824).[12]

By contrast, where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended.[13] In various situations where appellate review would not subject the defendant to a second trial, this Court has held that an order favoring the defendant could constitutionally be appealed by the Government. Since the 1907 Criminal Appeals Act, for example, the Government has been permitted without serious constitutional challenge to appeal from orders arresting judgment after a verdict has been entered against the defendant. See, *e. g., United States* v. *Bramblett,* 348 U. S. 503 (1955); *United States* v. *Green,* 350 U. S. 415 (1956); *Pratt* v. *United States,* 70 App. D. C. 7, 11, 102 F. 2d 275, 279 (1939). Since reversal

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jeopardy claim by appealing his conviction, or that the first jeopardy continues until he is acquitted or his conviction becomes final, see *Green* v. *United States,* 355 U. S. 184, 189 (1957). As Mr. Justice Harlan noted in *United States* v. *Tateo,* 377 U. S. 463, 465–466 (1964), however, the practical justification for the exception is simply that it is fairer to both the defendant and the Government.

[12] In *Perez,* the Court emphasized the limited scope of this exception by adding: "To be sure, the power [to declare a mistrial and subject the defendant to retrial] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." 9 Wheat., at 580.

[13] On a number of occasions, the Court has observed that the Double Jeopardy Clause "prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell,* 303 U. S. 391, 399 (1938). See also *One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232, 235–236 (1972); *Stroud* v. *United States,* 251 U. S. 15, 18 (1919); cf. *United States* v. *Jorn,* 400 U. S. 470, 479 (1971).

on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution.

Similarly, it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged. *Forman* v. *United States,* 361 U. S. 416, 426 (1960). If reversal by a court of appeals operated to deprive the Government of its right to seek further review, disposition in the court of appeals would be "tantamount to a verdict of acquittal at the hands of the jury, not subject to review by motion for rehearing, appeal, or certiorari in this Court." *Ibid.* See also *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233, 243 (1957).

It is difficult to see why the rule should be any different simply because the defendant has gotten a favorable post-verdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling. Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.[14]

As we have noted, this Court has had relatively few occasions to comment directly on the constitutional restrictions on Government appeals. The few relevant

[14] Judge Learned Hand took this position in *United States* v. *Zisblatt,* 172 F. 2d 740, 743 (CA2), appeal dismissed on the Government's motion, 336 U. S. 934 (1949). "So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition."

cases are nonetheless consistent with double jeopardy cases from related areas, in focusing on the prohibition against multiple trials as the controlling constitutional principle.

The Court first addressed the question in *United States* v. *Ball, supra.* After trial on an indictment for murder, the jury found one of the defendants not guilty. The indictment was later determined to be defective, but this Court held that an acquittal, even on a defective indictment, was sufficient to bar a subsequent prosecution for the same offense. 163 U. S., at 669. "The verdict of acquittal was final," the Court wrote, "and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution." *Id.,* at 671.

Eight years later the Court was again faced with a double jeopardy challenge to a Government appeal. In *Kepner* v. *United States,* 195 U. S. 100 (1904),[15] the prosecution sought what was in essence a trial *de novo* after the defendant had been acquitted by the court in a bench trial. The Court, relying on the *Ball* case, held that "to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment." *Id.,* at 133. Permitting an appeal in *Kepner* would in effect have exposed the defendant to a second trial, in violation of the constitutional protection against multiple trials for the same offense.

Respondent contends that *Ball* and *Kepner* stand for

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[15] The challenge in *Kepner* was based, not on the Constitution, but on a statutory provision that extended double jeopardy protection to the Philippines. While cases construing that statute do not necessarily control the construction of the Double Jeopardy Clause of the Fifth Amendment, see *Green* v. *United States,* 355 U. S., at 197, we accept *Kepner* as having correctly stated the relevant double jeopardy principles.

the proposition that the key to invoking double jeopardy protection is not whether the defendant might be subjected to multiple trials, but whether he can point to a prior verdict or judgment of acquittal. In *Ball,* however, the Court explained that review of the verdict of acquittal was barred primarily because it would expose the defendant to the risk of a second trial after the finder of fact had ruled in his favor in the first. And, although the *Kepner* case technically involved only a single proceeding, the Court regarded the practice as equivalent to two separate trials, and the evil that the Court saw in the procedure was plainly that of multiple prosecution: [16]

> "The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense." 195 U. S., at 133.

The respondent seeks some comfort from this Court's more recent decision in *Fong Foo* v. *United States,* 369 U. S. 141 (1962), but that case, too, reflects the policy against multiple trials in limiting the Government's appeal rights. In *Fong Foo* the trial court had interrupted the Government's case and directed the jury to return verdicts of acquittal as to all the defendants. This Court held that even if the District Court had erred in directing the acquittal, the Double Jeopardy Clause was offended "when the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be

[16] Although *Kepner* technically involved only one proceeding, the Court regarded the second factfinding as the equivalent of a second trial. In subsequent cases, this Court has treated the *Kepner* principle as being addressed to the evil of successive trials, see *Stroud* v. *United States,* 251 U. S. 15, 18 (1919); *Palko* v. *Connecticut,* 302 U. S. 319, 322–323 (1937).

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tried again for the same offense." *Id.*, at 143. The Court noted that although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review.

Finally, respondent places great weight on our decision in *United States* v. *Sisson*, 399 U. S. 267 (1970). He claims that *Sisson* extends the constitutional protection against Government appeals to any case in which the ruling appealed from is based upon facts outside the face of the indictment.

Sisson arose under the former Criminal Appeals Act and came here on direct appeal from the District Court. The defendant had been tried for refusing to submit to induction, and the jury had found him guilty. On a postverdict motion, however, the District Court entered what it termed an "arrest of judgment," dismissing the indictment on the ground that Sisson could not be convicted because his sincere opposition to the war in Vietnam outweighed the country's need to draft him. The Government sought to appeal the District Court's ruling on the theory that it was within the "arresting judgment" provision of the Criminal Appeals Act. We held that the ruling was not appealable under either the "arresting judgment" or the "motion in bar" provisions of the Act and dismissed the case for want of appellate jurisdiction.

Writing for a plurality of four Justices, Mr. Justice Harlan gave three reasons for his conclusion that the District Court's ruling was not appealable as an arrest of judgment. First, he wrote, the District Court's ruling was not within the common-law definition of an arrest of judgment since it went beyond the face of the record. The Criminal Appeals Act, he noted, was drafted against a common-law background in which the statutory phrase had a "well-defined and limited meaning" that did not

incorporate rulings that relied upon evidence introduced at trial. Second, the District Court's ruling failed to satisfy the statutory requirement that the decision arresting judgment be "for insufficiency of the indictment." The issue of the sincerity of Sisson's beliefs was not presented by the indictment; accordingly, the indictment was not "insufficient" under the appeals statute, since it was sufficient to charge an offense and it did not allege facts that in themselves established the availability of a constitutional privilege. In Part II–C of the opinion, for which Mr. Justice Black provided a majority of the Court, Mr. Justice Harlan explained the third reason for concluding that the District Court's order was not an arrest of judgment: because the order was "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial," it was an acquittal "rendered by the trial court after the jury's verdict of guilty." 399 U. S., at 288. The District Court's post-verdict ruling, he wrote, was indistinguishable from a hypothetical verdict of acquittal entered by a jury on an instruction incorporating the constitutional defense that the judge had recognized in his ruling. If the jury had been so instructed and had acquitted, he pointed out, there would plainly have been no appeal under the Criminal Appeals Act. The legislative history of the Act made it clear that Congress did not contemplate review of verdicts of acquittal, no matter how erroneous the constitutional theory underlying the instructions. Nor, he added, could an appeal have been taken consistently with the Double Jeopardy Clause. The latter point was made in the following passage:

> "Quite apart from the statute, it is, of course, well settled that an acquittal can 'not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Consti-

> tution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence.' *United States* v. *Ball,* 163 U. S. 662, 671 (1896)." 399 U. S., at 289–290.

Respondent argues that this passage was meant to provide an alternative holding for *Sisson,* that even if the Criminal Appeals Act would permit an appeal on the facts in *Sisson,* the Double Jeopardy Clause would not. In essence, respondent rests his case on what he perceives to be the Court's syllogism in this portion of the *Sisson* opinion: (1) the postverdict ruling was not a common-law arrest of judgment, but an acquittal; (2) under the *Ball* case, an acquittal cannot be appealed without offending the Double Jeopardy Clause; thus, (3) the District Court's ruling in *Sisson* was shielded from review as a matter of constitutional law.

We are constrained to disagree. A more natural reading of this passage suggests that the reference to the Double Jeopardy Clause was meant to apply to the hypothetical jury verdict, not to the order entered by the trial court in *Sisson* itself.[17] Appeal from the hypothet-

[17] Under respondent's interpretation of the passage, the reliance on *Ball* is difficult to explain. The rationale of the *Ball* case, and particularly the portion quoted in *Sisson,* turns on the fact that an appeal might result in a second trial, which would not have been necessary in *Sisson.* On the narrower reading of the passage, the reference to *Ball* is precisely in point; the verdict of the hypothetical jury would be unappealable for the very reason stated in the quotation from the *Ball* case.

In addition, respondent's proposed reading of the passage would constitutionalize the very common-law distinctions that the *Sisson* Court anticipated an amended Criminal Appeals Act would eliminate. If no postverdict order except a common-law arrest of judgment is constitutionally appealable, this Court and the courts of appeals would continue to be plagued with the "limitations imposed by [the]

ical jury verdict would have been precluded both by the statute and by the Constitution; appeal from the District Court's actual ruling in the case, however, was barred solely by the statute. The only direct effect of the Constitution on the case was, as the Court pointed out in a footnote following the quoted passage, that after this Court's jurisdictional dismissal, Sisson could not be retried. 399 U. S., at 290 n. 18.[18] Accordingly, we find *Sisson* no authority for the proposition that the Government cannot constitutionally appeal any postverdict order that would have been an unappealable acquittal under the former Criminal Appeals Act.

D

The Government has not seriously contended in this case that any ruling of law by a judge in the course of a trial is reviewable on the prosecution's motion,[19] although this view has had some support among the commentators since Mr. Justice Holmes adopted it in his dissent to *Kepner* v. *United States, supra.*[20] Mr. Jus-

awkward and ancient [Criminal Appeals] Act," 399 U. S., at 308. Worse still, the unhappy task of exploring pleading distinctions that existed at common law would now be imposed on the States, see *Benton* v. *Maryland,* 395 U. S. 784 (1969).

[18] On any view, *Sisson* would have been a singularly inappropriate case in which to decide the constitutional point. The constitutional question was not raised or briefed by the parties, and resolution of the issue in the manner respondent suggests would have marked a significant development in double jeopardy law, deserving of plenary treatment.

[19] The Government has advanced this argument, if rather cautiously, in its brief in a companion case, *United States* v. *Jenkins, post,* p. 358, upon which it has relied in this case. See Brief for United States in *United States* v. *Jenkins,* No. 73–1513, O. T. 1974, pp. 24–25, n. 16.

[20] See, *e. g.,* Mayers & Yarbrough, *Bis Vexari:* New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 8–15 (1960); Miller, Appeals by the State in Criminal Cases, 36 Yale L. J. 486 (1927).

tice Holmes accepted as common ground that the Double Jeopardy Clause forbids "a trial in a new and independent case where a man already had been tried once." 195 U. S., at 134. But in his view the first jeopardy should be treated as continuing until both sides have exhausted their appeals on claimed errors of law, regardless of the possibility that the defendant may be subjected to retrial after a verdict of acquittal.

A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal.[21] These interests, however, do not apply in the case of a postverdict ruling of law by a trial judge. Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions. We therefore conclude that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government

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[21] See *Ashe* v. *Swenson*, 397 U. S. 436, 446–447 (1970); *id.*, at 455 n. 11, 459 (BRENNAN, J., concurring); *Green* v. *United States*, 355 U. S., at 187; Comment, Double Jeopardy and Government Appeals of Criminal Dismissals, 52 Tex. L. Rev. 303, 340–342 (1974).

may appeal from that ruling without running afoul of the Double Jeopardy Clause.

III

Applying these principles to the present case is a relatively straightforward task. The jury entered a verdict of guilty against Wilson. The ruling in his favor on the *Marion* motion could be acted on by the Court of Appeals or indeed this Court without subjecting him to a second trial at the Government's behest. If he prevails on appeal, the matter will become final, and the Government will not be permitted to bring a second prosecution against him for the same offense. If he loses, the case must go back to the District Court for disposition of his remaining motions. We therefore reverse the judgment and remand for the Court of Appeals to consider the merits of the Government's appeal.

Reversed and remanded.

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

Respondent Wilson was indicted for converting to his own use funds of Local 367, IBEW, which he served as business manager and financial secretary. The theory of the prosecution was that respondent had caused union funds to be expended for his daughter's wedding reception. It was undisputed that a check drawn on the union and signed by two union officers, Brinker and Schaefer, had been forwarded to the hotel where the wedding reception had been held, and that the hotel had applied the payment in satisfaction of debts incurred on account of the reception.

The funds were paid in November 1966. An indictment was returned in October 1971, three days prior to the running of the statute of limitations. By that time,

neither of the two signatories to the union check was available to testify in the case. Brinker had died in 1968; Schaefer was terminally ill. Respondent filed a pretrial motion to dismiss the indictment on the ground that preindictment delay violated the Due Process Clause of the Fifth Amendment. See *United States* v. *Marion,* 404 U. S. 307. Specifically, respondent argued that the unavailability of the two signatories, caused by preindictment delay, prejudiced his defense. After two pretrial hearings, the District Court denied the motion.

At the trial, it was established that the local's attorney, one Burke, had made a $1,000 deposit at the hotel where the wedding reception was held, to cover expenses. A bill for the balance had been mailed by the hotel to respondent's home address. Five months later the check signed by Brinker and Schaefer had arrived. The testimony established that the usual procedure for issuance of a check was the completion of a voucher signed by local president Schaefer and the recording secretary, thus signifying approval of the expenditure, preparation of a check by a secretary, and signature by the local president and treasurer. It was established that respondent had first given Brinker and Schaefer their office positions, though they had been elected to the offices they held in the union.

Respondent testified that he had never directed anyone to issue the check in question and that he had reimbursed Burke personally for the $1,000 deposit. He did acknowledge, however, that Burke had told him in November 1966, shortly after the payment reached the hotel, that the bill had been paid.

At the close of evidence respondent renewed his motion to dismiss on account of preindictment delay. The judge withheld decision until receiving the verdict.

The jury found respondent guilty. The District Court

then ruled on respondent's motion. It found that the Government had unreasonably delayed the indictment 16 months after completion of an FBI investigation in 1970. The court found that the delay caused the union president Schaefer to be unavailable as a trial witness. (Brinker had died in 1968, while the Government's investigation was in progress.) Since, in the court's view, the presence of Schaefer, the signer of the check and voucher, would have added "testimony of utmost importance to the trial," the court ruled that respondent had been substantially prejudiced by the delay that deprived the trial of Schaefer's testimony. Accordingly, the court dismissed the indictment.

The Government sought to appeal, arguing that the dismissal had been erroneous. The Court of Appeals held that appeal by the Government violated the Double Jeopardy Clause.

In *United States* v. *Sisson,* 399 U. S. 267, facts developed in the trial of Sisson led a jury to convict him. But after the jury verdict the District Court rendered a postverdict opinion called "an arrest of judgment" which this Court called "a post-verdict directed acquittal," *id.,* at 290, which was described as "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case," *id.,* at 290 n. 19, a reading reaffirmed in *United States* v. *Jorn,* 400 U. S. 470, 478 n. 7.

In the present case the District Court reviewed the evidence given at the trial and concluded that the respondent had been prejudiced because of testimony the missing witness (terminally ill) probably would have added. What was asked on appeal was that the appellate judges review independently the evidence at the trial bearing on guilt and reach a different conclusion. In *United States* v. *Ball,* 163 U. S. 662, 671, the Court said in a dictum that has had a continuing impact on the law:

"The verdict of acquittal was final, and *could not be reviewed,* on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution." (Emphasis supplied.)

In *Kepner* v. *United States,* 195 U. S. 100, the defendant was acquitted of an embezzling charge following a nonjury trial in a court of the Philippines. The Government took an appeal to the Supreme Court of the Philippines, which independently reviewed the record and found Kepner guilty. This Court reversed, holding that the Double Jeopardy Clause barred the entry of conviction by the appellate court.* The Court considered appellate review by the Philippine Supreme Court to be equivalent to the second trial in *Ball.* The Court accordingly held:

> "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered . . . . The protection is not . . . against the peril of second punishment, but against being again tried for the same offense." 195 U. S., at 130.

Fong Foo v. *United States,* 369 U. S. 141, involved a trial not completed but promising to be "long and complicated," where the trial judge directed a verdict for the defendants on the ground of prosecutorial improprieties and lack of credibility of Government witnesses. The Court of Appeals had held that the trial judge had no power to direct an acquittal on the record before it. This Court reversed, though the Court of Appeals "thought, not without reason, that the acquittal was based upon an

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*Technically, the Court was construing, not the Double Jeopardy Clause, but a statute passed by Congress for administration of the Philippines that contained identical language. But the Court treated the question as a constitutional one, finding the above-quoted dictum from *Ball* controlling.

egregiously erroneous foundation," *id.*, at 143. The dictum of *Ball*, quoted above, was deemed controlling. *Ibid.*

In the present case, as in *Fong Foo*, the ruling of the trial court is based in part on the evidence adduced at the trial and in part on other related issues. Thus the issue of a speedy trial in the present case is not reviewable, for it is part and parcel of the process of weighing the Government's evidentiary case against respondent. Therefore we should affirm the judgment below.

UNITED STATES *v.* JENKINS

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

No. 73–1513. Argued December 9, 1974—Decided February 25, 1975

After respondent was ordered to report for induction, his local draft board refused to postpone his induction to allow him to claim a conscientious objector classification, and he was subsequently indicted for refusing and failing to report for induction. Following a bench trial the District Court "dismissed" the indictment and "discharged" respondent, holding that, although under *Ehlert* v. *United States*, 402 U. S. 99, the board was not required to entertain conscientious objector claims arising between notice of induction and the scheduled induction date, nevertheless, since respondent failed to report at a time when *Ehlert* had not yet been decided and when the prevailing law of the Circuit required a local board to reopen a registrant's classification if his conscientious objector views ripened only after he had been notified to report for induction, respondent was entitled to a postponement of induction until the board considered his conscientious objector claim, and that it would be unfair to apply *Ehlert* to respondent. The Court of Appeals dismissed the Government's appeal under 18 U. S. C. § 3731 on the ground that it was barred by the Double Jeopardy Clause, concluding that although the District Court had characterized its action as a dismissal of the indictment, respondent had in effect been acquitted, since the District Court had relied upon facts developed at trial and had concluded "that the statute should not be applied to [respondent] as a matter of fact." *Held:* Although it is not clear whether or not the District Court's judgment discharging respondent was a resolution of the factual issues against the Government, it suffices for double jeopardy purposes, and therefore for determining appealability under 18 U. S. C. § 3731, that further proceedings of some sort, devoted to resolving factual issues going to the elements of the offense charged and resulting in supplemental findings, would have been required upon reversal and remand. The trial, which could have resulted in a conviction, has long since terminated in respondent's favor, and to subject him to any

further proceedings, even if the District Court were to receive no additional evidence, would violate the Double Jeopardy Clause. Pp. 365–370.

490 F. 2d 868, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a statement concurring in the judgment, in which BRENNAN, J., joined, *post,* p. 370.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Louis F. Claiborne,* and *Edward R. Korman.*

James S. Carroll argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Jenkins was indicted and charged with violating § 12 (a) of the Military Selective Service Act, 62 Stat. 622, as amended, 50 U. S. C. App. § 462 (a), for "knowingly refusing and failing to submit to induction into the armed forces of the United States." App. 3. After a bench trial, the District Court "dismissed" the indictment and "discharged" the respondent. 349 F. Supp. 1068, 1073 (EDNY 1972). The Government sought to appeal this ruling pursuant to 18 U. S. C. § 3731,[1] but the

[1] Title 18 U. S. C. § 3731 provides, in relevant part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

. . . . . .

"The appeal in all such cases shall be taken within thirty days

Court of Appeals for the Second Circuit dismissed the appeal "for lack of jurisdiction on the ground that the Double Jeopardy clause prohibits further prosecution." 490 F. 2d 868, 880 (1973). We granted certiorari in this case and *United States* v. *Wilson, ante,* p. 332, also decided today, to consider the application of the Double Jeopardy Clause of the Fifth Amendment to Government appeals in criminal cases. 417 U. S. 908 (1974).

I

Respondent, who had first registered with his local draft board in 1966, was classified 1–A by his local board on November 18, 1970. He was found physically fit for induction, and on February 4, 1971, the local board sent respondent an Order to Report for Induction on February 24, 1971. After consulting an attorney and a local draft counselor, respondent wrote the local board and requested Selective Service Form 150 for a conscientious objector classification. Having received no response from the local board by February 23, the day before he had been ordered to report for induction, respondent went in person to the local board to request Form 150. Although respondent did secure the desired form, local board officials were directed by Selective Service headquarters not to postpone his induction to allow him to complete and submit the conscientious objector form. Respondent did not report for induction on February 24, 1971, and he was subsequently indicted.

Respondent was arraigned on January 13, 1972, and pleaded not guilty. The parties were directed to file all pretrial motions within 45 days, but no pretrial motions

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after the decision, judgment or order has been rendered and shall be diligently prosecuted.

. . . . . .

"The provisions of this section shall be liberally construed to effectuate its purposes."

were filed within that period. The case was called and continued on several occasions. During this period respondent filed a motion for judgment of acquittal based, in part, on the following ground:

> "The failure of the local board to postpone the induction order pending the determination of the defendant's claim as a conscientious objector was arbitrary and contrary to law and rendered the Order to report for induction invalid. *United States* v. *Gearey,* 368 F. 2d 144 (2nd Cir. 1966)." App. 4.

In *Gearey* the Court of Appeals had interpreted the controlling Selective Service regulation [2] to require a local board to reopen a registrant's classification if it found that the registrant's conscientious objector views had ripened only after he had been notified to report for

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[2] 32 CFR § 1625.2 (1965):

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The regulation had been in effect since 1955, 20 Fed. Reg. 737, and was not amended between the time *Gearey* was decided and the events leading up to respondent's indictment. The regulation was amended in 1973, 38 Fed. Reg. 731.

induction. At the time respondent was ordered to report for induction, *Gearey* remained the law of the Circuit. Two months later, however, this Court rejected *Gearey* in a decision affirming a contrary holding from another Circuit. *Ehlert* v. *United States,* 402 U. S. 99 (1971).

When the case proceeded to trial, respondent waived trial to a jury, and the case was tried to the court. At the close of the evidence, the court reserved decision in order to give the parties an opportunity to submit proposed findings. Although it does not appear from the record that either party requested the court to find the facts specially, Fed. Rule Crim. Proc. 23 (c), the court filed written findings of fact and conclusions of law, and directed that the indictment be dismissed and the respondent be discharged. The court acknowledged that respondent had failed to report for induction as ordered, 349 F. Supp., at 1070, and that under *Ehlert* the board is not required to entertain conscientious objector claims arising between notice of induction and the scheduled induction date. Nevertheless, since respondent failed to report for induction at a time when *Ehlert* had not yet been decided and *Gearey* represented the prevailing law, respondent was entitled to a postponement of induction until the board considered his conscientious objector claim. The court reasoned that it would be unfair to apply *Ehlert* to respondent:

> "This court cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law." 349 F. Supp., at 1073.[3]

[3] The District Court may have believed that respondent could not be convicted for knowingly refusing to report for induction if he had acted in the belief that the board's order was illegal under *Gearey*. There was no direct evidence that respondent relied upon *Gearey* in refusing to report for induction. Respondent called as a witness a local draft counselor whom he had contacted upon

The Government filed a timely notice of appeal [4] and argued that the District Court had incorrectly concluded that *Ehlert* was not retroactive.[5] Since this Court held long ago that the Government cannot bring an appeal in a criminal case absent an express enabling statute, *United States* v. *Sanges*, 144 U. S. 310 (1892), the Court of Appeals considered first whether petitioner's appeal was authorized by 18 U. S. C. § 3731.

The Government contended, and respondent did not dispute, that the intention of Congress in amending 18

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receiving his notice to report for induction. The counselor would have testified as to respondent's sincerity and apparently would have touched upon the *Gearey* issue. App. 70–73. The court ruled that the counselor's testimony was inadmissible. At that time, the court regarded the effect of *Gearey* as "strictly a question of law," *id.*, at 73, but the judge apparently changed his mind after further deliberation, as was his prerogative:

"Trials will never be concluded if judgments rendered after full consideration are to be reversed because of remarks made and tentative theories advanced by a judge in the course of the trial." *United States* v. *Wain*, 162 F. 2d 60, 65 (CA2), cert. denied, 332 U. S. 764 (1947).

[4] The notice of appeal was filed within the requisite 30 days, but the Government did not file its brief until seven months later. The Court of Appeals indicated that it would have dismissed the appeal for failure to prosecute diligently, 18 U. S. C. § 3731, had respondent so requested. 490 F. 2d 868, 869 n. 2. Respondent has similarly made no such argument in this Court.

[5] By the time the Government filed its brief, the Court of Appeals had held that *Ehlert* could be applied to a registrant whose refusal to report for induction occurred while *Gearey* still represented the law of the Circuit. *United States* v. *Mercado*, 478 F. 2d 1108 (1973). The court observed, however:

"We recognize such a rule might be harsh as applied to a registrant who in fact reasonably relied in good faith on the case law or upon the knowledge that local boards in this circuit would consider a belated conscientious objection claim, and perhaps there is room for flexibility in enforcement of this rule to avoid injustice in a particular case . . . ." *Id.*, at 1111.

U. S. C. § 3731 in 1971 was to extend the Government's right to appeal to the fullest extent consonant with the Fifth Amendment.[6] Judge Friendly, writing for the Court of Appeals, carefully reviewed the evolution of the Double Jeopardy Clause and concluded that the draftsmen "intended to import into the Constitution the common law protections much as they were described by Blackstone." 490 F. 2d, at 873. While available evidence was equivocal on whether "the crown's inability to appeal an acquittal after a trial on the merits" was incorporated in the common-law concept of double jeopardy, the majority was of the view that decisions by this Court had resolved any such ambiguity adversely to the Government. *Id.*, at 874, citing *United States* v. *Ball,* 163 U. S. 662 (1896); *Kepner* v. *United States,* 195 U. S. 100 (1904); *Fong Foo* v. *United States,* 369 U. S. 141 (1962); *United States* v. *Sisson,* 399 U. S. 267 (1970). Although the District Court had characterized its action as a dismissal of the indictment, the Court of Appeals concluded that the respondent had been acquitted since the District Court had relied upon facts developed at trial and had concluded "that the statute should not be applied to [respondent] as a matter of fact." 490 F. 2d, at 878.

Judge Lumbard dissented on two grounds. First, an appeal by the Government was permissible since the District Court had properly characterized its action as a dismissal rather than an acquittal. The District Court's decision was "essentially a legal determination construing the statute on which the indictment was based," *id.*, at 882, and not really an adjudication on the merits in the sense that it rested on facts brought out at trial. Second, even if the District Court did acquit respondent, the Double Jeopardy Clause does not stand as an absolute

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[6] See H. R. Conf. Rep. No. 91–1768, p. 21 (1970). Cf. S. Rep. No. 91–1296 (1970).

barrier against appeals by the Government; there is a societal interest to be weighed in determining the appealability of the decision.[7]

II

When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal. *United States* v. *Wilson, ante,* at 344–345, 352–353. When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict. To be sure, the defendant would prefer that the Government not be permitted to appeal or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect.

Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge. While the protection against double jeopardy has most often been articulated

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[7] Judge Lumbard analogized respondent's case to mistrial cases in which the " 'public's interest in fair trials designed to end in just judgments' " may be weighed. *Illinois* v. *Somerville,* 410 U. S. 458, 470 (1973). That interest, he felt, would not be served by permitting a clearly guilty defendant to go free because of an erroneous interpretation of the controlling law. 490 F. 2d, at 884. We disagree with this analysis because we think it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here.

in the context of jury trials,[8] the recent decision by Congress to authorize Government appeals whenever consistent with the Double Jeopardy Clause, when combined with the increasing numbers [9] of bench trials, makes this area important though unilluminated by prior decisions of this Court.

A general finding of guilt by a judge may be analogized to a verdict of "guilty" returned by a jury. *Mulloney* v. *United States,* 79 F. 2d 566, 584 (CA1 1935), cert. denied, 296 U. S. 658 (1936). In a case tried to a jury, the distinction between the jury's verdict of guilty and the court's ruling on questions of law is easily perceived. In a bench trial, both functions are combined in the judge, and a general finding of "not guilty" may rest either on

[8] See, *e. g., United States* v. *Ball,* 163 U. S. 662 (1896); *Green* v. *United States,* 355 U. S. 184 (1957); *Fong Foo* v. *United States,* 369 U. S. 141 (1962). Cf. *Kepner* v. *United States,* 195 U. S. 100 (1904).

[9] 1974 Annual Report of the Director, Administrative Office of the United States Courts IX–97, Trials Completed in the United States District Courts During the Fiscal Years 1962 Through 1974:

Fiscal year	Total	Criminal	
		Non-jury	Jury
1962	3,788	1,090	2,698
1963	3,865	1,159	2,706
1964	3,924	1,076	2,848
1965	3,872	1,143	2,729
1966	4,410	1,239	3,171
1967	4,405	1,345	3,060
1968	5,533	1,800	3,733
1969	5,563	1,883	3,680
1970	6,583	2,357	4,226
1971	7,456	2,923	4,533
1972	7,818	2,968	4,850
1973	8,571	2,927	5,644
1974	7,600	2,753	4,847

the determination of facts in favor of a defendant or on the resolution of a legal question favorably to him. If the court prepares special findings of fact, either because the Government or the defendant requested them [10] or because the judge has elected to make them *sua sponte*,[11] it may be possible upon sifting those findings to determine that the court's finding of "not guilty" is attributable to an erroneous conception of the law whereas the court has resolved against the defendant all of the factual issues necessary to support a finding of guilt under the correct legal standard. The Government argues that this is essentially what happened in this case. Brief for United States 11–14.

We are less certain than the Government, however, of the basis upon which the District Court ruled. It is, to be sure, not clear that the District Court resolved issues of fact in favor of respondent. But neither is it clear to us that the District Court, in its findings of fact and conclusions of law, expressly or even impliedly found against respondent on all the issues necessary to establish guilt under even the Government's formulation of the applicable law. The court's opinion certainly contains no general finding of guilt, and although the specific findings resolved against respondent many of the component elements of the offense, there is no finding on the statutory element of "knowledge." In light of the judge's discussion of the *Gearey* issue in his opinion, such an omission may have reflected his conclusion that the Govern-

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[10] Federal Rule Crim. Proc. 23 (c):

"*Trial Without a Jury.*

"In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein."

[11] See, *e. g.*, *Sullivan* v. *United States*, 348 U. S. 170, 174 (1954).

ment had failed to establish the requisite criminal intent beyond a reasonable doubt. See n. 3, *supra.*

On such a record, a determination by the Court of Appeals favorable to the Government on the merits of the retroactivity issue tendered to it by the Government would not justify a reversal with instructions to reinstate the general finding of guilt: there was no such finding, in form or substance, to reinstate. We hold today in *Wilson, supra,* that the Double Jeopardy Clause does not bar an appeal when errors of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilt. But because of the uncertainty as to the basis for the District Court's action here, *Wilson* does not govern this case.

The Government suggests two possible theories, each of which would go beyond our holding in *Wilson,* for permitting an appeal even though the trial proceedings did not result in either a verdict or a finding of guilt. First, the Government suggests that "whether a new trial must follow an appeal is always a relevant consideration," but no more; the Double Jeopardy Clause is not an absolute bar in such a situation.[12] Second, at least in a bench trial setting, the Government contends that the concept of "trial" may be viewed quite broadly. If, in a bench trial, a judge has ruled in favor of the defendant at the close of the Government's case on an erroneous legal theory, the Government ought to be able to appeal; if the appeal were successful, any subsequent proceedings including, presumably, the reopening of the proceeding for the admission of additional evidence, would merely

[12] Brief for United States 10 n. 5, 24 n. 16. The Government was of the view that it did not have to make this broader argument in the context of this case but merely sought to preserve it. In light of our disposition of its principal argument, we proceed to this alternative ground.

be a "continuation of the first trial." [13] Tr. of Oral Arg. 16. This theory would also permit remanding a case to the District Court for more explicit findings.

We are unable to accept the Government's contentions. Both rest upon an aspect of the "continuing jeopardy" concept that was articulated by Mr. Justice Holmes in his dissenting opinion in *Kepner* v. *United States,* 195 U. S., at 134–137, but has never been adopted by a majority of this Court. Because until recently appeals by the Government have been authorized by statute only in specified and limited circumstances, most of our double jeopardy holdings have come in cases where the defendant has appealed from a judgment of conviction. See, *e. g., Green* v. *United States,* 355 U. S. 184 (1957); *Trono* v. *United States,* 199 U. S. 521 (1905); *United States* v. *Ball,* 163 U. S., at 671–672. In those few cases that have reached this Court where the appellate process was initiated by the Government following a verdict of acquittal, the Court has found the appeal barred by the Double Jeopardy Clause. See, *e. g., Kepner* v. *United States, supra; Fong Foo* v. *United States,* 369 U. S. 141 (1962). In those cases, where the defendants had not been adjudged guilty, the Government's appeal was not permitted since further proceedings, usually in the form of a full retrial, would have followed. Here there was a judgment discharging the defendant, although we cannot say with assurance

[13] The premise apparently underlying this position is that the factfinder has not been discharged in a bench trial; unlike a jury trial, where the discharge of the jury upon returning a verdict of acquittal terminates a defendant's jeopardy, *Green* v. *United States,* 355 U. S., at 191, the judge theoretically remains available to reconvene the case, take up where he left off, and resume his duties as factfinder. Preliminarily, it may be observed that the availability of the judge is by no means assured, as this case illustrates: the District Judge has reportedly resigned. 43 U. S. L. W. 2268 (1974).

whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U. S. C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States, supra,* at 187.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

I would hold that the Double Jeopardy Clause bars the Government's appeal from the ruling of this trial court in respondent's favor. See *Fong Foo* v. *United States,* 369 U. S. 141. Accordingly, I concur in the affirmance of the judgment below.

Syllabus

UNITED STATES ET AL. *v.* NEW JERSEY STATE LOTTERY COMMISSION

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

No. 73–1471. Argued November 20, 1974—
Decided February 25, 1975

A licensed New Jersey radio station sought, but was denied, declaratory relief from the Federal Communications Commission (FCC) against the application of 18 U. S. C. § 1304 to the broadcast of winning numbers in a lawful state-run lottery such as New Jersey has. Subsequent to the Court of Appeals' reversal of the FCC's denial of relief, Congress enacted 18 U. S. C. § 1307 (a) (2) making § 1304 inapplicable to information concerning a state-authorized lottery broadcast in that State or an adjacent State having such a lottery. *Held:* In view of the enactment of § 1307 the case is remanded to the Court of Appeals so that it may consider whether the case is moot as the Government contends, or is not moot because, as intervenor State of New Hampshire contends, § 1307 in violation of First Amendment rights would still not allow broadcasters in Vermont, which has no lottery, to broadcast winning numbers in the New Hampshire lottery.

491 F. 2d 219, vacated and remanded.

Deputy Solicitor General Wallace argued the cause for petitioners. On the brief were *Solicitor General Bork, Assistant Attorney General Kauper, Louis F. Claiborne, Danny J. Boggs,* and *Joseph A. Marino.*

Stephen Skillman, Assistant Attorney General of New Jersey, argued the cause for respondent. With him on the brief was *William F. Hyland,* Attorney General.*

*Briefs of *amici curiae* urging affirmance were filed by *Robert K. Killian,* Attorney General, and *Barney Lapp* and *Daniel R. Schaefer,* Assistant Attorneys General, for the State of Connecticut; by *Warren B. Rudman,* Attorney General, and *David H. Souter,* Deputy Attorney General, for the State of New Hampshire; by *Louis Schwartz* and *Robert A. Woods* for the Maryland Public Broadcasting Commission; by *William J. Brown,* Attorney General,

PER CURIAM.

This case involves a question regarding the applicability of 18 U. S. C. § 1304, which provides:

> "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Jersey Cape, a licensed radio station in New Jersey, sued for declaratory relief before the Federal Communications Commission arguing that § 1304 should not apply to the broadcast of the winning number in a lawful state-run lottery such as the one conducted by the State of New Jersey. See N. J. Stat. Ann. § 5:9–1 *et seq.* (1973). The Commission denied relief. 30 F. C. C. 2d 794 (1971). Upon a petition for rehearing, the New Jersey Lottery Commission was allowed to intervene and the FCC reaffirmed its denial. 36 F. C. C. 2d 93 (1972). The Lottery Commission petitioned for review in the Court of Appeals for the Third Circuit, 491 F. 2d 219 (1974), and the States of New Hampshire and Pennsylvania were granted permission to intervene as petitioners, *id.*, at 221

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and *Stephen T. Parisi* for the State of Ohio; by *Verne Hodge,* Attorney General, and *Henry L. Feuerzeig,* First Assistant Attorney General, for the Government of the Virgin Islands; by *John B. Summers* for the National Association of Broadcasters; and by *Thomas R. Asher, Melvin L. Wulf,* and *Joel M. Gora* for the American Civil Liberties Union.

n. 2. Sitting en banc, the Third Circuit unanimously reversed the FCC. We granted certiorari to resolve an apparent conflict between that decision and the decision by the Court of Appeals for the Second Circuit in *New York State Broadcasters Assn.* v. *United States,* 414 F. 2d 990 (1969).

Subsequent to the briefing and oral argument of the case in this Court, Congress passed and the President signed Pub. L. 93–583, 88 Stat. 1916, codified at 18 U. S. C. § 1307 (1970 ed., Supp. IV), which, in relevant part, provides:

> "(a) The provisions of section . . . 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—
>
> . . . . . .
>
> "(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery."

The United States now urges us to dismiss this case as moot. It points out that the only relief requested was by a broadcaster located in New Jersey, a State that conducts an authorized lottery, and therefore the type of broadcast at issue is now allowed by statute. Intervenor, the State of New Hampshire disputes the suggestion of mootness. New Hampshire argues that the amendment to § 1304 does not grant it full relief. It is noted that Vermont, an adjacent State, does not conduct a state-authorized lottery. Thus, Vermont broadcasters will not be allowed, under § 1304, as modified by § 1307, to broadcast to New Hampshire listeners the winning numbers in the New Hampshire state lottery. New Hampshire apparently believes that this limitation constitutes a denial of First Amendment rights. This specific issue, however, was not briefed or argued in this Court.

In view of the enactment of § 1307, we deem it appropriate to remand to the Court of Appeals so that it may consider whether the case is now moot. Accordingly, the judgment below is vacated and the case is remanded.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I do not believe that this case has become moot—certainly not for the reasons intimated by the Court. The First Amendment provides that Congress shall make no law abridging the freedom of the press. It is to me shocking that a radio station or a newspaper can be regulated by a court or by a commission, to the extent of being prevented from publishing any item of "news" of the day. So to hold would be a prior restraint of a simple and unadulterated form, barred by constitutional principles. Can anyone doubt that the winner of a lottery is prime news by our press standards?

In our history, Congress has shown at times an appetite for performing the judicial function of finding people guilty. That is the reason why the Constitution contains Art. I, § 9, cl. 3, which outlaws bills of attainder. See *United States* v. *Brown,* 381 U. S. 437 (1965); *United States* v. *Lovett,* 328 U. S. 303 (1946). For Congress to hold that the radio station in the present case was or was not guilty of violating 18 U. S. C. § 1304 would be a flagrant usurpation of Art. III functions.

Our decision should rest not on what Congress has done but on the merits of the controversy, which do not seem to me to be substantial. I would not presume that Congress undertook to pass on the merits of the claim at

issue before us.* I would not remand for consideration of the issue of mootness. To me it is manifest that the case is not moot and that the judgment below should be affirmed.

*As the State of New Hampshire points out, the new § 1307 even on its face does not resolve the claims of all parties to this action. New Hampshire, which was granted leave to intervene in the Court of Appeals, conducts a lottery; neighboring Vermont does not. Title 18 U. S. C. § 1307 (a)(2) (1970 ed., Supp. IV), upon which the Court relies, applies only to broadcasts by a station in the State which conducts the lottery, or in an adjacent State which also conducts a lottery; presumably, then, § 1304 remains applicable to a Vermont radio station which desires to broadcast information concerning the New Hampshire lottery. The restraint imposed by § 1304 will thus continue to inhibit the New Hampshire lottery with respect to certain groups of prospective participants, including New Hampshire residents who listen to Vermont radio stations and Vermont residents who might wish to cross the state line and participate.

WILLIAMS & WILKINS CO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 73–1279. Argued December 17, 1974—
Decided February 25, 1975

203 Ct. Cl. 74, 487 F. 2d 1345, affirmed by an equally divided Court.

Alan Latman argued the cause for petitioner. With him on the briefs were *Arthur J. Greenbaum* and *Martin F. Richman.*

Solicitor General Bork argued the cause for the United States. With him on the brief were *Assistant Attorney General Hills, Harriet S. Shapiro,* and *William G. Kanter.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

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*Briefs of *amici curiae* urging reversal were filed by *Arthur B. Hanson* and *William J. Butler, Jr.,* for the American Chemical Society; by *Robert B. Washburn* for the American Society for Testing and Materials et al.; by *Joseph Calderon* for the American Guild of Authors and Composers et al.; by *Charles H. Lieb* for the Association of American Publishers, Inc., et al.; by *Irwin Karp* for the Authors League of America, Inc.; by *Paul G. Zurkowski* for the Information Industry Assn.; by *Alfred H. Wasserstrom* for the Magazine Publishers Assn., Inc.; and by the Associated Councils of the Arts.

Briefs of *amici curiae* urging affirmance were filed by *William D. North, Ronald L. Engel,* and *James M. Amend* for the American Library Assn. and the Special Libraries Assn.; by *Philip B. Brown, Stephen C. Lieberman,* and *John P. Furman* for the Association of Research Libraries et al.; and by *Harry N. Rosenfield* for the National Education Assn.

Syllabus

SERFASS *v.* UNITED STATES

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

No. 73–1424. Argued December 9, 1974—Decided March 3, 1975

Petitioner, who had submitted a post-induction order claim for conscientious objector status to his local board, was later indicted for willful failure to report for and submit to induction into the Armed Forces. He filed a pretrial motion, accompanied by an affidavit, to dismiss the indictment on the ground that the local board did not state adequate reasons for refusing to reopen his file, and a motion to postpone the trial "for the reason that a Motion to Dismiss has been simultaneously filed and the expeditious administration of justice will be served best by considering the Motion prior to trial." The District Court dismissed the indictment, noting that the material facts were derived from the affidavit, petitioner's Selective Service file, and a stipulation that the information petitioner had submitted to the board "establishes a prima facie claim for conscientious objector status based upon late crystallization." The court held that dismissal of the indictment was appropriate because petitioner was entitled to full consideration of his claim before he was assigned to combatant training and because the local board's statement of reasons for its refusal to reopen petitioner's file was "sufficiently ambiguous to be reasonably construed as a rejection on the merits, thereby prejudicing his right to in-service review." The Government appealed under 18 U. S. C. § 3731. The Court of Appeals, rejecting petitioner's contention that it lacked jurisdiction under § 3731 because the Double Jeopardy Clause barred further prosecution, reversed. *Held:* The Double Jeopardy Clause does not bar an appeal by the United States under 18 U. S. C. § 3731 from a pretrial order dismissing an indictment since in that situation the criminal defendant has not been "put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States* v. *Jorn*, 400 U. S. 470, 479. Pp. 383–394.

(a) In light of the language of the present version of § 3731 and of its legislative history, it is clear that Congress intended to authorize an appeal to a court of appeals so long as further prosecution would not be barred by the Double Jeopardy Clause. Pp. 383–387.

(b) The concept of "attachment of jeopardy" defines a point in criminal proceedings at which the purposes and policies of the Double Jeopardy Clause are implicated. Jeopardy does not attach until a defendant is put to trial, which in a jury trial occurs when the jury is empaneled and sworn and in a nonjury trial when the court begins to hear evidence. P. 388.

(c) Jeopardy had not attached in this case when the District Court dismissed the indictment, because petitioner had not then been put to trial. There had been no waiver of a jury trial; the court had no power to determine petitioner's guilt or innocence; and petitioner's motion was premised on the belief that its consideration before trial would serve the "expeditious administration of justice." P. 389.

(d) The principle that jeopardy does not attach until a defendant is put to trial before the trier of facts is no mere technicality or mechanical rule, and petitioner's contention that the District Court's dismissal of the indictment was the "functional equivalent of an acquittal on the merits" is without substance, as the word "acquittal" has no significance unless jeopardy has attached. *United States* v. *Sisson,* 399 U. S. 267; *United States* v. *Brewster,* 408 U. S. 501, distinguished. Pp. 389–393.

492 F. 2d 388, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting statement, *post,* p. 394.

Harry A. Dower argued the cause for petitioner. With him on the brief was *Barry N. Mosebach.*

Edward R. Korman argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Deputy Solicitor General Frey.*

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

We granted certiorari to decide whether a Court of Appeals has jurisdiction of an appeal by the United

States from a pretrial order dismissing an indictment based on a legal ruling made by the District Court after an examination of records and an affidavit setting forth evidence to be adduced at trial.

I

The material facts are not in dispute. Petitioner, whose military service had been deferred for two years while he was in the Peace Corps, was ordered to report for induction on January 18, 1971. On December 29, 1970, he requested the form for conscientious objectors, Selective Service Form 150, and after submitting the completed form to his local board, he requested an interview. Petitioner met with the local board on January 13, 1971, and thereafter he was informed by letter that it had considered his entire Selective Service file, had "unanimously agreed that there was no change over which [petitioner] had no control," and had therefore "decided not to re-open [petitioner's] file." He was also informed that he was "still under Orders to report for Induction on January 18, 1971 at 5:15 A. M." Petitioner appeared at the examining station and refused induction on January 18.

A grand jury returned an indictment charging petitioner with willfully failing to report for and submit to induction into the Armed Forces, in violation of 50 U. S. C. App. § 462 (a). At petitioner's arraignment he pleaded not guilty and demanded a jury trial. The trial date was set for January 9, 1973. Prior to that time, petitioner filed a motion to dismiss the indictment on the ground that the local board did not state adequate reasons for its refusal to reopen his file. Attached to the motion was an affidavit of petitioner stating merely that he had applied for conscientious objector status and that the local board's letter was the only communication concerning his claim which he had received. At the

same time, petitioner moved "to postpone the trial of the within matter which is now scheduled for January 9, 1973, for the reason that a Motion to Dismiss has been simultaneously filed and the expeditious administration of justice will be served best by considering the Motion prior to trial."

On January 5 the District Court granted petitioner's motion to continue the trial and set a date for oral argument on the motion to dismiss the indictment. Briefs were submitted, and after hearing oral argument, the District Court entered an order directing the parties to submit a copy of petitioner's Selective Service file. On July 16, 1973, it ordered that the indictment be dismissed. In its memorandum, the court noted that the material facts were derived from petitioner's affidavit, from his Selective Service file, and from the oral stipulation of counsel at the argument "that the information which Serfass submitted to the Board establishes a prima facie claim for conscientious objector status based upon late crystallization." [1] The District Court held that dismissal of the indictment was appropriate because petitioner was "entitled to full consideration of his claim prior to assignment to combatant training and service," and because the local board's statement of reasons for refusing to reopen his Selective Service file was "sufficiently ambiguous to be

[1] The District Court concluded that petitioner's defense was properly raised by motion before trial and that, although petitioner had not waived his right to trial by jury, his defense was properly to be determined by the court. Fed. Rules Crim. Proc. 12 (b)(1), (4). Compare *United States* v. *Ponto*, 454 F. 2d 657, 663 (CA7 1971), with *United States* v. *Ramos*, 413 F. 2d 743, 744 n. 1 (CA1 1969). See *United States* v. *Covington*, 395 U. S. 57, 60 (1969); *United States* v. *Sisson*, 399 U. S. 267, 301 (1970); *United States* v. *Knox*, 396 U. S. 77, 83 (1969); 8 J. Moore, Federal Practice ¶ 12.04 (2d ed. 1975).

reasonably construed as a rejection on the merits, thereby prejudicing his right to in-service review." [2]

The United States appealed to the United States Court of Appeals for the Third Circuit, asserting jurisdiction under the Criminal Appeals Act, 18 U. S. C. § 3731, as amended by the Omnibus Crime Control Act of 1970, 84 Stat. 1890.[3] In a "Motion to Quash Appeal for Lack of Jurisdiction" and in his brief, petitioner contended that the Court of Appeals lacked jurisdiction because further prosecution was prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The Court of Appeals rejected that contention. It concluded that, although no appeal would have been possible in this case under the Criminal Appeals Act as it existed prior to the 1970 amendments,[4]

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[2] In ordering dismissal the District Court relied primarily on *United States* v. *Ziskowski,* 465 F. 2d 480 (CA3 1972), and *United States* v. *Folino,* No. 72–1974 (CA3 June 29, 1973) (unreported).

[3] Title 18 U. S. C. § 3731 provides in pertinent part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

. . . . . .

"The provisions of this section shall be liberally construed to effectuate its purposes."

[4] Prior to the 1970 amendments, which were effective January 2, 1971, 18 U. S. C. § 3731 (1964 ed., Supp. V) authorized an appeal by the United States to a court of appeals in all criminal cases "[f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section." Under this provision, the Court of Appeals concluded, appeals "were permissible only if the dismissal of an indictment was based upon a defect in the indictment or in the institution of the prosecution, rather than upon evidentiary facts

those amendments were "clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible." Relying on its earlier opinion in *United States* v. *Pecora,* 484 F. 2d 1289 (1973), the Court of Appeals held that since petitioner had not waived his right to a jury trial,[5] and no jury had been empaneled and sworn at the time the District Court ruled on his motion to dismiss the indictment, jeopardy had not attached and the dismissal was an appealable order. *Pecora* had held appealable, under the present version of § 3731, a pretrial dismissal of an indictment based on a stipulation of the facts upon which the indictment was based. In this case the Court of Appeals saw "no significant constitutional difference" arising from the fact that "the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding, as in *Pecora,* that there were insufficient facts as a matter of law to support a conviction." In both cases "the pretrial motion of dismissal was based upon undisputed facts raising a legal issue and the defendant did not waive his right to a jury trial," and in both "denial of the motion to dismiss [would have] entitled the defendant to the jury trial which he ha[d] not waived." [6]

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outside the face of the indictment which would possibly constitute a defense at trial."

[5] The Court of Appeals noted that the District Court "expressly found that [petitioner] did not waive his right to a jury trial," that the procedures for waiver required by Fed. Rule Crim. Proc. 23 (a) had not been complied with, and that simultaneously with his motion to dismiss the indictment petitioner had filed a motion to postpone the trial.

[6] In *Pecora* the Court of Appeals distinguished *United States* v. *Hill,* 473 F. 2d 759 (CA9 1972), holding unappealable the pretrial dismissal of an indictment alleging the mailing of obscene advertisements, on the grounds that in *Hill* (1) there was no determination

As to the merits, the Court of Appeals concluded that in *Musser* v. *United States,* 414 U. S. 31 (1973), this Court had "placed an abrupt end to [the] line of cases" on which the District Court relied. It held that *Musser* should be applied retroactively to registrants such as petitioner who refused induction before the case was decided, and that since petitioner's local board was without power to rule on the merits of a post-induction order conscientious objector claim, his right to in-service review was not prejudiced. Accordingly, it reversed the order of the District Court and remanded the case for trial or other proceedings consistent with its opinion.

Because of an apparent conflict among the Courts of Appeals concerning the question whether the Double Jeopardy Clause permits an appeal under § 3731 from a pretrial order dismissing an indictment in these circumstances, we granted certiorari. Petitioner did not seek review of, and we express no opinion with respect to, the holding of the Court of Appeals on the merits.

II

Prior to 1971, appeals by the United States in criminal cases were restricted by 18 U. S. C. § 3731 to categories descriptive of the action taken by a district court, and they were divided between this Court and the courts of appeals.[7] In *United States* v. *Sisson,* 399 U. S. 267, 307–

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whether the defendant had waived his right to a jury trial and (2) the District Court determined the character of evidence actually entered into the record "so it may be said that jeopardy had attached." In this case the Court of Appeals concluded that the second distinction between *Pecora* and *Hill* did not "permit our holding the instant order unappealable," and it noted that to the extent *Pecora* and *Hill* were inconsistent, it was bound by *Pecora.*

[7] Title 18 U. S. C. § 3731 (1964 ed., Supp. V) provided in pertinent part:

"An appeal may be taken by and on behalf of the United States

308 (1970), Mr. Justice Harlan aptly described the situation obtaining under the statute as it then read:

> "Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case. When judged in these terms, the Criminal Appeals Act is a failure. Born of compromise,

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from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section."

Provision for appeals in certain cases to the courts of appeals was first made in 1942. Act of May 9, 1942, c. 295, § 1, 56 Stat. 271, codified as former 18 U. S. C. § 682 (1946 ed.). Section 682 provided for an appeal to a court of appeals from "a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

> and reflecting no coherent allocation of appellate responsibility, the Criminal Appeals Act proved a most unruly child that has not improved with age. The statute's roots are grounded in pleading distinctions that existed at common law but which, in most instances, fail to coincide with the procedural categories of the Federal Rules of Criminal Procedure. Not only does the statute create uncertainty by its requirement that one analyze the nature of the decision of the District Court in order to determine whether it falls within the class of common-law distinctions for which an appeal is authorized, but it has also engendered confusion over the court to which an appealable decision should be brought."

At the same time that this Court was struggling with the "common law distinctions" of former § 3731, the decisions of the Courts of Appeals were demonstrating that, even when apparently straightforward, the language of the statute was deceptive. Thus, although after 1948 [8] § 3731 literally authorized an appeal to a court of appeals whenever an indictment or information was set aside or dismissed except where direct appeal to this Court was authorized, that provision was generally construed, as it was construed by the Court of Appeals in this case, *supra,* at 381, and n. 4, to authorize an appeal to a court of appeals only if the decision setting aside or dismissing an indictment or information was "based upon a defect in the indictment or information, or in the institution of the prosecution." *United States* v. *Apex Distributing Co.,* 270 F. 2d 747, 755 (CA9 1959). See *United States* v. *Ponto,* 454 F. 2d 657, 659–663 (CA7 1971). In such fashion, even

[8] Act of June 25, 1948, 62 Stat. 844, codified as former 18 U. S. C. § 3731 (1946 ed., Supp. II). The reviser's note states that "[m]inor changes were made to conform to Rule 12 of the Federal Rules of Criminal Procedure."

those "common law distinctions" which were removed from the face of the Criminal Appeals Act by the 1948 amendments were preserved by judicial construction. See *United States* v. *Apex Distributing Co., supra,* at 751–755; *United States* v. *DiStefano,* 464 F. 2d 845, 847–848 (CA2 1972).

The limits of the appellate jurisdiction of this Court and the courts of appeals under former § 3731, as construed, resulted in the inability of the United States to appeal from the dismissal of prosecution in a substantial number of criminal cases. In those cases where appellate jurisdiction lay in this Court, review was limited further by decisions of "the United States not to appeal the dismissal of a prosecution believed to be erroneous, simply because the question involved [was] not deemed of sufficiently general importance to warrant" our attention.[9]

It was against this background that Congress undertook to amend § 3731. The legislative history of the 1970 amendments indicates that Congress was concerned with what it perceived to be two major problems under the statute as then construed: lack of appealability in many cases, and the requirement that certain appeals could be taken only to this Court. See S. Rep. No. 91–1296, pp. 4–18 (1970). Particular concern was expressed with respect to problems of appealability "in selective service cases where judges have reviewed defendants' selective service files before trials and dismissed the indictments after finding that there have been errors by the draft boards." *Id.,* at 14. Congress was of the view that "earlier versions of section 3731" had been subject to "restrictive judicial interpretations

[9] Department of Justice Comments on S. 3132, in S. Rep. No. 91–1296, p. 24 (1970). See also letter from Solicitor General Griswold to Senator McClellan, *id.,* at 33.

of congressional intent." *Id.*, at 18. Accordingly, it determined to "assure that the United States may appeal from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits," and that "the appeal shall be taken first to a court of appeals." *Id.*, at 2–3. See *id.*, at 18.

In light of the language of the present version of § 3731, including the admonition that its provisions "shall be liberally construed to effectuate its purposes," and of its legislative history,[10] it is clear to us that Congress intended to authorize an appeal to a court of appeals in this kind of case so long as further prosecution would not be barred by the Double Jeopardy Clause.[11] We turn to that inquiry.

III

Although articulated in different ways by this Court, the purposes of, and the policies which animate, the Double Jeopardy Clause in this context are clear. "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea,

[10] The relevance and significance of the "well considered and carefully prepared" report of the Senate Judiciary Committee, see *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 395 (1951) (Jackson, J., concurring), is not affected by the fact that the amendments proposed by the Committee and adopted without change by the Senate were modified by the House-Senate Conference Committee. See H. R. Conf. Rep. No. 91–1768, p. 21 (1970). The latter report contains no explanation of the changes made, and the changes themselves are consistent with the intent expressed in the Senate Report. See *United States* v. *Wilson, ante,* at 337–339.

[11] This has been the general view of the Courts of Appeals. *E. g., United States* v. *Jenkins,* 490 F. 2d 868, 870 (CA2 1973), aff'd, *ante,* p. 358; *United States* v. *Brown,* 481 F. 2d 1035, 1039–1040 (CA8 1973). But see, *e. g., United States* v. *Southern R. Co.,* 485 F. 2d 309, 312 (CA4 1973).

one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U. S. 184, 187–188 (1957). See *United States* v. *Jorn,* 400 U. S. 470, 479 (1971); *Price* v. *Georgia,* 398 U. S. 323, 326 (1970).

As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." See *United States* v. *Jorn, supra,* at 480. In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. *Downum* v. *United States,* 372 U. S. 734 (1963); *Illinois* v. *Somerville,* 410 U. S. 458 (1973). In a nonjury trial, jeopardy attaches when the court begins to hear evidence. *McCarthy* v. *Zerbst,* 85 F. 2d 640, 642 (CA10 1936). See *Wade* v. *Hunter,* 336 U. S. 684, 688 (1949). The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States* v. *Jorn, supra,* at 479. See *Kepner* v. *United States,* 195 U. S. 100, 128, 130–131 (1904); *United States* v. *Macdonald,* 207 U. S. 120, 127 (1907); *Bassing* v. *Cady,* 208 U. S. 386, 391–392 (1908); *Collins* v. *Loisel,* 262 U. S. 426, 429 (1923).[12]

[12] To the extent the passages referred to deal with the predecessors of the present version of § 3731, they are relevant because of the Court's view that appeals from orders entered prior to the attach-

Under our cases jeopardy had not yet attached when the District Court granted petitioner's motion to dismiss the indictment. Petitioner was not then, nor has he ever been, "put to trial before the trier of facts." The proceedings were initiated by his motion to dismiss the indictment. Petitioner had not waived his right to a jury trial, and, of course, a jury trial could not be waived by him without the consent of the Government and of the court. Fed. Rule Crim. Proc. 23 (a). See *Patton* v. *United States,* 281 U. S. 276, 312 (1930); *Singer* v. *United States,* 380 U. S. 24 (1965). In such circumstances, the District Court was without power to make any determination regarding petitioner's guilt or innocence. Petitioner's defense was raised before trial precisely because "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining" its validity. *United States* v. *Covington,* 395 U. S. 57, 60 (1969). See Fed. Rule Crim. Proc. 12 (b)(1).[13] His motion to postpone the trial was premised on the belief that "the expeditious administration of justice will be served best by considering the Motion [to dismiss the indictment] prior to trial." At no time during or following the hearing on petitioner's motion to dismiss the indictment did the District Court have jurisdiction to do more than grant or deny that motion, and neither before nor after the ruling did jeopardy attach.

IV

Petitioner acknowledges that "formal or technical jeopardy had not attached" at the time the District

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ment of jeopardy presented no constitutional problem. See *infra,* at 392.

[13] Pursuant to 18 U. S. C. §§ 3771 and 3772, proposed amendments to the Federal Rules of Criminal Procedure, including amendments to Rule 12, were transmitted to Congress on April 22, 1974. The effective date of the proposed amendments was postponed until August 1, 1975, by Act of July 30, 1974, 88 Stat. 397.

Court ruled on his motion to dismiss the indictment. However, he argues that because that ruling was based on " 'evidentiary facts outside of the indictment, which facts would constitute a defense on the merits at trial,' *United States* v. *Brewster,* 408 U. S. 501, 506" (1972), it was the "functional equivalent of an acquittal on the merits" and "constructively jeopardy had attached." The argument is grounded on two basic and interrelated premises. First, petitioner argues that the Court has admonished against the use of "technicalities" in interpreting the Double Jeopardy Clause, and he contends that the normal rule as to the attachment of jeopardy is merely a presumption which is rebuttable in cases where an analysis of the respective interests of the Government and the accused indicates that the policies of the Double Jeopardy Clause would be frustrated by further prosecution. Cf. *United States* v. *Velazquez,* 490 F. 2d 29, 33 (CA2 1973). Second, petitioner maintains that the disposition of his motion to dismiss the indictment was, in the circumstances of this case, the "functional equivalent of an acquittal on the merits," and he concludes that the policies of the Double Jeopardy Clause would in fact be frustrated by further prosecution. See *United States* v. *Ponto,* 454 F. 2d 657, 663–664 (CA7 1971). We disagree with both of petitioner's premises and with his conclusion.

It is true that we have disparaged "rigid, mechanical" rules in the interpretation of the Double Jeopardy Clause. *Illinois* v. *Somerville,* 410 U. S. 458, 467 (1973). However, we also observed in that case that "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Ibid.* Cf. *United States* v. *Sisson,* 399 U. S., at 303. Implicit in the latter statement is the premise that the "constitutional policies underpinning

the Fifth Amendment's guarantee" are not implicated before that point in the proceedings at which "jeopardy attaches." *United States* v. *Jorn,* 400 U. S., at 480. As we have noted above, the Court has consistently adhered to the view that jeopardy does not attach until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." *Id.,* at 479. This is by no means a mere technicality, nor is it a "rigid, mechanical" rule. It is, of course, like most legal rules, an attempt to impart content to an abstraction.

When a criminal prosecution is terminated prior to trial, an accused is often spared much of the expense, delay, strain, and embarrassment which attend a trial. See *Green* v. *United States,* 355 U. S., at 187–188; *United States* v. *Jorn, supra,* at 479. Although an accused may raise defenses or objections before trial which are "capable of determination without the trial of the general issue," Fed. Rule Crim. Proc. 12 (b)(1), and although he must raise certain other defenses or objections before trial, Fed. Rule Crim. Proc. 12 (b)(2), in neither case is he "subjected to the hazards of trial and possible conviction." *Green* v. *United States, supra,* at 187. Moreover, in neither case would an appeal by the United States "allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first." *United States* v. *Wilson, ante,* at 352. See *United States* v. *Jorn, supra,* at 484. Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier "having jurisdiction to try the question of the guilt or innocence of the accused." *Kepner* v. *United States,* 195 U. S., at 133. See *Price* v. *Georgia,* 398 U. S., at 329. Without risk of a determination of guilt, jeop-

ardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.

Petitioner's second premise, that the disposition of his motion to dismiss the indictment was the "functional equivalent of an acquittal on the merits," and his conclusion that the policies of the Double Jeopardy Clause would be frustrated by further prosecution in his case need not, in light of the conclusion we reach above, long detain us. It is, of course, settled that "a verdict of acquittal . . . is a bar to a subsequent prosecution for the same offence." *United States* v. *Ball,* 163 U. S. 662, 671 (1896); *Green* v. *United States, supra,* at 188. Cf. *Kepner* v. *United States, supra; Fong Foo* v. *United States,* 369 U. S. 141 (1962). But the language of cases in which we have held that there can be no appeal from, or further prosecution after, an "acquittal" cannot be divorced from the procedural context in which the action so characterized was taken. See *United States* v. *Wilson, ante,* at 346–348. The word itself has no talismanic quality for purposes of the Double Jeopardy Clause. Compare *United States* v. *Oppenheimer,* 242 U. S. 85, 88 (1916), with *United States* v. *Barber,* 219 U. S. 72, 78 (1911), and *United States* v. *Goldman,* 277 U. S. 229, 236–237 (1928). In particular, it has no significance in this context unless jeopardy has once attached and an accused has been subjected to the risk of conviction.

Our decision in *United States* v. *Sisson,* 399 U. S. 267 (1970), is not to the contrary. As we have noted in *United States* v. *Wilson, ante,* at 350–351, we do not believe the Court in *Sisson* intended to express an opinion with respect to the constitutionality of an appeal by the United States from the order entered by the District Court in that case. Moreover, even if we were to take the contrary view, we would reach the same conclusion here. For in *Sisson,* jeopardy had attached; the order

of the District Court was "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case." 399 U. S., at 290 n. 19. See *id.*, at 288; *United States* v. *Jorn, supra,* at 478 n. 7. Whatever else may be said about *Sisson,*[14] it does not alter the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy.

Similarly, petitioner's reliance on *United States* v. *Brewster,* 408 U. S. 501 (1972), is misplaced. The question in that case was whether the Court had "jurisdiction under 18 U. S. C. § 3731 (1964 ed., Supp. V) to review the District Court's [pretrial] dismissal of the indictment against appellee." *Id.*, at 504–505. In the course of concluding that there was jurisdiction, we observed: "Under *United States* v. *Sisson,* 399 U. S. 267 (1970), an appeal does not lie from a decision that rests, not upon the sufficiency of the indictment alone, but upon extraneous facts. If an indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the merits at trial, no appeal is available. See *United States* v. *Findley,* 439 F. 2d 970 (CA1 1971)." 408 U. S., at 506. The question at issue in *Brewster,* the question decided in *Sisson,* and the citation of *United States* v. *Findley,*[15] demonstrate beyond question that this passage in *Brewster* was not concerned with the constitutional question which, by virtue of the 1970 amendments to 18 U. S. C. § 3731, is before us in this case.

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[14] It is clear that Congress intended to overrule *Sisson*'s construction of former § 3731 in the 1970 amendments. See S. Rep. No. 91–1296, p. 11 (1970); n. 10, *supra.*

[15] In analyzing *Sisson* the Court of Appeals in *Findley* concluded: "Collectively we believe this was an approach not in terms of double jeopardy, but in terms of the kind of error section 3731 was intended to cover." 439 F. 2d 970, 973.

V

In holding that the Court of Appeals correctly determined that it had jurisdiction of the United States' appeal in this case under 18 U. S. C. § 3731, we of course express no opinion on the question whether a similar ruling by the District Court after jeopardy had attached would have been appealable. Nor do we intimate any view concerning the case put by the Solicitor General, of "a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense." Compare *United States* v. *Findley,* 439 F. 2d 970, 973 (CA1 1971), with *United States* v. *Pecora,* 484 F. 2d, at 1293–1294. See *United States* v. *Jenkins,* 490 F. 2d 868, 880 (CA2 1973), aff'd, *ante,* p. 358. We hold only that the Double Jeopardy Clause does not bar an appeal by the United States under 18 U. S. C. § 3731 with respect to a criminal defendant who has not been "put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States* v. *Jorn,* 400 U. S., at 479.

Affirmed.

Mr. Justice Douglas dissents, being of the view that the ruling of the District Court was based on evidence which could constitute a defense on the merits and therefore caused jeopardy to attach.

Syllabus

CHEMEHUEVI TRIBE OF INDIANS ET AL. *v.* FEDERAL POWER COMMISSION ET AL.

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

No. 73–1380. Argued January 13, 1975—Decided March 3, 1975*

Under § 4 (e) of Part I of the Federal Power Act, the Federal Power Commission (FPC) is authorized to issue licenses to individuals, corporations, or governmental units organized for the purpose of constructing "project works necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or for the purpose of utilizing the surplus water or water power from any Government dam . . . ." Section 23 (b) prohibits the unlicensed construction of such works on any navigable stream as well as the unlicensed utilization of such surplus water for the purposes of developing electric power. *Held:* These provisions of Part I of the Act giving the FPC licensing jurisdiction over hydroelectric facilities do not also confer such jurisdiction over thermal-electric power plants. Pp. 400–422.

(a) The structures constituting thermal-electric power plants are not "project works" within the meaning of § 4 (e), as is clear from the language of that provision when read together with the rest of the Act (none of whose provisions refers to the development or conservation of steam power), the Act's legislative history (which manifests a congressional intent to regulate only hydroelectric generating facilities), the FPC's consistent interpretation of its authority as not including jurisdiction over thermal-electric power plants, and this Court's decision in *FPC* v. *Union Electric Co.*, 381 U. S. 90. Pp. 400–412.

(b) The surplus water clause of § 4 (e) does not authorize FPC licensing of water used for cooling purposes in thermal-electric power plants, nothing in the Act's language or legislative history disclosing any congressional intent that that clause should serve any broader interests than the project works clause. And, con-

*Together with No. 73–1666, *Arizona Public Service Co. et al.* v. *Chemehuevi Tribe of Indians et al.*; and No. 73–1667, *Federal Power Commission* v. *Chemehuevi Tribe of Indians et al.*, also on certiorari to the same court.

trary to the Court of Appeals' holding, the Act does not vest the FPC with all the responsibilities that prior legislation had given to the Waterways Commission, responsibilities that in any case did not include licensing the use of surplus water by steam plants. Pp. 412–422.

160 U. S. App. D. C. 83, 489 F. 2d 1207, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which all other Members joined except DOUGLAS, J., who took no part in the consideration or decision of the cases.

Joseph J. Brecher argued the cause and filed a brief for the Chemehuevi Tribe of Indians et al. in all cases. *Deputy Solicitor General Wallace* argued the cause for the Federal Power Commission in all cases. On the brief were *Solicitor General Bork, Mark L. Evans, Leo E. Forquer, Drexel D. Journey, George W. McHenry, Jr.,* and *Daniel Goldstein. Northcutt Ely* argued the cause for the Arizona Public Service Co. et al. in all cases. With him on the briefs were *Harry A. Poth, Jr., Peyton G. Bowman III, William Duncan, Burt S. Pines, Rex E. Lee, C. Hayden Ames, John R. Bury, L. V. Robertson, Jr., Donald E. Dickerman, Sidney G. Baucom,* and *Robert Gordon.*†

MR. JUSTICE STEWART delivered the opinion of the Court.

In these three cases we review a single judgment of the Court of Appeals for the District of Columbia Circuit, to

† Briefs of *amici curiae* in all cases were filed by *Francis M. Shea, Richard T. Conway,* and *David Booth Beers* for Montana Power Co. et al., and by *Robert C. McDiarmid* for the Electric and Water Plant Board of Frankfort, Ky., et al. *James H. Goetz* filed a brief for the Buffalo Rapids Irrigation Project et al. as *amici curiae* in Nos. 73–1380 and 73–1666. *Frank William Frisk, Jr.,* filed a brief for the American Public Power Assn. as *amicus curiae* in Nos. 73–1666 and 73–1667. *Cameron F. MacRae, Harry H. Voigt,* and *E. David Doane* filed a brief for the Edison Electric Institute as *amicus curiae* in No. 73–1667.

determine whether thermal-electric power generating plants that draw cooling water from navigable streams are subject to the licensing jurisdiction of the Federal Power Commission under Part I of the Federal Power Act, c. 285, 41 Stat. 1063, as amended, 16 U. S. C. §§ 791a–823.

I

On September 20, 1971, two Indian tribes, five individual Indians, and two environmental groups [1] (hereinafter the complainants) filed a complaint with the Commission requesting it to require 10 public utility companies located in the Southwestern United States [2] to obtain licenses for six fossil-fueled thermal-electric generating plants being constructed by the companies along the Colorado River and its tributaries.[3] The plants are part of a projected vast electric power complex, and the energy generated within this new South-

[1] The complainants are the Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, Bill Begay, the Sierra Club, and the Committee to Save Black Mesa.

[2] The companies are the Arizona Public Service Co., Southern California Edison Co., Public Service Co. of New Mexico, Salt River Project, Tucson Gas & Electric Co., El Paso Electric Co., Los Angeles Department of Water & Power, Nevada Power Co., Utah Power & Light Co., and San Diego Gas & Electric Co.

[3] The six plants are all located in or near the Four Corners area of New Mexico, Arizona, Utah, and Colorado. The Four Corners plant is located on the Navajo Indian Reservation near Farmington, N. Mex. The Mohave plant is located on patented land in Clark County, Nev. The San Juan plant is located on patented land near Farmington, N. Mex. The Huntington Canyon plant is located primarily on state and patented land in Huntington Canyon, Utah. The Navajo plant is located on the Navajo Indian Reservation near Page, Ariz. The Kaiparowits plant will be located in southern Utah near Lake Powell. At the time of oral argument all of the plants were operational except for the Kaiparowits plant, which was still in the planning stage.

western power pool will be transmitted in interstate commerce to load centers as far as 600 miles from the sites of the plants.

The six plants involved in these cases, like all thermal-electric power plants, will require large amounts of water to cool and condense the steam utilized in the process of generating electricity. See generally 1 FPC, The 1970 National Power Survey I–10–1 to I–10–20. The water needed for cooling purposes will be obtained by withdrawing substantial quantities of water from the Colorado River system. The complaint filed with the Commission asserted that it had licensing jurisdiction over the plants pursuant to § 4 (e) of Part I of the Federal Power Act, 16 U. S. C. § 797 (e), because all six plants are "project works" for the development, transmission, and utilization of power across and along navigable waters, and because two of the plants will use "surplus water" impounded by a Government dam.[4]

The Commission on November 4, 1971, issued an order dismissing the complaint for lack of jurisdiction. The

[4] Section 4 (e) provides in part that the Federal Power Commission is authorized and empowered:

"To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided . . . ."

Commission stated that "the legislative history [of the original Federal Water Power Act] shows that it was not intended that the licensing of thermal stations be included. This construction of the Commission's licensing jurisdiction under Part I of the Federal Power Act has been the long-standing interpretation of the Commission [and] has been recognized favorably by the Supreme Court." 46 F. P. C. 1126, 1127 (citations omitted).

Following denial by the Commission of an application for a rehearing, 46 F. P. C. 1307, the complainants filed a petition in the Court of Appeals for the District of Columbia Circuit to review the Commission's order. The Court of Appeals undertook a scholarly and comprehensive review of the executive and legislative antecedents of the Federal Water Power Act of 1920, and traced in detail the Act's legislative history and the administrative and judicial interpretations of the Act since its passage. 160 U. S. App. D. C. 83, 489 F. 2d 1207. Based on this voluminous material, the Court of Appeals affirmed the Commission's conclusion that thermal-electric plants are not "project works" under § 4 (e) and that the Commission's licensing jurisdiction under the clause extends only to hydroelectric generating plants. "Steam plants," the court held, "were purposely omitted from the congressional scheme." 160 U. S. App. D. C., at 107, 489 F. 2d, at 1231. The Court of Appeals also held, however, that the Commission's licensing authority under the "surplus water" clause of § 4 (e) is not similarly limited. The use of "surplus water" for cooling purposes by thermal-electric generating plants is sufficient, the court concluded, to bring those plants within the Commission's licensing jurisdiction. 160 U. S. App. D. C., at 111–117, 489 F. 2d, at 1235–1241. Accordingly, the court remanded the case to the Commission to determine in the first instance whether any of the six plants involved in this case fall

under that branch of its licensing authority. *Id.*, at 118, 489 F. 2d, at 1242. We granted the parties' petitions for writs of certiorari to consider the important questions of statutory construction presented by this litigation. 417 U. S. 944.

II

The question whether thermal-electric generating plants are subject to the licensing jurisdiction of the Commission involves no issue as to the extent of congressional power under the Commerce Clause. It is well established that the interstate transmission of electric energy is fully subject to the commerce power of Congress. *FPC* v. *Union Electric Co.*, 381 U. S. 90, 94; *Public Utilities Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 86; *Electric Bond & Share Co.* v. *SEC*, 303 U. S. 419, 432–433. And it is equally clear that projects generating energy for interstate transmission, such as the six plants involved in this case, affect commerce among the States and are therefore within the purview of the federal commerce power, regardless of whether the plants generate electricity by steam or hydroelectric power. *FPC* v. *Union Electric Co.*, *supra*, at 94–95; see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 40–41; *Katzenbach* v. *McClung*, 379 U. S. 294, 301–304. The only question before us is whether Congress has exercised that power in Part I of the Federal Power Act by requiring a license for the construction and operation of thermal-electric power generating plants that withdraw large quantities of water from navigable waters for cooling and other plant purposes.

A

Consideration of the Commission's statutory licensing authority under Part I of the Federal Power Act must, of course, begin with the language of the Act itself. Section 4 (e), 16 U. S. C. § 797 (e), authorizes the Com-

mission to issue licenses to individuals, corporations, or governmental units organized for the purpose of constructing "project works necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or for the purpose of utilizing the surplus water or water power from any Government dam . . . ." Section 23 (b) of the Act, 16 U. S. C. § 817, in turn, prohibits the unlicensed construction of such works on any navigable stream as well as the unlicensed utilization of the surplus water from a Government dam for the purpose of developing electric power.[5] "Project" is defined as the complete unit of development of a power plant, 16 U. S. C. § 796 (11); and "project works" means the physical structure of a project. § 796 (12).

Emphasizing that these provisions do not require that the project works be used to generate "hydroelectric power," but rather merely "power," the complainants assert that the six thermal-electric power plants in this case fall squarely within the statutory language defining the Commission's licensing jurisdiction. Each of the thermal-electric facilities undoubtedly qualifies as a "complete unit of development of a power plant." The physical structure of each "project" therefore must be

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[5] Section 23 (b) provides in part:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter."

"project works." All concede that the plants are located on navigable waters and are engaged in the development of electric power. Furthermore, water is an integral part of the generation of electricity at the plants, being used to condense the steam which turns the turbines. The complainants assert that it is "equally indisputable" that the six plants are using "surplus water . . . from [a] Government dam" for the purpose of developing electric power.[6]

So long as adherence to the literal terms of a statute does not bring about a result completely at variance with the purpose of the statute, the complainants argue, there is no justification for resorting to extrinsic aids such as legislative history to determine congressional intent. And since modern methods of operating thermal-electric power generating plants present an even greater threat to the conservation and orderly development of the power potential in navigable streams than do the operations of hydroelectric projects,[7] they argue that recognition of the Commission's licensing jurisdiction over thermal-

[6] The Court of Appeals did not attempt to define "surplus water" and did not decide whether the six plants involved in this case are within the Commission's licensing jurisdiction under that clause. Instead, the court remanded the case to the Commission "to determine in the first instance whether the plants involved in this appeal fall within the category asserted by [the complainants]." 160 U. S. App. D. C. 83, 118, 489 F. 2d 1207, 1242.

[7] Thermal-electric generating plants used 120 billion gallons of water per day for cooling purposes in 1971, compared to approximately 178 million gallons of cooling water needed on a daily basis in 1920. See *id.*, at 105–106, n. 111, 489 F. 2d, at 1229–1230, n. 111. Largely for environmental reasons, many modern steam plants evaporate a significant amount of the water withdrawn for cooling purposes instead of returning it to the water source. Cf. N. Fabricant & R. Hallman, Toward a Rational Power Policy: Energy, Politics, and Pollution 99–101 (1971). Permanent loss of large quantities of water can obviously have a significant adverse effect on the "power potential" of the Nation's waterways.

electric plants will actually advance the principal purposes of the Act.

The complainants' reliance on the literal language of § 4 (e) and on the so-called "plain meaning" rule of statutory construction is not entirely unpersuasive. But their assertion that thermal-electric power plants drawing cooling water from navigable streams are unambiguously included within the Commission's licensing jurisdiction is refuted when § 4 (e) is read together with the rest of the Act, as, of course, it must be. See, *e. g., Chemical Workers* v. *Pittsburgh Glass,* 404 U. S. 157, 185; *United States* v. *Boisdoré's Heirs,* 8 How. 113, 122.

Section 4 (e) itself refers to "dams, water conduits, reservoirs, power houses, transmission lines, or other project works." The terms that precede "other project works," and which therefore indicate a congressional intent to limit the breadth of that general phrase, see *Gooch* v. *United States,* 297 U. S. 124, 128, refer to features ordinarily associated with hydroelectric facilities. The definition of "project" in 16 U. S. C. § 796 (11) similiarly refers to structures normally found in hydroelectric power complexes: a "project" is the "complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith . . . ." Although the complainants note that a power development utilizing steam as a generating force could have many of the same structures, that possibility only serves to emphasize the ambiguity latent in the seemingly clear language chosen by Congress to define the extent of the Commission's licensing authority.

Other provisions of the Act make more apparent the limitations intended by Congress upon the reach of

§ 4 (e). The Act itself was originally entitled the Federal *Water* Power Act, 41 Stat. 1077 (emphasis added); [8] and the preamble to the Act specified that one of its primary purposes was the development of water power. *Id.*, at 1063. In addition, § 4 (a) of the Act, 16 U. S. C. § 797 (a), authorizes the Commission to conduct investigations concerning "the *water-power* industry and its relation to other industries and to interstate or foreign commerce" (emphasis added); § 4 (g), 16 U. S. C. § 797 (g), authorizes the Commission to investigate the proposed occupancy of public lands for the development of electric power and to issue such orders as are necessary "to conserve and utilize the navigation and *water-power* resources of the region" (emphasis added). Similarly, § 10 (a) of the Act, 16 U. S. C. § 803 (a), provides that *all* licenses issued under the Act shall be on the condition that the project adopted will be best adapted to a comprehensive plan "for the improvement and utilization of *water-power* development" (emphasis added).

In none of these statutory provisions is there any reference to the development or conservation of steam power, despite the fact that in 1920, as today, thermal-electric generating plants produced the greatest portion of this

[8] "The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." *FPC* v. *Union Electric Co.*, 381 U. S. 90, 99. The title was changed in 1935 to the Federal Power Act to reflect the expanded duties of the Federal Power Commission under Title II of the Public Utility Act of 1935, 49 Stat. 838, as amended, 16 U. S. C. §§ 792–825u. The 1935 Act added Parts II and III to the Federal Power Act to regulate the interstate transmission and sale of electricity. See 16 U. S. C. §§ 824–825u. The original Federal Water Power Act became Part I of the Federal Power Act.

Nation's electric energy.[9] The explicit references to hydroelectric power, and the absence of any such references to steam power, manifest the limited scope of the Act's underlying purpose: "the comprehensive development of water power." *FPC* v. *Union Electric Co.*, 381 U. S., at 101.

B

Although the language of § 4 (e) itself could nonetheless be interpreted as extending the Commission's licensing jurisdiction to include thermal-electric power plants located on navigable streams, the legislative history of the Act conclusively demonstrates that Congress intended to subject to regulation only the construction and operation of hydroelectric generating facilities.

In 1918 [10] an administration bill prepared by the Secretaries of War, Interior, and Agriculture, containing most of the provisions eventually included in the Federal Water Power Act of 1920, was introduced in Congress.

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[9] In 1920 approximately 70% of the electricity generated in the United States was produced by steam power. 1 FPC, National Power Survey 63 (1964).

[10] The opinion of the Court of Appeals contains an exceedingly thorough analysis of the attempts by the Congress and the Executive to control the development of the power potential of the Nation's waterways in the years prior to 1918. 160 U. S. App. D. C., at 91–96, 489 F. 2d, at 1215–1220. See also J. Kerwin, Federal Water-Power Legislation (1926); Pinchot, The Long Struggle for Effective Federal Water Power Legislation, 14 Geo. Wash. L. Rev. 9 (1945). That analysis reveals that the only segment of the power industry intended to be affected by those early federal regulatory initiatives was the construction and maintenance of hydroelectric facilities. Referring to those early legislative proposals, the special House Committee on Water Power stated that "[t]he subject of water-power legislation with a view to the development of *hydroelectric power* has been a matter of very great public interest for a number of years." H. R. Rep. No. 715, 65th Cong., 2d Sess., 15 (emphasis added).

H. R. 8716, 65th Cong., 2d Sess. In a letter to Representative T. W. Sims, Chairman of the special House Committee on Water Power, which had held hearings on the bill, the Secretaries made it plain that only hydroelectric projects were intended to be covered by the legislation:

> "It is understood your committee will take action at an early date upon various proposals which have been made concerning water-power legislation. On account of the conditions now affecting the power industry and the need of maintaining our entire industrial machinery at its highest efficiency, a satisfactory solution of the water-power problem is, in our judgment, one of the most important steps for the consideration of this Congress and one which should receive attention at the earliest practicable date.
>
> . . . . . .
>
> "While the form of bill which has been presented for your consideration is directly concerned with water-power development only, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry. Probably no considerable increase in new water-power development can be expected immediately, but legislation is urgently needed in order to put existing water-power developments, which have been made under inadequate law, into a position of security which will enable them to make extensions and to meet maturing obligations upon favorable terms.
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> . . . . . .
>
> "Water power legislation should have in view not only the maintenance of the rights of the public in the national resources, but also the adequate protection of private capital by which such resources are developed. The bill before you aims to do

both." H. R. Rep. No. 715, 65th Cong., 2d Sess., 29.

The committee report on H. R. 8716 reflected the administration's theory that the legislation was designed "to provide for the development of hydroelectric power by private capital." H. R. Rep. No. 715, *supra,* at 15.[11] Despite the committee's recommendation, the bill failed to pass the 65th Congress because of a Senate filibuster. See *FPC* v. *Union Electric Co.,* 381 U. S., at 102 n. 18.

The administration bill was reintroduced in the 66th Congress. The House Committee on Water Power again recommended approval to meet "the need for legislation for the development of hydroelectric power . . . ." H. R. Rep. No. 61, 66th Cong., 1st Sess., 4.[12] The Senate

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[11] The House report accompanied S. 1419. The Committee on Water Power proposed substituting the provisions of the administration bill, H. R. 8716, for those originally contained in S. 1419. The report of the Senate Commerce Committee to accompany the original version of the Senate bill stated that S. 1419 provided for "the development of hydroelectric energy produced by utilization of water power." S. Rep. No. 179, 65th Cong., 2d Sess., 2.

[12] The House report added that the need for water power legislation "is clearly set forth by Secretary [of Agriculture] Houston in a recent report." H. R. Rep. No. 61, 66th Cong., 1st Sess., 4. In the report, Secretary Houston had explained to the House:

" 'The exigencies of war brought to light defects in our national utilization of power which had not been fully realized. Operating under statutes enacted when the electrical industry was in its infancy, we had permitted our vast water-power resources to remain almost untouched, turning to coal and oil as the main source of power; for steam power could be developed more quickly and easily with fewer legal restrictions and with greater security to the investment. . . . The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants located at the mine itself and operate all in great interstate systems. These considerations were presented before the special committee of the House of Representatives in the hearings held on the water-power bill during the last Congress. The need of adequate legislation is no less urgent now.' " *Id.,* at 4–5.

Committee on Commerce also recommended adoption of the bill in view of "the need for or the beneficent results to come from water power development." S. Rep. No. 180, 66th Cong., 1st Sess., 2. After compromise between the House and Senate on matters unrelated to the issue before us, see H. R. Conf. Rep. No. 910, 66th Cong., 2d Sess., this bill was enacted as the Federal Water Power Act of 1920.

Although the legislative history of the Act reveals an ambitious attempt by Congress to provide for comprehensive control over a large number of uses of the Nation's water resources, there is simply no suggestion in any of the legislative materials that the bill would authorize the new Commission to license the construction or maintenance of thermal-electric power plants. "The principal use to be developed and regulated in the Act," this Court explained in *FPC* v. *Union Electric Co., supra,* at 99, "was that of *hydroelectric power* to meet the needs of an expanding economy." (Emphasis added; footnote omitted.) See also 381 U. S., at 115 (Goldberg, J., dissenting).

C

The limited scope of the § 4 (e) licensing authority, reflected in both the text of the Act and its legislative history, is reinforced by the Commission's consistent interpretation of that authority as not including jurisdiction over the construction and operation of thermal-electric power plants. In its First Annual Report to Congress, the Commission concluded that Congress intended only to give it licensing authority with respect to hydroelectric projects:

> "On neither the public lands and reservations nor on the waters of the United States is the jurisdiction of the Federal Power Commission as broad as the jurisdiction of Congress. The latter has authority

over all forms of use; *the Commission is limited to the consideration of projects designed to produce water power.* Structures or diversions having any other purpose, unless incidental to works constructed for power purposes or a necessary part of a comprehensive scheme of development, are not within the jurisdiction of the Commission." FPC, First Annual Report 51–52 (emphasis added).[13]

Ever since that first report in 1921, the Commission has consistently maintained the position that its licensing authority extends only to hydroelectric projects.[14] Such a longstanding, uniform construction by the agency charged with administration of the Federal Power Act, particularly when it involves a contemporaneous construction of the Act by the officials charged with the re-

[13] The First Annual Report to Congress also contained an opinion from the Commission's chief counsel concluding that the agency lacked jurisdiction to approve a right of way over public lands for a transmission line that would transmit electricity generated by a steam plant:

"I think it is fairly to be inferred from the context, as well as the circumstances surrounding the enactment of the legislation, that it was the purpose of Congress to confer exclusive jurisdiction on the Federal Power Commission, except as provided therein, over the matter of issuing licenses for power projects, or parts thereof, for the development of hydroelectric power, and that it was not intended to vest the Commission with jurisdiction over the public lands for other purposes. If this view be correct, it follows that where a proposed transmission line is in no way connected with a water-power project the Commission is without jurisdiction to license the same." FPC, First Annual Report 156.

[14] The Commission's view of the limited scope of its licensing jurisdiction has been restated in most of its annual reports to Congress. See, *e. g.,* 1935 Annual Report 1; 1940 Annual Report 1–3; 1946 Annual Report 1–3; 1950 Annual Report 3; 1956 Annual Report 3, 5; 1959 Annual Report 4; 1962 Annual Report 8, 12–13; 1964 Annual Report 10–11, 13; 1966 Annual Report 8–9, 13; 1969 Annual Report 25; 1972 Annual Report 26–27.

sponsibility of setting its machinery in motion, is entitled to great respect. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 210; *Udall* v. *Tallman*, 380 U. S. 1, 16; *Power Reactor Development Co.* v. *Electrical Workers*, 367 U. S. 396, 408.

The deference due this longstanding administrative construction is enhanced by the fact that Congress gave no indication of its dissatisfaction with the agency's interpretation of the scope of its licensing jurisdiction when it amended the Act in 1930, c. 572, 46 Stat. 797,[15] or when it re-enacted the Federal Water Power Act as Part I of the Federal Power Act in 1935.[16] See *Saxbe* v. *Bustos*, 419 U. S. 65; *Cammarano* v. *United States*, 358 U. S. 498, 510–511; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273. Indeed, on several occasions the Commission has supported legislative proposals to expand its jurisdiction to encompass licensing authority over the construction and operation of thermal-electric generating plants but has been unable to persuade Congress to act favorably on these proposed amendments to the Act. See 1962 Annual Report 12–13; 1964 Annual Report 10–11; 1966 Annual Report 8–9.

D

The conclusion that Congress did not intend to give the Commission licensing jurisdiction with respect to

[15] In 1930 a Reorganization Act was enacted to improve the functioning of the Commission by making it an independent agency with authority to employ its own full-time staff. 46 Stat. 797, codified, as amended, at 16 U. S. C. §§ 792, 793, 797 (d).

[16] Title II of the Public Utility Act of 1935, 49 Stat. 838, expanded the functions of the Federal Power Commission by authorizing the regulation of the interstate transmission and sale of electricity. The Commission's new regulatory powers were codified as Parts II and III of the new Federal Power Act. See 16 U. S. C. §§ 824–825u. The original Federal Water Power Act became Part I of the new

thermal-electric power plants is also supported by this Court's decision in *FPC* v. *Union Electric Co.*, 381 U. S. 90. The Court there sustained the Commission's position that a license was required under the Act to construct a pumped-storage hydroelectric plant to be located on a nonnavigable stream. Although the plant did not affect commerce on navigable waters, its generation of electricity for interstate transmission would affect "the interests of interstate or foreign commerce" within the meaning of § 23 (b) of the Act, 16 U. S. C. § 817, the Court held, and therefore a license was required. The Union Electric Co., arguing that the Commission lacked licensing authority, asserted that there was no difference between the generation of energy by a thermal-electric power plant and by a hydroelectric project in terms of impact on interstate commerce that could justify a distinction in jurisdictional treatment. Accordingly, if impact on commerce in general, rather than on commerce on navigable waters, was the criterion for Commission jurisdiction, argued Union Electric, steam plants, as well as its pumped-storage hydroelectric plant, should be subject to licensing under Part I of the Federal Power Act.

The Court found the answer to this argument in the fact that, even though not located on a navigable stream, Union Electric's generating plant produced electricity by harnessing water power: Unlike Parts II and III of the Federal Power Act, "under which the Commission regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Fed-

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Federal Power Act. Despite the breadth of the additional powers given the Commission, its authority under the licensing provisions of the Federal Water Power Act remained virtually unchanged. See H. R. Rep. No. 1318, 74th Cong., 1st Sess., 7; cf. *FPC* v. *Union Electric Co.*, 381 U. S. 90, 91 n. 2.

eral Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." 381 U. S., at 110 (footnotes omitted). See also *id.*, at 115 (Goldberg, J., dissenting): "The legislative history here, however, establishes to my satisfaction that [Congress] has required licenses of neither steam plants nor the type of hydroelectric plant here involved, and in light of this legislative history I agree with the Court of Appeals that Congress intended that a license be required only where the interests of commerce on navigable waters are affected." (Footnote omitted.)

III

For the above reasons we agree with the conclusion of the Court of Appeals that the structures composing thermal-electric power plants are not "project works" required to be licensed by the Commission. The Court of Appeals went on to hold, however, that the surplus water clause of § 4 (e) authorizes the Commission to license the use of such water not only for the development of hydroelectric energy but also for cooling purposes in thermal-electric power plants, finding that the surplus water provision was intended to serve broader interests than the project works clause of the same subsection of the Act. "It reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements as well as a concern with comprehensive water resource management. It empowers the FPC to license the use of either 'surplus water' or 'water power' from *any* Government dam, and thus is not limited to the mere leasing of excess Government water power. . . . [T]he addition of the words 'surplus water' in [§ 4 (e)]

was intended to afford the FPC a broad licensing authority over federally controlled waters . . . . The FPC could license either the use of 'water power'—*i. e.*, electricity actually generated by the Government—or the use of 'surplus water' for the private generation of water power or other purposes." 160 U. S. App. D. C., at 116–117, 489 F. 2d, at 1240–1241. We cannot agree with this conclusion of the Court of Appeals with respect to the "surplus water" clause of § 4 (e), because we can find no support for it in the text, in the legislative history, or in the administrative interpretation of Part I of the Federal Power Act.

The original title, preamble, and text of Part I of the Federal Power Act provide strong evidence that Congress intended to restrict the Commission's licensing jurisdiction with respect to the power industry to the construction and maintenance of hydroelectric facilities. See *supra,* at 403–404. Nothing in the language of the Act suggests that the surplus water clause was designed to be an exception to the Act's limited scope and purpose.[17] Similarly, from 1921 to the present the Commission has consistently interpreted its licensing authority as being "limited to the consideration of projects designed to produce water power." FPC, First Annual Report 51. See *supra,* at 408–409. No exception has ever been recog-

[17] In fact, § 23 (b) of the Act, 16 U. S. C. § 817, makes it unlawful for an unlicensed party "for the purpose of developing electric power, to . . . utilize the surplus water or water power from any Government dam." Although the use of cooling water by thermal-electric power plants is necessary to increase the efficiency of the generating process, see 160 U. S. App. D. C., at 108 n. 128, 489 F. 2d, at 1232 n. 128, it is most natural to read § 23 (b)'s reference to using water "for the purpose of developing electric power" to mean harnessing the power of falling water to produce electric energy. The "plain meaning" of § 23 (b), therefore, would seem to limit the scope of the Commission's licensing jurisdiction under the surplus water clause to hydroelectric facilities.

nized by the Commission for thermal-electric power plants using surplus water from Government dams.

The Court of Appeals' own extensive analysis of the general background and legislative history of the Federal Water Power Act conclusively demonstrates that Congress intended the Act as a whole, not merely the project works clause, to subject to regulation only that segment of the power industry involving the construction and operation of hydroelectric generating facilities. See 160 U. S. App. D. C., at 91–109, 489 F. 2d, at 1215–1233; cf. *supra,* at 405–408. More importantly, the legislative history pertaining to the surplus water clause itself indicates that that clause, like the rest of the Act, relates to the conservation and development of only hydroelectric power.

The phrase "surplus water or water power from any Government dam" had its origins in legislation enacted during the late 19th and early 20th centuries, conferring on the Secretary of War the authority to lease at individual dam sites excess water for power development.[18] The term "surplus water" in those statutes always referred to its use for the development of water power.[19]

[18] For example, the Act of Aug. 11, 1888, 25 Stat. 400, provided in part: "[T]he Secretary of War is hereby authorized and empowered to grant leases or licenses for the use of the *water powers* on the Muskingum River at such rate and on such conditions and for such periods of time as may seem to him just, equitable, and expedient: *Provided,* That the leases or licenses shall be limited to the use of the *surplus water* not required for navigation." *Id.,* at 417 (emphasis added). See also Act of Sept. 19, 1890, c. 907, 26 Stat. 426, 447; Act of June 13, 1902, 32 Stat. 331, 358, as amended, Act of June 28, 1902, 32 Stat. 408, 409; Act of Mar. 6, 1906, 34 Stat. 52; Act of Apr. 23, 1906, 34 Stat. 130; Act of May 9, 1906, 34 Stat. 183, 184; Act of June 25, 1906, c. 3530, 34 Stat. 456, 457; Act of Mar. 4, 1907, 34 Stat. 1288; Act of Mar. 3, 1909, 35 Stat. 815, 819.

[19] The complainants note that in other legislation before the beginning of the 20th century Congress had used the term "surplus

In 1914 the Adamson bill, H. R. 16053, 63d Cong., 2d Sess., was introduced to amend the Dam Act, 34 Stat. 386, by providing for the comprehensive regulation of water power development on navigable streams. Section 14 of the bill, the antecedent of § 4 (e)'s surplus water clause, authorized the Secretary of War to lease "the right to develop power from the surplus water over and above that required for navigation at any navigation dam now or hereafter constructed . . . and owned by the United States . . . ." 51 Cong. Rec. 11415. The report of the House Committee on Interstate and Foreign Commerce [20] and congressional debate on § 14 plainly indicate that only water power uses of surplus water were to be regulated.[21] Steam power was mentioned only as a com-

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water" in contexts that could not possibly refer solely to the development of hydroelectric power. *E. g.*, 19 Stat. 377, c. 107, as amended, 43 U. S. C. § 321, reserving for public use "all surplus water" not actually used for irrigation and reclamation on desert land entered by private individuals. But the relevant statutory history clearly indicates that when the term "surplus water" was used in conjunction with "water power" or "surplus water power," as in § 4 (e) of Part I of the Federal Power Act, that term always referred to the use of such water for the development of hydroelectric power.

[20] The House Committee reported that:

"Section 14 is a new section authorizing the Secretary of War, with the approval of the Chief of Engineers, to lease to any applicant who has complied with the laws of the State in which the dam may be located, any surplus power developed by a dam that is constructed or owned by the United States for the purposes of navigation." H. R. Rep. No. 592, 63d Cong., 2d Sess., 6.

[21] See, *e. g.*, 51 Cong. Rec. 11403 (remarks of Rep. Mann): "We have many navigation dams in the United States. At many of them there is surplus water which may be used for the development of water power, and we authorize the Secretary of War to lease that surplus water power and to make charges for it." See also 51 Cong. Rec. App. 768 (remarks of Rep. Brown).

peting source of electric energy, with no consideration given to its regulation.[22]

Section 14 was amended on the floor of the House to limit the duration of the leases authorized to 50 years. The amendment also changed the surplus water language of the section so that it closely resembled the language later adopted in the Federal Water Power Act: amended § 14 authorized "leases for the use of *surplus water and water power* generated at dams and works constructed wholly or in part by the United States in the interest of navigation . . . ." 51 Cong. Rec. 13256 (emphasis added). The change in language was not intended to broaden the scope of the surplus water clause. See *id.*, at 13257.

The Senate Commerce Committee reported out a substitute bill, S. 6413, 63d Cong., 2d Sess., rather than the amended Adamson bill. Like the House bill, S. 6413, containing another version of a surplus water clause,[23] was directed only to "[t]he question of *water-power development* by the construction of dams across navigable streams and the improvement of navigation in connection with water-power development." S. Rep. No. 846, 63d Cong., 3d Sess., 1 (emphasis added). Neither bill, however, was enacted during the 63d Congress.

Similar bills were introduced in the 64th and 65th Congresses. Again, nothing in the language or reports on any of that proposed legislation indicated that the licensing authority to be created would extend to the

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[22] See, *e. g.*, *id.*, at 12336 (remarks of Rep. Underwood); *id.*, at 12593 (remarks of Rep. Bryan); *id.*, at 12777 (remarks of Rep. Rainey).

[23] Section 10 of the Senate bill authorized the Secretary of War to lease "the right to utilize the surplus water over and above that required for navigation at any [federal] navigation dam . . . ." S. 6413, 63d Cong., 2d Sess.

use of "surplus water" by steam plants. Section 10 of the Shields bill, S. 3331, 64th Cong., 1st Sess., for example, authorized the Secretary of War to lease "the right to utilize the surplus water power over and above that required for navigation at any navigation dam now or hereafter constructed . . . ." 53 Cong. Rec. 2198. The House Committee on Interstate and Foreign Commerce struck S. 3331 in its entirety and substituted a new bill. Section 19 of that bill, identical to § 14 of the amended Adamson bill that had been passed by the House in 1914, authorized the Secretary of War "to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interests of navigation . . . ." H. R. Rep. No. 404, 64th Cong., 1st Sess., 6. The committee report explained that "[s]ection 19 regulates the method to be pursued by the War Department in leasing the power at dams erected in whole or in part by the Government itself." *Id.*, at 11. The section, stated the committee, "continues the method existing as to Government dams for many years, under which the War Department has satisfactorily regulated and leased surplus water at a number of such structures." *Ibid.* The "method existing," of course, provided for the lease of surplus water at individual dams for the purpose of water power development.

The administration bill considered initially by the 65th Congress, H. R. 8716, 65th Cong., 2d Sess., which as amended by that Congress and the 66th Congress became the Federal Water Power Act of 1920, contained a surplus water clause that paralleled the provisions of the earlier bills. Section 4 (d) of that bill, now § 4 (e) of the Federal Power Act, authorized the Federal Power Commission to issue licenses "for the purpose of utilizing the surplus water or water power over and above that

required for navigation at any navigation dam now or hereafter constructed . . . and owned by the United States . . . ." H. R. Rep. No. 715, 65th Cong., 2d Sess., 23. No explanation was given for substitution of the disjunctive "or" for the conjunctive "and" in the phrase "surplus water or water power," but there is nothing to indicate that the change was designed to expand the scope of surplus water licensing authority beyond that contemplated by the earlier proposed legislation. To the contrary, testimony given during the extensive hearings conducted by the special House Committee on Water Power reflected the general understanding that the Commission's licensing jurisdiction would be limited to hydroelectric facilities.[24]

The administration bill, as already noted, see *supra,* at 407, was reintroduced in the 66th Congress and was enacted without any material changes in the surplus water clause as the Federal Water Power Act of 1920. As the Court of Appeals observed, see 160 U. S. App. D. C., at 112–113, 489 F. 2d, at 1236–1237, little relevant legislative history concerning the meaning of the surplus water clause was generated during the 66th Congress.

[24] O. C. Merrill, Department of Agriculture engineer and one of the principal draftsmen of the bill, testified in response to questioning by members of the committee as to the scope of the proposed Commission's licensing authority: "This bill is concerned only, in such instances, in the development of power. When that is done the licensee may make any other use that is available. . . . The only thing this bill is doing is to grant a license for that particular power development occupying the public lands. There is no assumption of any control whatever over any other uses the licensee may make of that water outside of that development." Hearings on Water Power before the House Committee on Water Power, 65th Cong., 2d Sess., 93. Similarly, Representative Edward Taylor explained: "[T]his bill is for the purpose, as I understand it, of giving authority to create power and utilize water for power purposes." *Id.,* at 96.

Nevertheless, the general history of the Act demonstrates that the legislators viewed the bill as primarily regulating the development of hydroelectric power. Nothing in the record of the debates indicates that Congress intended the surplus water clause to create an exception to the limited scope and purpose of the Act or that it viewed that clause as embodying a meaning different from that of the virtually identical surplus water provisions contained in earlier legislative proposals.

The Court of Appeals based its contrary conclusion in large part on the fact that the Federal Water Power Act repealed the statutory authority for the Waterways Commission, created by the Rivers and Harbors Act of 1917. 40 Stat. 269. The court stated that "the newly created Federal Power Commission took over the planning and coordinating responsibilities of the Waterways Commission, which included consideration of a spectrum of water uses not related to water power." 160 U. S. App. D. C., at 115–116, 489 F. 2d, at 1239–1240 (footnote omitted). The court concluded from this transfer of responsibilities that the Federal Water Power Act reflected a concern with comprehensive water resource management and that the surplus water clause was intended to provide a basis for expanding governmental supervision of general water resource development and use. *Id.*, at 116–117, 489 F. 2d, at 1240–1241.

Although it is true that § 29 of the Federal Water Power Act, 41 Stat. 1077, did expressly repeal the statutory authority for the Waterways Commission, it seems evident that that repeal was not intended to transfer all of that Commission's functions to the new Federal Power Commission. The House debates clearly indicate that the Waterways Commission authority was repealed largely because that Commission was not in fact a functioning agency, and in order to prevent any possible conflict be-

tween it and the new FPC. There is no indication of any purpose to transfer the Waterways Commission's jurisdiction to the FPC. *E. g.*, 58 Cong. Rec. 2250–2251 (remarks of Rep. Anderson). In fact, a proposed amendment that would have provided for such a transfer of authority was never actually introduced in the Senate. See 59 Cong. Rec. 1173–1176 (remarks of Sens. Ashurst, Fletcher, and Ransdell). Those functions of the Waterways Commission not expressly given to the new FPC or transferred to other agencies were thus simply eliminated by § 29.[25]

Moreover, the responsibilities which the Waterways Commission did possess from 1917 to 1920, although quite broad, were investigatory, not regulatory. The Commission was authorized "to secure the necessary data, and to formulate and report to Congress . . . a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purposes of navigation and for every useful purpose, and recommendations for the modification or discontinuance of any project herein or heretofore adopted." Rivers and Harbors Act of 1917, § 18, 40 Stat. 269. Accordingly, even if it could be concluded that the Waterways Commission's powers had been inherited by the FPC, that conclusion would not support recognition of Commission *licensing* jurisdiction over thermal-electric power plants using "surplus water" for cooling purposes.[26]

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[25] Recognizing that the authority of the Waterways Commission "is very much more comprehensive and covers infinitely more ground than the water power commission created in the pending act," 59 Cong. Rec. 1176 (remarks of Sen. Ransdell), an amendment was adopted on the Senate floor to continue the existence of the Waterways Commission. *Id.*, at 1535. That amendment, however, was eliminated in conference. See H. R. Rep. No. 910, 66th Cong., 2d Sess., 13–14.

[26] The interpretation of the surplus water clause of § 4 (e) as limited to use of such water by hydroelectric facilities is reinforced

Contrary to the suggestion of the complainants, a reading of the surplus water provision as referring only to hydroelectric plants utilizing surplus water or water power from Government dams does not render that clause nugatory. First, a license to construct and operate project works does not automatically authorize use of surplus water from a Government dam. Where a project will use surplus water, the Commission may properly require a second license, which may impose additional charges or operational conditions on the licensee. Cf. *Alabama Power Co.*, 34 F. P. C. 1108; *California Oregon Power Co.*, 13 F. P. C. 1, 12–13, supplemental opinion, 15 F. P. C. 14, 18–21, petition for review dismissed, 99 U. S. App. D. C. 263, 239 F. 2d 426. Second, facilities constructed under a congressional grant issued prior to enactment of the Federal Water Power Act are exempted by § 23 (b) of the Act, 16 U. S. C. § 817, from the requirement of

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by legislation enacted prior and subsequent to the Federal Water Power Act. For example, the Act of Feb. 25, 1920, 41 Stat. 451, 43 U. S. C. § 521, authorized the Secretary of the Interior, "in connection with the operations under the reclamation law . . . to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper . . . ." Similarly, the Secretary of the Interior is authorized under the Boulder Canyon Project Act, 45 Stat. 1060, as amended, 43 U. S. C. § 617d, "to contract for the storage of water in [the Hoover Dam] reservoir and for the delivery thereof . . . for irrigation and domestic uses . . . ." The Court of Appeals recognized that those and other comparable provisions, *e. g.*, 58 Stat. 890, as amended, 33 U. S. C. § 708, demonstrate that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency." 160 U. S. App. D. C., at 118, 489 F. 2d, at 1242. But those provisions also tend to indicate that when Congress has wanted to confer the broad authority to dispose of "surplus water" for purposes other than hydroelectric power development, it has done so explicitly and unambiguously.

securing a "project works" license from the Commission during the life of the original works. See *Northwest Paper Co.* v. *FPC*, 344 F. 2d 47. However, if such a project should seek to utilize surplus water from a Government dam built subsequent to June 10, 1920, a surplus water clause license would be required. Finally, it is by no means irrational for Congress to provide the Commission with alternative, albeit sometimes coextensive, bases of jurisdiction, so that it can proceed on the strength of one where the existence of the other may be unclear.

IV

The complainants finally argue that even though it may have been proper 50 years ago to construe the Commission's licensing jurisdiction as limited to hydroelectric projects, such a construction does great violence to the policies central to the Federal Power Act in the light of modern conditions. Although in 1920 steam plants supplied the bulk of the Nation's electric power and, as today, those plants were water-cooled,[27] the complainants point to the tremendous growth in size and efficiency of the modern thermal-electric power complex and the concomitant increase during the past half century in the quantity of water used by steam plants and change in the nature of that usage.[28] Because the cool-

[27] See *id.*, at 107 n. 124, 489 F. 2d, at 1231 n. 124; 1 FPC, National Power Survey 63 (1964); cf. Fabricant & Hallman, *supra*, n. 7, at 52.

[28] The total generating capacity of all steam plants in the United States in 1920 was under 9000 megawatts. Edison Electric Institute, Historical Statistics of the Electric Utility Industry Through 1970, p. 4 (2d ed.). By 1970 total installed capacity of conventional steam plants was more than 275,000 megawatts. *Ibid.* Thermal-electric plants in 1971 used 120 billion gallons of cooling water per day, compared to 178 million gallons per day in 1920. See 160 U. S. App. D. C., at 105–106, n. 111, 489 F. 2d, at 1229–1230, n. 111. A substantial amount of the water used for cooling purposes by many

ing water used by the six plants involved in this case will be evaporated rather than returned to the river system,[29] those plants will withdraw permanently up to 250,000 acre feet of water annually from the Colorado River system—more water than was used by all the steam plants in the United States in 1920.[30] Unless such uses are regulated by subjecting them to the licensing jurisdiction of the Commission, the complainants argue, private power interests will succeed in appropriating the power potential in public waters, the very evil the Federal Water Power Act was designed to eliminate.

Whatever the merits of the complainants' argument as a matter of policy, it is properly addressed to Congress, not to the courts. The legislative history of the Federal Water Power Act conclusively demonstrates that in 1920 Congress intended to provide for the orderly development of the power potential of the Nation's waterways only through the licensing of hydroelectric projects. And in

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modern steam plants is evaporated, rather than returned to the water source. Cf. Fabricant & Hallman, *supra,* n. 7, at 99–101.

[29] Congress has delegated to the Secretary of the Interior the federal authority to allocate for consumptive uses water from Government dams in the Colorado River Basin. See generally *Arizona* v. *California,* 373 U. S. 546. Because the salinity of water used for cooling purposes by thermal-electric plants is increased by reason of partial evaporation and because the downstream Colorado River system already suffers from a substantial salinity problem, the Secretary required the plants involved in this case to agree to evaporate all water used, rather than return it to the river system, as part of their contracts for the use of Colorado River water.

[30] Thermal-electric power generating plants used 178 million gallons of cooling water per day in 1920, see n. 28, *supra,* which is approximately 546 acre feet per day. (There are 325,851 gallons in an acre foot, the amount of water needed to cover an area of one acre to a depth of one foot.) The six plants involved in this case will use more than 650 acre feet of water per day. See 160 U. S. App. D. C., at 90, 489 F. 2d, at 1214.

1935, when the Act was re-enacted as Part I of the Federal Power Act, Congress chose not to expand the licensing authority of the Commission despite the fact that in Parts II and III of the Act, giving the Commission regulatory authority over various aspects of the transmission and sale of electric energy in interstate commerce, Congress treated the source of the energy and the method of generation as immaterial. See *FPC* v. *Union Electric Co.*, 381 U. S., at 110. Moreover, several times in recent years the Commission has sought an expansion of its licensing jurisdiction to include thermal-electric power generating plants, but Congress has failed to approve any of these proposals.

It may well be that the "obvious" distinction, recognized by Congress in 1920, in 1935, and in subsequent years of inaction, and by this Court in the *Union Electric* case, *supra*, at 110, between utilization of water resources by a hydroelectric project and a thermal-electric power plant is no longer viable. But until Congress changes the licensing provisions of Part I of the Federal Power Act, it is our duty to apply the statute as it was written and has been construed for the past 54 years.

For the foregoing reasons, the judgment before us is vacated, and the cases are remanded to the Court of Appeals with directions to enter a judgment affirming the Commission's dismissal of the complaint for lack of jurisdiction.

It is so ordered.

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

Syllabus

DECOTEAU, NATURAL MOTHER AND NEXT FRIEND OF FEATHER ET AL. *v.* DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT

CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

No. 73–1148. Argued December 16, 1974—
Decided March 3, 1975*

The Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty, *held* terminated and returned to the public domain by an 1891 Act which, in ratification of a previously negotiated 1889 Agreement between the affected Indian tribe and the United States, not only opened all unallotted lands to settlement but also appropriated and vested in the tribe a sum certain per acre in payment for the express cession and relinquishment of "all" of the tribe's "claim, right, title, and interest" in the unallotted lands; and therefore the South Dakota state courts have civil and criminal jurisdiction over conduct of members of the tribe on the non-Indian, unallotted lands within the 1867 reservation borders. The face of the Act and its surrounding circumstances and legislative history all point unmistakably to this conclusion. *Mattz* v. *Arnett,* 412 U. S. 481, and *Seymour* v. *Superintendent,* 368 U. S. 351, distinguished. Pp. 431–449.

No. 73–1148, 87 S. D. 555, 211 N. W. 2d 843, affirmed; No. 73–1500, 489 F. 2d 99, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 460.

Bertram E. Hirsch argued the cause for petitioner in No. 73–1148. With him on the briefs was *Arthur Lazarus, Jr.* *William F. Day, Jr.,* Special Assistant Attorney

*Together with No. 73–1500, *Erickson, Warden* v. *United States ex rel. Feather et al.,* on certiorari to the United States Court of Appeals for the Eighth Circuit.

General of South Dakota, argued the cause for petitioner in No. 73–1500 and respondent in No. 73–1148. On the briefs were *Kermit A. Sande,* Attorney General, *Walter W. Andre,* Assistant Attorney General, and *Tom D. Tobin,* Special Assistant Attorney General. *Larry R. Gustafson* argued the cause and filed a brief for respondents in No. 73–1500.

Harry R. Sachse argued the cause for the United States as *amicus curiae* urging affirmance in No. 73–1500. With him on the brief were *Solicitor General Bork, Assistant Attorney General Johnson, Louis F. Claiborne,* and *Edmund B. Clark.*†

Mr. Justice Stewart delivered the opinion of the Court.

These two cases, consolidated for decision, raise the single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and the Sisseton and Wahpeton bands of Sioux Indians, was terminated and returned to

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†*Solicitor General Bork, Assistant Attorney General Johnson, Louis F. Claiborne, Harry R. Sachse,* and *Edmund B. Clark* filed a brief for the United States as *amicus curiae* urging reversal in No. 73–1148.

Allen I. Olson, Attorney General, and *Paul M. Sand,* First Assistant Attorney General, filed a brief for the State of North Dakota as *amicus curiae* urging affirmance in No. 73–1148, joined by the Attorneys General for their respective States as follows: *Evelle J. Younger* of California, *W. Anthony Park* of Idaho, *Richard C. Turner* of Iowa, *Robert L. Woodahl* of Montana, *Clarence A. H. Meyer* of Nebraska, *Robert List* of Nevada, *David L. Norvell* of New Mexico, *Larry D. Derryberry* of Oklahoma, *Slade Gorton* of Washington, and *Robert W. Warren* of Wisconsin.

Briefs of *amici curiae* urging affirmance in No. 73–1500 were filed by *Glen A. Wilkinson, Jerry C. Straus,* and *Richard A. Baenen* for the Arapahoe Tribe of Wind River Reservation et al., and by the Sisseton-Wahpeton Sioux Tribe.

the public domain, by the Act of March 3, 1891, c. 543, 26 Stat. 1035. In each of the two cases, the South Dakota courts asserted jurisdiction over members of the Sisseton-Wahpeton Tribe for acts done on lands which, though within the 1867 reservation borders, have been owned and settled by non-Indians since the 1891 Act. The parties agree that the state courts did not have jurisdiction if these lands are "Indian country," as defined in 18 U. S. C. § 1151,[1] and that this question depends upon whether the lands retained reservation status after 1891.[2] We hold, for the reasons that follow, that the

[1] "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[2] If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation." 18 U. S. C. § 1151 (a). On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U. S. C. § 1151 (c). Even within "Indian country," a State may have jurisdiction over some persons or types of conduct, but this jurisdiction is quite limited. See, *e. g., McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164; *Williams* v. *Lee,* 358 U. S. 217; *Worcester* v. *Georgia,* 6 Pet. 515. While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction. *McClanahan* v. *Arizona State Tax Comm'n, supra,* at 177–178, n. 17; *Kennerly* v. *District Court of Montana,* 400 U. S. 423, 424 n. 1; *Williams* v. *Lee, supra,* at 220–222, nn. 5, 6, and 10.

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1891 Act terminated the Lake Traverse Reservation, and that consequently the state courts have jurisdiction over conduct on non-Indian lands within the 1867 reservation borders.

I

The 1867 boundaries of the Lake Traverse Reservation enclose approximately 918,000 acres of land. Within the 1867 boundaries, there reside about 3,000 tribal members and 30,000 non-Indians. About 15% of the land is in the form of "Indian trust allotments"; these are individual land tracts retained by members of the Sisseton-Wahpeton Tribe when the rest of the reservation lands were sold to the United States in 1891. The trust allotments are scattered in a random pattern throughout the 1867 reservation area. The remainder of the reservation land was purchased from the United States by non-Indian settlers after 1891, and is presently inhabited by non-Indians.

It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities. In the two cases before us, however, the State asserted jurisdiction over Indians based on conduct occurring on non-Indian, unallotted land within the 1867 reservation borders.

The petitioner in No. 73–1148, Cheryl Spider DeCoteau, is the natural mother of Herbert John Spider and Robert Lee Feather; all are enrolled members of the Sisseton-Wahpeton Tribe. Both children have been assigned to foster homes by order of the respondent District County Court for the Tenth Judicial District of South Dakota. The petitioner gave Robert up for adoption in March of 1971, and Herbert was later separated from her through neglect and dependency proceedings in the respondent court, initiated by the State Welfare Depart-

ment. On August 31, 1972, the petitioner commenced a habeas corpus action in a State Circuit Court alleging that the respondent had lacked jurisdiction to order her children separated from her and asking that they be released from the custodial process of the respondent. After a hearing, the state court denied the writ, finding that the respondent had possessed jurisdiction because "the non-Indian patented land, upon which a portion of the acts or omissions giving rise to the Order of the District County Court occurred, is not within Indian Country." [3] While acknowledging that this non-Indian patented land is within the 1867 boundaries of the Lake Traverse Reservation, the court noted that the tribe "had sold or relinquished [the non-Indian land in question] to the United States under the terms of the agreement which was ratified by acts of Congress, March 3, 1891." The South Dakota Supreme Court affirmed,[4] upon the ground that the 1891 Act ratified an 1889 Agreement by which

> "the Sisseton and Wahpeton Bands of Indians sold their unallotted lands, and the United States Government paid a sum certain for each and every acre

[3] The Circuit Court's opinion of September 26, 1972, is unpublished. It was stipulated that some 50% of the mother's allegedly wrongful acts and omissions occurred on non-Indian patented land, the remainder occurring on Indian allotments over which the State does not have jurisdiction. The parties here have assumed that the State had jurisdiction to exercise custody over the petitioner's children if the non-Indian, patented lands were not "Indian country" under 18 U. S. C. § 1151 (a). We have made the same assumption. We note, however, that § 1151 (c) contemplates that isolated tracts of "Indian country" may be scattered checkerboard fashion over a territory otherwise under state jurisdiction. In such a situation, there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory. How these conflicts should be resolved is not before us.

[4] 87 S. D. 255, 211 N. W. 2d 843.

> purchased. . . . This, then, was an outright cession and sale of lands by the Indians to the United States. The land sold was separated from the reservation by Congress and became part of the public domain." [5]

The relators in No. 73–1500 are enrolled members of the tribe who were convicted in South Dakota courts of various violations of the State's penal laws committed on non-Indian lands within the 1867 reservation boundaries. The relators, in the custody of a state penitentiary, separately petitioned for writs of habeas corpus in the United States District Court for the District of South Dakota, alleging that the state courts had lacked criminal jurisdiction over their conduct within the 1867 reservation boundaries. The District Court summarily denied the petitions, but the Court of Appeals for the Eighth Circuit reversed.[6] In *DeMarrias* v. *South Dakota,* 319 F. 2d 845, that court had previously held that the 1891 Act had terminated the Lake Traverse Reservation, leaving only allotted Indian lands within tribal or federal jurisdiction. But in the present case the Court of Appeals overruled its *DeMarrias* decision, finding it inconsistent with the principles of statutory construction established by this Court in *Mattz* v. *Arnett,* 412 U. S. 481, and *Seymour* v. *Superintendent,* 368 U. S. 351. The Court of Appeals accordingly held that "[t]he boundaries of the Lake Traverse Indian reservation remain as they were established in 1867. The scene of the alleged crimes is, therefore, within Indian country. South Dakota had no jurisdiction to try appellants." 489 F. 2d 99, 103.

We granted certiorari in the two cases, 417 U. S. 929, to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the Eighth Circuit

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[5] *Id.,* at 559, 211 N. W. 2d, at 845.

[6] 489 F. 2d 99.

as to the effect of the 1891 Act on South Dakota's civil and criminal jurisdiction over unallotted lands within the 1867 reservation boundaries.

II

When the Sioux Nation rebelled against the United States in 1862, the Sisseton and Wahpeton bands of the Nation remained loyal to the Federal Government, many members serving as "scouts" for federal troops. This loyalty went unrecognized, however, when the Government confiscated the Sioux lands after the rebellion. In a belated act of gratitude, the United States entered into a treaty with the Sisseton-Wahpeton Tribe in 1867. The treaty granted the tribe a permanent reservation in the Lake Traverse area, and provided for tribal self-government under the supervision of federal agents.[7]

But familiar forces soon began to work upon the Lake Traverse Reservation. A nearby and growing population of white farmers, merchants, and railroad men began urging authorities in Washington to open the reservation to general settlement. The Indians, suffering from disease and bad harvests, developed an increasing need for cash and direct assistance.[8] Meanwhile, the Govern-

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[7] Treaty of Feb. 19, 1867, 15 Stat. 505. The treaty is reprinted as Appendix A to this opinion.

[8] On April 22, 1889, a banker from Milbank, S. Dak., D. W. Diggs, wrote the Secretary of the Interior:

"[The Lake Traverse Reservation] is a great detriment to our interests, as it blocks the progress of two or three lines of railroad that we are very anxious to see completed.

"We need these roads badly, and the opening of the reservation would give new impetus to immigration which has been attracted by government lands further west.

"Any information that will enable the citizens of this section to render any service that may be needed in hastening the opening will be appreciated." National Archives Records of the Bureau of

ment had altered its general policy toward the Indian tribes. After 1871, the tribes were no longer regarded as sovereign nations, and the Government began to regulate their affairs through statute or through contractual agreements ratified by statute.[9] In 1887, the General Allotment Act (or Dawes Act) was enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands.[10] The Act empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit. See *Mattz* v. *Arnett,* 412 U. S., at 496–497.

Against this background, a series of negotiations took place in 1889 with the objective of opening the Lake

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Indian Affairs, Record Group No. 75, Letters Received; Special Case 147 (Sisseton), Letter No. 26163–1889, encls. 2, 3, and 5.

In an enclosed "resolution," Diggs and six other local, non-Indian citizens from the counties adjacent to the reservation promised to use their influence to secure to the tribe further congressional appropriations, mentioned in the 1867 Treaty, Art. VI, as compensation for the tribe's loyalty during the 1862 Sioux uprising. The evident goal of the effort was to assure tribal consent to an agreement opening the reservation to settlement and development.

On December 13, 1890, while the cession Agreement of 1889 was still before Congress, the Governor of South Dakota wrote the Secretary of the Interior that the tribe was in a "destitute condition" and urged that the Government "at once take steps to relieve the necessities [of] this long suffering people . . . slowly suffering death from privation and starvation." National Archives Records of the Bureau of Indian Affairs, Record Group No. 75, Letters Received: Special Case 147 (Sisseton), Letter No. 39462–1890.

[9] Act of Mar. 3, 1871, c. 120, § 1, 16 Stat. 566. But that Act did not purport to invalidate or impair any prior treaty obligation incurred by the United States toward an Indian tribe. 25 U. S. C. § 71.

[10] Act of Feb. 8, 1887, c. 119, 24 Stat. 388.

Traverse Reservation to settlement. In April of that year, a South Dakota banker, D. W. Diggs, sent to the Secretary of the Interior a request on behalf of the local white community that reservation lands be made available for commerce, farming, and railroad development.[11] In May, Diggs met with a council of tribal leaders, who told him that the tribe would consider selling the reserved lands if the Government would first pay a "loyal scout claim" which the tribe believed was owing as part of the 1867 Treaty. Spokesmen for the tribe were quoted in the local press that month as follows:

> "We never thought to keep this reservation for our lifetime.
>
> . . . . . .
>
> ". . . Now that South Dakota has come in as a state we have some one to go to, to right our wrongs. The Indians have taken their land in severalty. They are waiting for patents. The Indians are anxious to get patents. We are willing the surplus land should be sold. We don't expect to keep reservation. We want to get the benefit of the sale. If the government will pay what they owe, we will be pleased with the opening. There will be left over allotments 880,000 acres. If the government pays what they owe, and pay what they agree per acre, we will be pleased with the opening. When the government asks me to do anything, I am always willing to do it. I hope you will try to get the government to do what is right.
>
> "If the government will do this, it will benefit both the Indians and the whites [and illustrates by holding up half a dozen keys [in a] perpendicular position, separately], we all stand this way [and

[11] See n. 8, *supra*.

then, pressing them against each other], we will be as one key. When the reservation is open we meet as one body. We be as one.

. . . . . .

". . . If we get the money we will open up. Your committee needn't be discouraged, we will open up.

". . . We are anxious to become citizens and vote. We have laid before you all we have to say from our hearts. . . ." [12]

By summer, the Commissioner of Indian Affairs had apparently been won over, for in August 1889, he sent to the Secretary of the Interior a set of draft instructions for the guidance of a Commission to negotiate with the Sisseton and Wahpeton Indians for the sale of their surplus lands.[13] The instructions noted that the negotiations would be pursuant to § 5 of the General Allotment Act, that the allotment of individual tracts of reservation land to tribal members was already "virtually . . . completed," and that "the Indians desire to sell a portion at least of their surplus [*i. e.*, unallotted] lands."

While these proposed instructions suggested that sale of all the surplus lands might be "inadvisable," the negotiations in fact proceeded toward such a total sale. The three Government representatives [14] were appointed in November, and two weeks of meetings at the reservation promptly ensued. The proceedings at these meet-

[12] The Minneapolis Tribune, May 22, 1889, p. 1 (reproduced in 1 App. for Respondent in No. 73–1148, p. 19).

[13] National Archives Records of the Bureau of Indian Affairs, Record Group No. 75, Land Division, Letter Book 188, Aug. 13, 1889.

[14] Charles A. Maxwell, Chief of the Land Division of the Department of the Interior, Eliphalet Whittlesey, Secretary of the Board of Indian Commissioners, and D. W. Diggs.

ings were transcribed,[15] and the records show that the Indians wished to sell outright all of their unallotted lands, on three conditions: that each tribal member, regardless of age or sex, receive an allotment of 160 acres; that Congress appropriate moneys to make good on the tribe's outstanding "loyal scout claim"; and that an adequate sales price per acre be arrived at for all of the unallotted land.[16]

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[15] See the Report of councils with Sisseton and Wahpeton Indians in S. Exec. Doc. No. 66, 51st Cong., 1st Sess., 15–29 (1890) (Councils Report).

[16] The Government negotiators reported to the Commissioner of Indian Affairs that they had "advised them [the tribe] that we proposed to give $2.50 per acre for each and every acre of the lands which they desired to dispose of . . . ." Letter to Commissioner, Dec. 1889, S. Exec. Doc. No. 66, *supra,* at 7. The report continued:

"We first proposed to reserve one section in each township for school purposes, and certain other portions of the reservation for future allotments and the tracts now occupied by the Government for agency and school purposes, and also such tracts as were occupied and used for educational and missionary purposes among the Indians, but upon informal inquiry among the Indians it was learned that this plan would not meet with their approval. They argued that as the money, interest, and perhaps some of the principal of the funds arising from the sale of the surplus lands were to be used for educational and civilization purposes, it would not be proper for them also to reserve a large quantity of land for educational and Government purposes, and admitting the force of the argument we did not press the matter, believing it better that the Government should own the lands upon which the agency and school buildings are located, and that missionary societies and churches should have the privilege of purchasing the land now occupied by them. We also learned that the Indians preferred to have the allotments equalized so that each person, including married women, would have 160 acres, the plan outlined in your annual report, and sell all the surplus lands remaining, and hence the provisions of article four." *Ibid.*

The sale of all unallotted lands was not an irrational choice in light of the unusually large number of allotments which the Agree-

In December, an Agreement was reached and the contract was signed by the required majority of male adult tribal members. Its terms [17] were accurately summa-

ment specified. President Harrison later noted this in submitting the 1889 Agreement to the Congress:

"This agreement involves a departure from the terms of the general allotment act in at least one important particular. It gives to each member of the tribe 160 acres of land without regard to age or sex, while the general law gives this allotment only to heads of families." *Id.*, at 1.

During the negotiations, the intent of all parties to effect a clear conveyance of all unallotted lands was evident. For instance, on December 3, 1889, Gabriel Renville, a tribal spokesman, stated:

"I have spoken for all of the people, and it is their wish that I should say these things. In the past there has been lots of land sold, but we have not been benefited by the sales. In 1867 they promised us they would help us, but they have not helped us very much for many years. Let them first settle our claim [loyal scout claim] and then we will talk about our surplus lands. We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc., but cash. We can buy for ourselves what we need if payment is made in cash, and then we do not care to have an agency here after the surplus lands have been sold. The people have asked me to say this as their wish." Councils Report 19–20.

Michael Renville, another tribal spokesman, stated:

"We have always said that when the sale of surplus lands was considered we would ask that 160 acres be given to each member of the tribe . . . . We said in council that we would not sell surplus lands until back annuities [for the loyal scout claim] were paid, but you say that if the lands are now sold the back annuities would be paid at the same time. This pleases us." *Id.*, at 21.

In explaining a proposed draft of the agreement to the tribal members, negotiator Whittlesey noted:

"After you have received your back annuities, each receive 160 acres of land; you will sell all that is left . . . . There are 918,000 acres in the reservation, about 127,000 acres now allotted; it will take, we think, about 130,000 to complete allotments; that will leave about 660,000 acres to sell." *Id.*, at 22.

The Indians were aware that they were taking a not insignificant step in selling the reservation lands. Gabriel Renville stated:

"This little reservation is ours, and all we have left. There is

[*Footnote 17 is on p. 437*]

rized by the Commissioner of Indian Affairs in his report to the Secretary of the Interior: [18]

> "By article 1, the Indians cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation remaining after the allotments and additional allotments provided for in article 4 shall have been made.
>
> "Article 2 provides that the United States will pay to the Indians $2.50 per acre for the lands ceded.
>
> "Article 3 provides for the payment of back annuities, and continues the annuities of $18,400 until July 1, 1901.
>
> "Article 4 provides for the equalization of allotments so that each person, including married women, shall have 160 acres."

President Harrison immediately submitted the Agreement to Congress for legislative approval. While the

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nothing in our treaty that says that we must sell. It was given us as a permanent home, but now we have decided to sell . . . ." *Id.*, at 25.

In explaining the final agreement to the Secretary of the Interior, the Commissioner of Indian Affairs noted:

"The reservation contains 918,780 acres, and there have been 127,887 acres allotted, but all the Indians who are entitled have not yet received their allotments. It is almost impossible to give the accurate number of Indians entitled to allotments, for since the allotments were completed numerous applications have been made for land, and as before stated, it is known that all who are entitled have not received allotments. I think, taking these facts into consideration, that these people number between 1,500 and 1,600 souls, and taking the latter as a basis of calculation, it will require about 128,000 acres to make allotments and additional allotments provided for, making a total of 256,000 acres, leaving 662,780 acres to which the Indian title is extinguished by the terms of the agreement." Letter to the Secretary, S. Exec. Doc. No. 66, *supra,* at 4–5.

[17] The Agreement is reprinted as Appendix B to this opinion.

[18] S. Exec. Doc. No. 66, *supra,* at 3.

subsequent legislative history is largely irrelevant to the issues before us, three aspects bear notice. First, the several committee reports which commented on the Agreement recognized that it effected a simple and unqualified cession of all of the unallotted lands to the United States for a sum certain.[19] Second, the Congress recognized that the Agreement could not be altered, and therefore debate centered largely on the disposition to be made by the United States of the lands it had acquired under the Agreement; it was decided that these lands

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[19] For instance, a report of the Senate Committee on Indian Affairs summarized the Agreement as follows:

"By the terms of this Agreement the said bands of Indians agreed to cede, sell, relinquish, and convey to the United States the unallotted lands within the Lake Traverse Reservation."

"As to the equalization of allotments on the basis of 160 acres, provided in the bill, when viewed in the light of the fact that the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families, and the further fact that they are soon to assume the responsibilities of citizenship, with all it implies respecting the moral and material welfare of their families, we think that the departure from the general allotment act of 1887 in the case of these Indians is just and proper and should be allowed . . . .

"This reservation contains 918,780 acres of agricultural lands, 127,887 of which have been allotted to the Sisseton and Wahpeton Indians under the act of Congress approved February 8, 1887 (24 Stats., 388). The additional allotments, as provided in article 4 of the agreement, will require 112,113 acres, making a total of 240,002 acres, which leaves a surplus, including the lands occupied by the agency and missionary societies, of 678,778 acres, the Indian title to which will be extinguished by the terms of the agreement. The cost of the purchase, at $2.50 per acre, will amount to $1,696,945, which is to be a trust fund held by the United States for the benefit of these Indians. The appropriation named in the bill is estimated to cover the purchase, and pay the back annuities." S. Rep. No. 661, 51st Cong., 1st Sess., 1, 3–4 (1890).

Almost identical language appears in H. R. Rep. No. 1356, 51st Cong., 1st Sess., 1, 8–9 (1890).

should be sold to settlers at $2.50 per acre under the homestead laws.[20] Third, the Congress included the Sisseton-Wahpeton Agreement in a comprehensive Act which also ratified several other agreements providing for the outright cession of surplus reservation lands to the Government.[21] The other agreements employed cession language virtually identical to that in the Sisseton-Wahpeton Agreement, but in these other cases the Indians sold only a described portion of their lands, rather than all "unallotted" portions, the result being merely a reduction in the size of the affected reservations.[22] The intended effect of all of these ratification

[20] Act of Mar. 3, 1891, § 30, 26 Stat. 1039. See 22 Cong. Rec. 2809–2810, 3784 (1891) (remarks of Congs. Holmann and Perkins); *id.*, at 3453, 3457–3458 (1891) (remarks of Sens. Pettigrew and Dawes).

[21] Act of Mar. 3, 1891, 26 Stat. 989. The other agreements ratified were negotiated with the following tribes: the Citizen Band of Pottawatomie Indians, § 8, 26 Stat. 1016; the Absentee Shawnee Indians, § 9, 26 Stat. 1018; the Cheyenne and Arapahoe Tribes, § 13, 26 Stat. 1022; the Coeur d'Alene Indians (I), § 19, 26 Stat. 1026; the Coeur d'Alene Indians (II), § 20, 26 Stat. 1029; the Gros Ventres, Mandans, and Arickarees, § 23, 26 Stat. 1032; the Crow Indians, § 31, 26 Stat. 1039.

[22] The Sisseton-Wahpeton Agreement provided that the tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation. . . ." 26 Stat. 1036. The language in the other agreements ratified at the same time is comparable:

"—cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to the following described tract of country . . . ." 26 Stat. 1016 (Citizen Band of Pottawatomie Indians).

"—cede, relinquish and surrender, forever and absolutely, to the United States, all their claim, title and interest of every kind and character in and to the following described tract of country . . . ." 26 Stat. 1019 (Absentee Shawnee Indians).

"—cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all

agreements was made clear by the sponsors of the comprehensive legislation:

> "All the pending agreements or treaties for the purchase of Indian lands are ratified and confirmed by the provisions of this bill. . . .
>
> "The bill carries the largest appropriation ever carried by an Indian appropriation bill, but it extinguishes the Indian title to a great domain and opens it to settlement by the hardy and progessive pioneers . . . ." [23]
>
> "We do not pretend to make any modification or amendment of the agreements themselves. We merely ratify those, and then we take the estate we have acquired in this way, and after providing for the payment of the money, or whatever it is we have agreed to pay these Indians, we take these landed estates and parcel and divide them out among

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their claim, title, and interest of every kind and character, in and to the lands embraced in the following described tract of country . . . ." 26 Stat. 1022 (Cheyenne and Arapahoe Tribes).

"—cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho . . . ." 26 Stat. 1027 (Coeur d'Alene Indians (I)).

"—cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to the following-described portion of their reservation . . . ." 26 Stat. 1030 (Coeur d'Alene Indians (II)).

"—cede, sell, and relinquish to the United States all their right, title, and interest in and to all that portion of the Fort Berthold Reservation [as herein described] . . . ." 26 Stat. 1032 (Gros Ventres, Mandans, and Arickarees).

"—agree to dispose of and sell to the Government of the United States, for certain considerations hereinafter mentioned, all that portion of the Crow Indian Reservation [as herein described] . . . ." 26 Stat. 1040 (Crow Indians).

[23] Remarks of Cong. Perkins, 22 Cong. Rec. 3784 (1891).

> the people in a fashion that we think is the most conducive to the occupancy of that country by an honest, laborious, earnest, and faithful set of people." [24]
>
> "The remainder of the bill is made up of the other appropriations necessary to carry out the agreements that were made with Indians for the surrender of a large portion of their reservations to the public domain. In the main it has cost the United States between $1.25 and $1.50 an acre for some ten or eleven million acres of land. All this land is opened by this bill to settlement as part of the public domain upon the payment by the settler of $1.50 an acre, for all except that which was obtained from the Sisseton and Wahpeton reservation, which is open to settlement at $2.50 an acre, because the United States gave the Indians for the surrender $2.50 an acre." [25]

As passed by the Congress, the 1891 Act recited and ratified the 1889 Agreement with the tribe and appropriated $2,203,000 to pay the tribe for the ceded land and to make good the tribe's "loyal scout" claim. § 27, 26 Stat. 1038. A portion of the moneys was made available for immediate distribution to tribal members, on a per capita basis, and the remaining funds were, as had been agreed, "placed in the Treasury of the United States, to the credit of said . . . Indians [at five percent interest] . . . for the education and civilization of said bands of Indians or members thereof." § 27, 26 Stat. 1039. The Act further provided that the 160-acre allotments were to be effected "as soon as practicable," pursuant to the terms of the General Allotment Act. § 29, 26 Stat. 1039. Finally, the Act provided that upon payment of

[24] Remarks of Sen. Morgan, *id.*, at 3455.

[25] Remarks of Sen. Dawes, *id.*, at 3879.

the per capita purchase moneys to the tribe, and the completion of the enlarged allotment process, "the lands by said agreement ceded, sold, relinquished, and conveyed to the United States" shall be opened "only to entry and settlement [at $2.50 per acre] under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located," § 30, 26 Stat. 1039.

On April 11, 1892, President Harrison declared open for settlement all "lands embraced in said reservation, saving and excepting the lands reserved for and allotted to said Indians." [26] The ceded lands were rapidly purchased and settled by non-Indians.

The jurisdictional history subsequent to the 1891 Act is not wholly clear, but it appears that state jurisdiction over the ceded (*i. e.*, unallotted) lands went virtually unquestioned until the 1960's. The Lake Traverse Reservation was eliminated from the maps published by the Commissioner of Indian Affairs until 1908; thereafter, some Government maps included the area as an "open" or "former" reservation, while more recent ones have characterized it simply as a "reservation." [27] Federal Indian agents have remained active in the area, and Con-

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[26] Proclamation of the President, Apr. 11, 1892, 27 Stat. 1017.

[27] Compare the maps contained in the Annual Reports of the Commissioner of Indian Affairs for 1892, 1909, and 1918, with the Map of Indian Lands and Related Facilities as of 1971, compiled by Bureau of Indian Affairs in cooperation with the Geological Survey, U. S. Dept. of Interior. The parties here have cited us to numerous Interior Department memoranda and letters, issued over the past 80-odd years, which refer to the area either as a "reservation" or a "former reservation." No consistent pattern emerges. The authors of these documents appear to have put no particular significance on their choice of a label.

gress has regularly appropriated funds for the tribe's welfare; [28] the allotted Indian tracts have retained their "trust" status pursuant to periodic Executive Orders.[29] A tribal constitution did not appear until 1946, and tribal jurisdiction under it extended only to "Indian-owned lands lying in the territory within the original confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation." [30] In 1963, the Court of Appeals for the Eighth Circuit held that the 1891 Act had terminated the reservation; in the process, the court noted that "the highest court of that state [South Dakota] has repeatedly held that South Dakota has jurisdiction," and that the Justice Department had taken a like position. *DeMarrias* v. *South Dakota,* 319 F. 2d, at 846.

But the Commissioner of Indian Affairs approved a new tribal constitution in 1966, which stated: "The jurisdiction of the Sisseton-Wahpeton Sioux Tribe shall extend to lands lying in the territory within the original confines of the Lake Traverse Reservation as described in Article III of the Treaty of February 19, 1867." [31] Apparently, however, no tribal court or legal code was established to exercise this jurisdiction. In 1972, a field

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[28] See, *e. g.,* 39 Stat. 988 and 42 Stat. 576.

[29] See Exec. Orders Nos. 1916 (1914), 3994 (1924), 7984 (1938). See also the delegated orders of the Secretary of the Interior, at 28 Fed. Reg. 11630 (1963), 33 Fed. Reg. 15067 (1968), and 38 Fed. Reg. 34463 (1973). The delegation of authority was by Executive Order No. 10250 (June 5, 1951), 3 CFR 755–757 (1949–1953 Comp.). Congress has several times authorized extensions of trust relations with respect to Indian tribes, *e. g.,* Acts of June 21, 1906, 34 Stat. 326, and Mar. 2, 1917, 39 Stat. 976.

[30] Art. I, Constitution and Bylaws of the Sisseton-Wahpeton Sioux Tribe, approved by the Commissioner of Indian Affairs, Oct. 16, 1946.

[31] Art. I, Revised Constitution and Bylaws of the Sisseton-Wahpeton Sioux Tribe, approved by the Commissioner of Indian Affairs, Aug. 26, 1966.

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solicitor for the Department of the Interior rendered an opinion that the 1891 Act had not extinguished tribal jurisdiction over the 1867 reservation lands.[32] In 1973, the Court of Appeals overruled *DeMarrias,* in the decision here under review, and in early 1974, after several months of preparation, the tribe formally established a law court and a legal code to exercise civil and criminal jurisdiction throughout the 1867 reservation lands.

III

This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States* v. *Celestine,* 215 U. S. 278, 285. The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 174, quoting *Carpenter* v. *Shaw,* 280 U. S. 363, 367. Accordingly, the Court requires that the "congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz* v. *Arnett,* 412 U. S., at 505. See also *Seymour* v. *Superintendent,* 368 U. S. 351, and *United States* v. *Nice,* 241 U. S. 591. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit. *Mattz* v. *Arnett, supra,* and *Seymour* v. *Superintendent, supra.*

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[32] Boundaries of the Lake Traverse Indian Reservation, Field Solicitor's Opinion, Aberdeen Office, Bureau of Indian Affairs, Aug. 16, 1972.

But in this case, "the face of the Act," and its "surrounding circumstances" and "legislative history," all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891. The negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands. See *supra,* at 432–437. The Agreement's language, adopted by majority vote of the tribe, was precisely suited to this purpose:

> "The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made." [33]

[33] Agreement of 1889, Art. I, 26 Stat. 1036.

Counsel for the State has argued that the "school lands" provision of the 1891 Act, § 30, 26 Stat. 1039, is further evidence of Congress' intent to vest jurisdiction over unallotted lands in the State. Counsel for the tribal members would have us draw a contrary inference from the provision. The provision reads:

"That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, *and be subject to the laws of the State wherein located . . .*" (Emphasis added.)

Counsel differ as to whether the emphasized phrase refers to the "lands by said agreement ceded, sold, relinquished, and conveyed to the United States," or to "the sixteenth and thirty-sixth sections of said lands." We think the disagreement irrelevant to the juris-

This language is virtually indistinguishable from that used in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act. See nn. 21 and 22, *supra*. That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the "public domain." See *supra*, at 440–441. Cf. *Mattz* v. *Arnett*, 412 U. S., at 504 n. 22.

It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather than simply a major portion of, the affected tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18

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dictional issue before us. The "school provision" was not part of the 1889 Agreement, and there is no indication in the legislative history that Congress intended the provision to qualify the terms of the cession of unallotted lands to the Government. In opening public lands to settlement, it was the usual practice of Congress to except the 16th and 36th sections from settlement and to reserve these to the State for common school purposes. Indeed, the 1891 Act contains an omnibus "school provision," applicable to all the agreements ratified therein, which reiterates this purpose. § 38, 26 Stat. 1044. Even if we were to assume, with counsel for the tribal members, that the "state law" phrase of § 30 refers only to school lands, the natural inference would be that state law is to govern the manner in which the 16th and 36th sections are to be employed "for common school purposes." This implies nothing about the presence or absence of state civil and criminal jurisdiction over the remainder of the ceded lands.

U. S. C. § 1151 (c). See *United States* v. *Pelican,* 232 U. S. 442. With the benefit of hindsight, it may be argued that the tribe and the Government would have been better advised to have carved out a diminished reservation, instead of or in addition to the retained allotments. But we cannot rewrite the 1889 Agreement and the 1891 statute. For the courts to reinstate the *entire* reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

The Court of Appeals thought that a finding of termination here would be inconsistent with *Mattz* and *Seymour.* This is not so. We adhere without qualification to both the holdings and the reasoning of those decisions. But the gross differences between the facts of those cases and the facts here cannot be ignored.

In *Mattz,* the Court held that an 1892 Act of Congress [34] did not terminate the Klamath River Indian Reservation in northern California. That Act declared the reservation lands "subject to settlement, entry, and purchase" under the homestead laws of the United States, empowered the Secretary of the Interior to allot tracts to tribal members, and provided that any proceeds of land sales to settlers should be placed in a fund for the tribe's benefit. The 1892 statute could be considered a termination provision only if continued reservation status were inconsistent with the mere opening of lands to settlement, and such is not the case. See 18 U. S. C. § 1151 (a).

[34] Act of June 17, 1892, 27 Stat. 52.

But the 1891 Act before us is a very different instrument. It is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented. The 1891 Act does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain—$2.50 per acre—in payment for the express cession and relinquishment of "all" of the tribe's "claim, right, title and interest" in the unallotted lands. The statute in *Mattz,* by contrast, benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers. See also *Ash Sheep Co.* v. *United States,* 252 U. S. 159, 164–166. Furthermore, the circumstances surrounding congressional action in *Mattz* militated persuasively against a finding of termination. That action represented a clear retreat from previous congressional attempts to vacate the Klamath River Reservation in express terms; and the Department of the Interior had consistently regarded the Klamath River Reservation as a continuing one, despite the 1892 legislation. *Mattz* v. *Arnett, supra,* at 503–505. In the present case, by contrast, the surrounding circumstances are fully consistent with an intent to terminate the reservation, and inconsistent with any other purpose.

In *Seymour,* the Court held that a 1906 Act of Congress [35] did not terminate the southern portion of the Colville Indian Reservation in Washington. Like that in question in *Mattz,* this Act was unilateral in character; like that in question in *Mattz,* it merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit. The *Seymour* Court was not confronted with a straightforward agreement ceding lands to the Government for a sum certain. In *Seymour,* the Court sharply contrasted the 1906 Act, which provided

[35] 34 Stat. 80.

only for non-Indian settlement, with an 1892 Act, which plainly "'vacated'" and restored "'to the public domain'" the northern portion of the Colville Reservation. *Seymour* v. *Superintendent,* 368 U. S., at 355. The 1891 Act before us here is analogous to that 1892 statute.

Thus, in finding a termination of the Lake Traverse Reservation, we are not departing from, but following and reaffirming, the guiding principles of *Mattz* and *Seymour.*

Until the Court of Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years. Counsel for the tribal members stated at oral argument that many of the Indians have resented state authority and suffered under it. Counsel for the State denied this and argued that an end to state jurisdiction would be calamitous for all the residents of the area, Indian and non-Indian alike. These competing pleas are not for us to adjudge, for our task here is a narrow one. In the 1889 Agreement and the 1891 Act ratifying it, Congress and the tribe spoke clearly. Some might wish they had spoken differently, but we cannot remake history.

The judgment in No. 73–1148 is affirmed, and that in No. 73–1500 is reversed.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

TREATY OF FEB. 19, 1867, 15 STAT. 505, AS AMENDED, 15 STAT. 509

Whereas it is understood that a portion of the Sissiton and Warpeton bands of Santee Sioux Indians, numbering from twelve hundred to fifteen hundred persons, not only preserved their obligations to the government of the United States, during and since the outbreak of the Medewakantons and other bands of Sioux in 1862, but

freely perilled their lives during that outbreak to rescue the residents on the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands; and that another portion of said Sissiton and Warpeton bands, numbering from one thousand to twelve hundred persons, who did not participate in the massacre of the whites in 1862, fearing the indiscriminate vengeance of the whites, fled to the great prairies of the northwest, where they still remain; and

Whereas Congress, in confiscating the Sioux annuities and reservations, made no provision for the support of these, the friendly portion of the Sissiton and Warpeton bands, and it is believed [that] they have been suffered to remain homeless wanderers, frequently subject to intense suffering from want of subsistence and clothing to protect them from the rigors of a high northern latitude, although at all times prompt in rendering service when called upon to repel hostile raids and to punish depredations committed by hostile Indians upon the persons and property of the whites; and

Whereas the several subdivisions of the friendly Sissitons and Warpeton bands ask, through their representatives, that their adherence to their former obligations of friendship to the government and people of the United States be recognized, and that provision be made to enable them to return to an agricultural life and be relieved from a dependence upon the chase for a precarious subsistence: therefore,

A treaty has been made and entered into, at Washington city, District of Columbia, this nineteenth day of February, A. D. 1867, by and between Lewis V. Bogy, Commissioner of Indian Affairs, and William H. Watson, commissioners, on the part of the United States, and the undersigned chiefs and headmen of the Sissiton and

Warpeton bands of Dakota or Sioux Indians, as follows, to wit:

ARTICLE I. The Sissiton and Warpeton bands of Dakota Sioux Indians, represented in council, will continue their friendly relations with the government and people of the United States, and bind themselves individually and collectively to use their influence to the extent of their ability to prevent other bands of Dakota or other adjacent tribes from making hostile demonstrations against the government or people of the United States.

ARTICLE II. The said bands hereby cede to the United States the right to construct wagon roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the government may require, over and across the lands claimed by said bands (including their reservation as hereinafter designated) over any route or routes that *that* may be selected by authority of the government, said lands so claimed being bounded on the south and east by the treaty line of 1851 and the Red river of the North to the mouth of Goose river, on the north by the Goose river and a line running from the source thereof by the most westerly point of Devil's lake to the Chief's Bluff at the head of James river, and on the west by the James river to the mouth of Mocasin river, and thence to Kampeska lake.

ARTICLE III. For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the friendly bands of Sissitons and Warpetons Sioux here represented, and also in consideration of the confiscation of all their annuities, reservations, and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered to the authorities of the government, and were not sent to the Crow Creek reservation, and for the members of said

bands who were released from prison in 1866, the following described lands as a permanent reservation, viz.:

Beginning at the head of Lake Travers[e], and thence along the treaty line of the treaty of 1851 to Kampeska lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty line of 1851 to the place of beginning.

ARTICLE IV. It is further agreed that a reservation be set apart for all other members of said bands who were not sent to the Crow Creek reservation, and also for the Cut head bands of Yanktonais Sioux, a reservation bounded as follows, viz.:

Beginning at the most easterly point of Devil's lake; thence along the waters of said lake to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne river; thence down said river to a point opposite the lower end of Aspen island, and thence on a direct line to the place of beginning.

ARTICLE V. The said reservations shall be apportioned in tracts of (160) one hundred and sixty acres to each head of a family, or single person over the age of (21) twenty-one years, belonging to said bands, and entitled to locate thereon, who may desire to locate permanently and cultivate the soil as a means of subsistence: each (160) one hundred and sixty acres so allotted to be made to conform to the legal subdivisions of the government surveys, when such surveys shall have been made; and every person to whom lands may be allotted under the provisions of this article who shall occupy and cultivate a portion thereof for five consecutive years shall thereafter be entitled to receive a patent for the same so soon as he shall have fifty acres of said tract fenced, ploughed, and in crop: *Provided,* [That] said patent shall not authorize

any transfer of said lands, or portions thereof, except to the United States, but said lands and the improvements thereon shall descend to the proper heirs of the persons obtaining a patent.

ARTICLE VI. And, further, in consideration of the destitution of said bands of Sissiton and Warpeton Sioux, parties hereto, resulting from the confiscation of their annuities and improvements, it is agreed that Congress will, in its own discretion, from time to time make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life under the system in operation on the Sioux reservation in 1862; including, if thought advisable, the establishment and support of local and manual labor schools; the employment of agricultural, mechanical, and other teachers; the opening and improvement of individual farms; and generally such objects as Congress in its wisdom shall deem necessary to promote the agricultural improvement and civilization of said bands.

ARTICLE VII. An agent shall be appointed for said bands, who shall be located at Lake Traverse; and whenever there shall be five hundred (500) persons of said bands permanently located upon the Devil's Lake reservation there shall be an agent or other competent person appointed to superintend at that place the agricultural, educational, and mechanical interests of said bands.

ARTICLE VIII. All expenditures under the provisions of this treaty shall be made for the agricultural improvement and civilization of the members of said bands authorized to locate upon the respective reservations, as hereinbefore specified, in such manner as may be directed by law; but no goods, provisions, groceries, or other articles—except materials for the erection of houses and articles to facilitate the operations of agriculture—shall be issued to Indians or mixed-bloods on either reservation

unless it be in payment for labor performed or for produce delivered: *Provided,* That, when persons located on either reservation, by reason of age, sickness, or deformity, are unable to labor, the agent may issue clothing and subsistence to such persons from such supplies as may be provided for said bands.

ARTICLE IX. The withdrawal of the Indians from all dependence upon the chase as a means of subsistence being necessary to the adoption of civilized habits among them, it is desirable that no encouragement be afforded them to continue their hunting operations as means of support, and, therefore, it is agreed that no person will be authorized to trade for furs or peltries within the limits of the land claimed by said bands, as specified in the second article of this treaty, it being contemplated that the Indians will rely solely upon agricultural and mechanical labor for subsistence, and that the agent will supply the Indians and mixed-bloods on the respective reservations with clothing, provisions, &c., as set forth in article eight, so soon as the same shall be provided for that purpose. And it is further agreed that no person not a member of said bands, parties hereto whether white, mixed-blood, or Indian, except persons in the employ of the government or located under its authority, shall be permitted to locate upon said lands, either for hunting, trapping, or agricultural purposes.

ARTICLE X. The chiefs and headmen located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the government, to organize a force sufficient to carry out all such rules, regulations, or

laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: *Provided,* That all rules, regulations, or laws adopted or amended by the chiefs and headmen on either reservation shall receive the sanction of the agent.

APPENDIX B TO OPINION OF THE COURT

AGREEMENT OF 1889, RATIFIED BY THE ACT OF MAR. 3, 1891, 26 STAT. 1035

Whereas, by section five of the act of Congress entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, it is provided "That at any time after lands have been allotted to all the Indian of any tribe, as herein provided, or sooner," if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by the said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservations not allotted as such tribe shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress; and the form and manner of executing such release shall also be prescribed by Congress.

Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of a portion of the land set apart and reserved to them by the third article of the treaty of February nineteenth, eighteen hundred and sixty-seven, between them and the United States,

and situated partly in the State of North Dakota and partly in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress approved February eighth, eighteen hundred and eighty-seven, aforesaid, at the Sisseton Agency, South Dakota, on this the twelfth day of December, eighteen hundred and eighty-nine, by and between Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, on the part of the United States, duly authorized and empowered thereto, and the chiefs, head-men, and male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, witnesseth:

ARTICLE I.

The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of two dollars and fifty cents per acre for each and every acre thereof, and it is agreed by the parties hereto that the sum so to be paid shall be held in the Treasury of the United States for the sole use and benefit of the said bands of Indians; and the same, with interest thereon at three per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of the said bands of Indians, or members thereof,

as provided in section five of an act of Congress, approved February eighth, eighteen hundred and eighty-seven, and entitled "An act to provided for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes:" *Provided,* That any religious society or other organization now occupying, under proper authority, for religious or educational work among the Indians, any of the land in this agreement ceded, sold, relinquished, and conveyed shall have the right, for two years from the date of the ratification of this instrument, within which to purchase the lands so occupied at a price to be fixed by the Congress of the United States: *Provided further,* That the cession, sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement.

ARTICLE III.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been

wrongfully and unjustly deprived by the operation of the provisions of an act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians"; said sum being at the rate of eighteen thousand four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty-eight less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July, eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, aforesaid; and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

ARTICLE IV.

It is further stipulated and agreed that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with

the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual, the object of this article being to equalize the allotments among the members of said bands, so that each individual, including married women, shall have one hundred and sixty acres of land; and patents shall issue for the lands allotted in pursuance of the provisions of this article, upon the same terms and conditions and limitations as is provided in section five of the act of Congress, approved February eighth, eighteen hundred and eighty-seven, hereinbefore referred to.

ARTICLE V.

The agreement concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, eighteen hundred and eighty-four, granting a right of way through their reservation for the Chicago, Milwaukee and Saint Paul Railway, is hereby accepted, ratified and confirmed.

ARTICLE VI.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ELIPHALET WHITTLESEY,
D. W. DIGGS,
CHAS. A. MAXWELL,
On the part of the United States.

The foregoing articles of agreement having been fully explained to us, in open council, we, the undersigned, being male adult members of the Sisseton and Wahpeton

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bands of Dakota or Sioux Indians, do hereby consent and agree to all the stipulations, conditions, and provisions therein contained.

Simon Ananangmari (his x mark), and others

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

In my view South Dakota has no jurisdiction over either the civil suit in the first of these two cases or the criminal prosecutions involved in the second. The so-called jurisdictional acts took place in "Indian country" over which the federal regime has exclusive jurisdiction until and unless the United States relinquishes it, and that has not been done here. Here, as in *United States* v. *Mazurie,* 419 U. S. 544 (1975), the acts were done within "Indian country" as defined in 18 U. S. C. § 1151, for they occurred on land "within the limits of" an Indian reservation "notwithstanding the issuance of any patent . . . ."

Petitioner DeCoteau is an enrolled member of the Sisseton-Wahpeton Sioux Tribe against whom South Dakota brought dependency and neglect proceedings in the state courts, seeking to terminate her parental authority over her minor children, also enrolled members of the tribe. The parties stipulated that all of the facts relevant to the court's order took place on the Lake Traverse Reservation which was established under the Treaty of February 19, 1867, 15 Stat. 505. Approximately half of the incidents involved occurred on allotted Indian land, and half occurred on land patented to non-Indians. The South Dakota Supreme Court ruled that since some of the incidents pertaining to dependency and neglect occurred on nontrust land within the reservation, they happened on land in "non-Indian country." 87 S. D. 555, 561, 211 N. W. 2d 843, 846 (1973).

Petitioner Erickson is the warden of a South Dakota penitentiary having in custody the 10 respondents in No. 73–1500. They are all members of the Sisseton-Wahpeton Tribe, and their crimes were committed within the boundaries of the Lake Traverse Reservation but on land owned by non-Indians. The Court of Appeals, ruling on petitions for habeas corpus, held that South Dakota had no jurisdiction to try respondents, 489 F. 2d 99 (CA8 1973).

The Treaty of Feb. 19, 1867, granted these Indians a permanent reservation with defined boundaries and the right to make their own laws and be governed by them subject to federal supervision, 15 Stat. 505, as amended. No more is asked here; and it must be conceded that the jurisdictional acts took place within the contours of that reservation.

In 1889 these Indians and three commissioners entered into an Agreement that, to furnish the Indians the wherewithal to survive, some of their lands would be opened for settlement. S. Exec. Doc. No. 66, 51st Cong., 1st Sess., 19 (1890). That Agreement was the occasion for the Act of Mar. 3, 1891, 26 Stat. 1035. The 1891 Act sets forth the entire Agreement, which Agreement was made under the authority of the General Allotment Act of Feb. 18, 1887, 24 Stat. 388, authorizing the Secretary of the Interior, if the President approves, to negotiate with an Indian tribe for the acquisition by the United States of such portions of its lands which the tribe consents to sell on terms "considered just and equitable." § 5, 24 Stat. 389. The Indians undertook to sell all their claim "to all the unallotted lands within the limits of the reservation." 26 Stat. 1036. There is not a word to suggest that the boundaries of the reservation were altered. The proceeds of sale were to be used "for the education and civilization" of these Indians. § 27, 26 Stat. 1039. The

lands allotted were not for the general use of the United States but with the exception of school lands [1] were to be "subject only to entry and settlement under the homestead and townsite laws" as provided in § 30 of the Act. 26 Stat. 1039. The purpose was not to alter or change the reservation but to lure white settlers onto the reservation whose habits of work and leanings toward education would invigorate life on the reservation.[2]

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[1] See 35 Cong. Rec. 3187, where Senator Gamble stated:

"Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain. This would withdraw about 29,000 acres of these lands and would leave 387,000 acres to be opened to settlement, and which would be affected by the proposed amendment."

See also 38 Cong. Rec. 1423, where Congressman Burke said:

"I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, and it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain. That enabling act was passed by Congress on the 22d day of February, 1889. In March of that same year Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or eleven millions of acres of land, and made an express appropriation, in accordance with the provisions of the enabling act, to pay outright out of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the treaty."

[2] A member of the Commission negotiating with the Indians stated:

"This reservation will be quickly settled by whites, bringing the arts of civilization, establishing schools in every township, so that you can send your children to school . . . . Another advantage is, that the whites will exchange work with you. This will enable you to

While doubtful clauses in agreements with Indians are resolved in favor of the Indians, see *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89 (1918), there is no doubtful language in the Agreement or in the 1891 Act. We recently stated in *Mattz* v. *Arnett,* 412 U. S. 481, 504 n. 22 (1973), that Congress uses "clear language of express termination" to disestablish and diminish a reservation and restore it to the public domain "when that result is desired." Congress in the very Act that opened the instant reservation opened several other reservations also. But as respects them it used different language. In contrast to the instant reservation, one other tribe agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to" a described tract.[3] Another agreed to "cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation" all their claim, title, and interest in a described tract.[4] Another agreed to "cede, sell, and relinquish to the United States all their right, title, and interest in and to all that portion" of a named reservation as specifically described.[5] Another agreed to sell to the United States "all that portion" of the reservation described by metes and bounds.[6]

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cultivate 50 acres where you now cultivate 10. There are other advantages which I have not mentioned. One is you will have towns and railroads and good markets near you. All this will make your lands more valuable. . . . You hitch the two together and the white man and the Indian will pull together." S. Exec. Doc. No. 66, 51st Cong., 1st Sess., 24 (1890).

[3] Citizen Band of Pottawatomie Indians, Act of Mar. 3, 1891, 26 Stat. 1016.

[4] Cheyenne and Arapahoe Indians, Act of Mar. 3, 1891, 26 Stat. 1022.

[5] Arickaree, Gros Ventre, and Mandan Indians, Act of Mar. 3, 1891, 26 Stat. 1032.

[6] Crow Indians, Act of Mar. 3, 1891, 26 Stat. 1040.

Congress made an unmistakable change when it came to the lands ceded in the instant case.

The dimensions of the tragedy inflicted by today's decision are made apparent by the facts pertaining to the management of this reservation.

This tribe is a self-governing political community, a status which is not lightly impaired, *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 168 (1973); *Williams* v. *Lee,* 358 U. S. 217, 220 (1959). The South Dakota decision limits tribal jurisdiction to the "closed" portion of the reservation. That tears the reservation asunder. The only provision of the 1891 Act which extends state jurisdiction into the reservation is a clause in § 30 which exempts sections 16 and 36 and reserves them "for common school purposes," and makes them "subject to the laws of the State wherein located." That language was deemed necessary because the South Dakota Enabling Act did not reserve the 16th and 36th sections in Indian reservations for school purposes; hence this special provision had to be made.[7]

Today only a small percentage of the members of the tribe live on the "closed" part of the reservation. The office of the local Bureau of Indian Affairs is at Sisseton which is not in the "closed" reservation. Federal services to members of the tribe extend to those residing on land opened to settlement as well as to those on trust allotments. The United States supports a tribal government to make and enforce laws throughout the land within the exterior boundaries of the reservation. The attitude of Congress, of the Department of the Interior (under which the Bureau of Indian Affairs functions), and of the tribe is that the jurisdiction of the tribe extends throughout the territory of the reservation as described in the Treaty. A

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

tribal constitution approved August 26, 1966, perpetuates that concept:

> "The jurisdiction of the Sisseton-Wahpeton Sioux Tribe shall extend to lands lying in the territory within the original confines of the Lake Traverse Reservation as described in Article III of the Treaty of February 19, 1867."

The Code of the tribe asserts a jurisdiction over the same domain:

> "The [Sisseton-Wahpeton Sioux Tribal] Court shall have a civil and criminal jurisdiction within the boundaries of the Sisseton-Wahpeton Indian Reservation as defined in the Treaty of February 19, 1867 including trust and non-trust lands, all roads, waters, bridges, and lands used for Federal purposes."

The tribe has a police force and a court. The tribe provides rental housing of 240 units. It provides fire protection. It is the major employer. It operates the only garbage collection and disposal. It is the major governmental entity within the reservation boundaries, servicing Indians [8] and non-Indians.

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[8] The *DeCoteau* case involves a problem of domestic relations which goes to the heart of tribal self-government. The question of a child's welfare cannot be decided without reference to his family structure. This involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture. The tribe is fearful that if South Dakota has jurisdiction over tribal children it will place them with non-Indian families where they will lose their cultural identity. Accordingly the tribe on July 6, 1972, passed the following resolution:

"WHEREAS, The Sisseton-Wahpeton Sioux Tribe is interested in the well-being of all the enrolled members of the tribe and

"WHEREAS, Minor children of Sisseton-Wahpeton descent have been placed in non-Indian foster and adoptive homes all over the United States.

"WHEREAS, The tribal council is in the process of researching

If this were a case where a Mason-Dixon type of line had been drawn separating the land opened for homesteading from that retained by the Indians, it might well be argued that the reservation had been diminished; but that is not the pattern that took place after 1891. Units of land suitable for homesteaders were scattered throughout the reservation. It is indeed difficult, looking at a current map, to find any substantial unit of contiguous Indian land left. The map picture, as stated in oral argument, shows a "crazy quilt pattern." The "crazy quilt" or "checkerboard" jurisdiction defeats the right of tribal self-government guaranteed by Art. X of the 1867 Treaty, 15 Stat. 510, and never abrogated.

In *Seymour* v. *Superintendent*, 368 U. S. 351, 358 (1962), we were invited to make a like construction of "Indian country" as used in 18 U. S. C. § 1151. We rejected that offer saying:

> "[W]here the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find

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the sovereign status of the tribal entity in respect to its jurisdiction as stated in the constitution of the Sisseton-Wahpeton Sioux Tribe, and,

"WHEREAS, It is the intent of the Sisseton-Wahpeton Sioux Tribe to establish its own method of social and economic development and well-being of the enrolled members, and,

"WHEREAS, It is the strong feeling of the tribal council to 'make every stand possible to keep these children on the reservation' (minutes of June 6th council meeting) and 'the tribal council would like these children to be placed in an Indian licensed home until an Indian home can be found for them to be adopted.'

"THEREFORE, BE IT RESOLVED, that Mr. Bert Hirsch, legal counsel from the Association of American Indian Affairs, will stand on these grounds in his argument in Roberts County Court on July 7, 1972 and future cases of this nature."

it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid."

This case involves jurisdiction over Indians—not non-Indians as in *United States* v. *Mazurie,* 419 U. S. 544 (1975)—within the boundaries of the reservation. If South Dakota has its way, the Federal Government and the tribal government have no jurisdiction when an act takes place in a homesteaded spot in the checkerboard; and South Dakota has no say over acts committed on "trust" lands. But where in fact did the jurisdictional act occur? Jurisdiction dependent on the "tract book" promises to be uncertain and hectic. Many acts are ambulatory. In a given case, who will move—the State, the tribe, or the Federal Government? The contest promises to be unseemly, the only beneficiaries being those who benefit from confusion and uncertainty. Without state interference, Indians violating the law within the reservation would be subject only to tribal jurisdiction, which puts the responsibility where the Federal Government can supervise it. Checkerboard jurisdiction cripples the United States in fulfilling its fiduciary responsibilities of guardianship and protection of Indians. It is the end of tribal authority for it introduces such an element of uncertainty as to what agency has jurisdiction as to make modest tribal leaders abdicate and aggressive ones undertake the losing battle against superior state authority. As Mr. Justice Miller stated nearly 100 years ago concerning the

importance of exclusive federal jurisdiction over acts committed by Indians within the boundaries of a reservation: "They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States* v. *Kagama,* 118 U. S. 375, 384 (1886).

Syllabus

COX BROADCASTING CORP. ET AL. *v.* COHN

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 73–938. Argued November 11, 1974—Decided March 3, 1975

Appellant reporter, employed by a television station owned by appellant broadcasting company, during a news report of a rape case, broadcast the deceased rape victim's name, which he had obtained from the indictments, which were public records available for inspection. The victim's father, appellee, brought a damages action against appellants in reliance on a Georgia statute making it a misdemeanor to broadcast a rape victim's name, claiming that his right to privacy had been invaded by the broadcast of his daughter's name. The trial court, rejecting appellants' claims that the broadcast was privileged under the First and Fourteenth Amendments, held that the Georgia statute gave a civil remedy to those injured by its violation and granted summary judgment for appellee. On appeal, the Georgia Supreme Court initially held that, while the trial court erred in construing the Georgia statute to extend a cause of action for invasion of privacy, the complaint stated a cause of action for common-law invasion of privacy, and that the First and Fourteenth Amendments did not, as a matter of law, require judgment for appellants. On a motion for rehearing appellants contended that a rape victim's name was a matter of public interest and hence could be published with impunity, but the Supreme Court denied the motion on the ground that the statute declared a state policy that a rape victim's name was not a matter of public concern, and sustained the statute as a legitimate limitation on the First Amendment's freedom of expression. *Held:*

1. This Court has jurisdiction over the appeal under 28 U. S. C. § 1257 (2). Pp. 476–487.

(a) The constitutionality of the Georgia statute was "drawn in question" within the meaning of § 1257 (2), since, when the Georgia Supreme Court relied upon it as a declaration of state public policy, the statute was drawn in question in a manner directly bearing upon the merits of the action, and the decision upholding its constitutional validity invokes this Court's appellate jurisdiction. P. 476.

(b) The Georgia Supreme Court's decision is a "final judgment or decree" within the meaning of § 1257. It was plainly final on the federal issue of whether the broadcasts were privileged

under the First and Fourteenth Amendments and is not subject to further review in the state courts; and appellants would be liable for damages if the elements of the state cause of action were proved. Moreover, since the litigation could be terminated by this Court's decision on the merits and a failure to decide the free speech question now will leave the Georgia press operating in the shadow of civil and criminal sanctions of a rule of law and statute whose constitutionality is in serious doubt, this Court's reaching the merits comports with its past pragmatic approach in determining finality. Pp. 476–487.

2. The State may not, consistently with the First and Fourteenth Amendments, impose sanctions on the accurate publication of a rape victim's name obtained from judicial records that are maintained in connection with a public prosecution and that themselves are open to public inspection. Here, under circumstances where appellant reporter based his televised report upon notes taken during court proceedings and obtained the rape victim's name from official court documents open to public inspection, the protection of freedom of the press provided by the First and Fourteenth Amendments bars Georgia from making appellants' broadcast the basis of civil liability in a cause of action for invasion of privacy that penalizes pure expression—the content of a publication. Pp. 487–497.

(a) The commission of a crime, prosecutions resulting therefrom, and judicial proceedings arising from the prosecutions are events of legitimate concern to the public and consequently fall within the press' responsibility to report the operations of government. Pp. 492–493.

(b) The interests of privacy fade when the information involved already appears on public record, especially when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press. Pp. 493–495.

231 Ga. 60, 200 S. E. 2d 127, reversed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 497. BURGER, C. J., concurred in the judgment. DOUGLAS, J., filed an opinion concurring in the judgment, *post*, p. 500. REHNQUIST, J., filed a dissenting opinion, *post*, p. 501.

Kirk M. McAlpin argued the cause for appellants. With him on the briefs was *Joseph R. Bankoff*.

Stephen A. Land argued the cause and filed briefs for appellee.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue before us in this case is whether, consistently with the First and Fourteenth Amendments, a State may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime.

I

In August 1971, appellee's 17-year-old daughter was the victim of a rape and did not survive the incident. Six youths were soon indicted for murder and rape. Although there was substantial press coverage of the crime and of subsequent developments, the identity of the victim was not disclosed pending trial, perhaps because of Ga. Code Ann. § 26–9901 (1972),[1] which makes

*Briefs of *amici curiae* were filed by *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, and *Don A. Langham* and *Alfred L. Evans, Jr.*, Assistant Attorneys General, for the State of Georgia, and by *David L. Freeman* and *Alfred F. Burgess* for Multimedia, Inc.

[1] "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

Three other States have similar statutes. See Fla. Stat. Ann. §§ 794.03, 794.04 (1965 and Supp. 1974–1975); S. C. Code Ann.

it a misdemeanor to publish or broadcast the name or identity of a rape victim. In April 1972, some eight months later, the six defendants appeared in court. Five pleaded guilty to rape or attempted rape, the charge of murder having been dropped. The guilty pleas were accepted by the court, and the trial of the defendant pleading not guilty was set for a later date.

In the course of the proceedings that day, appellant Wassell,[2] a reporter covering the incident for his employer, learned the name of the victim from an examination of the indictments which were made available for his inspection in the courtroom.[3] That the name of the

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§ 16–81 (1962); Wis. Stat. Ann. § 942.02 (1958). The Wisconsin Supreme Court upheld the constitutionality of a predecessor of § 942.02 in *State* v. *Evjue*, 253 Wis. 146, 33 N. W. 2d 305 (1948). The South Carolina statute was involved in *Nappier* v. *Jefferson Standard Life Insurance Co.*, 322 F. 2d 502, 505 (CA4 1963), but no constitutional challenge to the statute was made. In *Hunter* v. *Washington Post*, 102 Daily Washington L. Rptr. 1561 (1974), the District of Columbia Superior Court denied the defendant's motion for judgment on the pleadings based upon constitutional grounds in an action brought for invasion of privacy resulting from the defendant's publication identifying the plaintiff as a rape victim and giving her name, age, and address.

[2] Wassell was employed at the time in question as a news staff reporter for WSB–TV and had been so employed for the prior nine years. His function was to investigate newsworthy stories and make televised news reports. He was assigned the coverage of the trial of the young men accused of the rape and murder of Cynthia Cohn on the morning of April 10, 1972, the day it began, and had not been involved with the story previously. He was present during the entire hearing that day except for the first 30 minutes. App. 16–17.

[3] Wassell has described the way in which he obtained the information reported in the broadcast as follows:

"The information on which I prepared the said report was obtained from several sources. First, by personally attending and taking notes of the said trial and the subsequent transfer of four of the six

victim appears in the indictments and that the indictments were public records available for inspection are not disputed.[4] Later that day, Wassell broadcast over the facilities of station WSB–TV, a television station owned by appellant Cox Broadcasting Corp., a news report con-

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defendants to the Fulton County Jail, I obtained personal knowledge of the events that transpired during the trial of this action and the said transfer of the defendants. Such personal observations and notes were the primary and almost exclusive source of the information upon which the said news report was based. Secondly, during a recess of the said trial, I approached the clerk of the court, who was sitting directly in front of the bench, and requested to see a copy of the indictments. In open court, I was handed the indictments, both the murder and the rape indictments, and was allowed to examine fully this document. As is shown by the said indictments . . . the name of the said Cynthia Cohn appears in clear type. Moreover, no attempt was made by the clerk or anyone else to withhold the name and identity of the victim from me or from anyone else and the said indictments apparently were available for public inspection upon request." *Id.*, at 17–18.

[4] The indictments are in pertinent part as follows:

"THE GRAND JURORS selected, chosen and sworn for the County of Fulton . . . in the name and behalf of the citizens of Georgia, charge and accuse [the defendants] with the offense of:—

"RAPE

"for that said accused, in the County of Fulton and State of Georgia, on the 18th day of August, 1971 did have carnal knowledge of the person of Cynthia Leslie Cohn, a female, forcibly and against her will . . . ." *Id.*, at 22–23.

"THE GRAND JURORS selected, chosen and sworn for the County of Fulton . . . in the name and behalf of the citizens of Georgia, charge and accuse [the defendants] with the offense of:—

"MURDER

"for that said accused, in the County of Fulton and State of Georgia, on the 18th day of August, 1971 did while in the commission of the offense of Rape, a felony, upon the person of Cynthia Leslie Cohn, a female human being, cause her death by causing her to suffocate . . . ." *Id.*, at 24–25.

cerning the court proceedings. The report named the victim of the crime and was repeated the following day.[5]

In May 1972, appellee brought an action for money damages against appellants, relying on § 26–9901 and claiming that his right to privacy had been invaded by the television broadcasts giving the name of his deceased daughter. Appellants admitted the broadcasts but claimed that they were privileged under both state law and the First and Fourteenth Amendments. The trial court, rejecting appellants' constitutional claims and holding that the Georgia statute gave a civil remedy to those injured by its violation, granted summary judgment to appellee as to liability, with the determination of damages to await trial by jury.

On appeal, the Georgia Supreme Court, in its initial opinion, held that the trial court had erred in construing § 26–9901 to extend a civil cause of action for invasion of privacy and thus found it unnecessary to consider the constitutionality of the statute. 231 Ga. 60, 200 S. E. 2d 127 (1973). The court went on to rule, however, that the complaint stated a cause of action "for the invasion of the appellee's right of privacy, or for the tort of public disclosure"—a "common law tort exist[ing] in this jurisdiction without the help of the statute that the trial judge in this case relied on." *Id.*, at 62, 200 S. E. 2d, at 130. Although the privacy invaded was not that of the deceased victim, the father was held to have stated a

[5] The relevant portion of the transcript of the televised report reads as follows:

"Six youths went on trial today for the murder-rape of a teenaged girl.

"The six Sandy Springs High School boys were charged with murder and rape in the death of seventeen year old Cynthia Cohn following a drinking party last August 18th.

"The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court." App. 19–20.

claim for invasion of his own privacy by reason of the publication of his daughter's name. The court explained, however, that liability did not follow as a matter of law and that summary judgment was improper; whether the public disclosure of the name actually invaded appellee's "zone of privacy," and if so, to what extent, were issues to be determined by the trier of fact. Also, "in formulating such an issue for determination by the fact-finder, it is reasonable to require the appellee to prove that the appellants invaded his privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." *Id.*, at 64, 200 S. E. 2d, at 131. The Georgia Supreme Court did agree with the trial court, however, that the First and Fourteenth Amendments did not, as a matter of law, require judgment for appellants. The court concurred with the statement in *Briscoe* v. *Reader's Digest Assn., Inc.*, 4 Cal. 3d 529, 541, 483 P. 2d 34, 42 (1971), that "the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other."

Upon motion for rehearing the Georgia court countered the argument that the victim's name was a matter of public interest and could be published with impunity by relying on § 26–9901 as an authoritative declaration of state policy that the name of a rape victim was not a matter of public concern. This time the court felt compelled to determine the constitutionality of the statute and sustained it as a "legitimate limitation on the right of freedom of expression contained in the First Amendment." The court could discern "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection." 231 Ga., at 68, 200 S. E. 2d, at 134.

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We postponed decision as to our jurisdiction over this appeal to the hearing on the merits. 415 U. S. 912 (1974). We conclude that the Court has jurisdiction, and reverse the judgment of the Georgia Supreme Court.

II

Appellants invoke the appellate jurisdiction of this Court under 28 U. S. C. § 1257 (2) and, if that jurisdictional basis is found to be absent, through a petition for certiorari under 28 U. S. C. § 2103. Two questions concerning our jurisdiction must be resolved: (1) whether the constitutional validity of § 26–9901 was "drawn in question," with the Georgia Supreme Court upholding its validity, and (2) whether the decision from which this appeal has been taken is a "[f]inal judgment or decree."

A

Appellants clearly raised the issue of the constitutionality of § 26–9901 in their motion for rehearing in the Georgia Supreme Court. In denying that motion that court held: "A majority of this court does not consider this statute to be in conflict with the First Amendment." 231 Ga., at 68, 200 S. E. 2d, at 134. Since the court relied upon the statute as a declaration of the public policy of Georgia that the disclosure of a rape victim's name was not to be protected expression, the statute was drawn in question in a manner directly bearing upon the merits of the action, and the decision in favor of its constitutional validity invokes this Court's appellate jurisdiction. Cf. *Garrity* v. *New Jersey,* 385 U. S. 493, 495–496 (1967).

B

Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has

rendered a "[f]inal judgment or decree." Title 28 U. S. C. § 1257 retains this limitation on our power to review cases coming from state courts. The Court has noted that "[c]onsiderations of English usage as well as those of judicial policy" would justify an interpretation of the final-judgment rule to preclude review "where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124 (1945). But the Court there observed that the rule had not been administered in such a mechanical fashion and that there were circumstances in which there has been "a departure from this requirement of finality for federal appellate jurisdiction." *Ibid.*

These circumstances were said to be "very few," *ibid.;* but as the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U. S. C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date,[6] and imme-

[6] Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later. "For in those cases the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota*

diate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc.* v. *Johnson, supra,* at 124, as well as precipitate interference with state litigation.[7] In the cases in the first two categories considered below, the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question. In the other two categories, however, the federal issue would be mooted if the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state-court proceedings, but there is neverthe-

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State Board of Pharmacy v. *Snyder's Drug Stores, Inc.,* 414 U. S. 156, 163 (1973). See also *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 256 (1917); *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 127 (1945).

[7] *Gillespie* v. *United States Steel Corp.,* 379 U. S. 148 (1964), arose in the federal courts and involved the requirement of 28 U. S. C. § 1291 that judgments of district courts be final if they are to be appealed to the courts of appeals. In the course of deciding that the judgment of the District Court in the case had been final, the Court indicated its approach to finality requirements:

"And our cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' *Cohen* v. *Beneficial Industrial Loan Corp.,* [337 U. S. 541, 546]. See also *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 306; *Bronson* v. *Railroad Co.,* 2 Black 524, 531; *Forgay* v. *Conrad,* 6 How. 201, 203. *Dickinson* v. *Petroleum Conversion Corp.,* 338 U. S. 507, 511, pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" 379 U. S., at 152–153.

less sufficient justification for immediate review of the federal question finally determined in the state courts.

In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final. In *Mills* v. *Alabama,* 384 U. S. 214 (1966), for example, a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The State Supreme Court reversed, remanding for jury trial. This Court took jurisdiction on the reasoning that the appellant had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground. To dismiss the appeal "would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.,* at 217–218 (footnote omitted).[8]

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[8] Other cases from state courts where this Court's jurisdiction was sustained for similar reasons include: *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 418 n. (1971); *Construction Laborers* v. *Curry,* 371 U. S. 542, 550–551 (1963); *Pope* v. *Atlantic C. L. R. Co.,* 345 U. S. 379, 382 (1953); *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 73–74 (1946). In the *Richfield* case the Court said with respect to finality:

"The designation given the judgment by state practice is not controlling. *Department of Banking* v. *Pink,* 317 U. S. 264, 268. The question is whether it can be said that 'there is nothing more to be decided' (*Clark* v. *Williard,* 292 U. S. 112, 118), that there has been 'an effective determination of the litigation.' *Market Street Ry. Co.* v. *Railroad Commission,* 324 U. S. 548, 551; see *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 123–124. That question will be

Second, there are cases such as *Radio Station WOW, supra,* and *Brady* v. *Maryland,* 373 U. S. 83 (1963), in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings. In *Radio Station WOW,* the Nebraska Supreme Court directed the transfer of the properties of a federally licensed radio station and ordered an accounting, rejecting the claim that the transfer order would interfere with the federal license. The federal issue was held reviewable here despite the pending accounting on the "presupposition . . . that the federal questions that could come here have been adjudicated by the State court, and that the accounting which remains to be taken could not remotely give rise to a federal question . . . that may later come here . . . ." 326 U. S., at 127. The judgment rejecting the federal claim and directing the transfer was deemed "dissociated from a provision for an accounting even though that is decreed in the same order." *Id.,* at 126. Nothing that could happen in the course of the accounting, short of settlement of the case, would foreclose or make unnecessary decision on the federal question. Older cases in the Court had reached the same result on similar facts. *Carondelet Canal & Nav. Co.* v. *Louisiana,* 233 U. S. 362 (1914); *Forgay* v. *Conrad,* 6 How. 201 (1848). In the latter case, the Court, in an opinion by Mr. Chief Justice Taney, stated that the Court had not understood the final-judgment rule "in this strict and technical sense, but has given [it] a more liberal, and, as we think, a more reasonable construction,

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resolved not only by an examination of the entire record (*Clark* v. *Williard, supra*) but, where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice." *Id.,* at 72.

and one more consonant to the intention of the legislature." *Id.*, at 203.[9]

In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review. The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts. *California* v. *Stewart,* 384 U. S. 436 (1966) (decided with *Miranda* v. *Arizona*), epitomizes this category. There the state court reversed a conviction on federal constitutional grounds and remanded for a new trial. Although the State might have prevailed at trial, we granted its petition for certiorari and affirmed, explaining that the state judgment was "final" since an acquittal of the defendant at trial would preclude, under state law, an appeal by the State. *Id.*, at 498 n. 71.

A recent decision in this category is *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156 (1973), in which the Pharmacy Board rejected an application for a pharmacy operating permit relying on a state statute specifying ownership requirements which the applicant did not meet. The State Supreme

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[9] In *Brady* v. *Maryland,* 373 U. S. 83 (1963), the Maryland courts had ordered a new trial in a criminal case but on punishment only, and the petitioner asserted here that he was entitled to a new trial on guilt as well. We entertained the case, saying that the federal issue was separable and would not be mooted by the new trial on punishment ordered in the state courts. *Id.*, at 85 n. 1.

Court held the statute unconstitutional and remanded the matter to the Board for further consideration of the application, freed from the constraints of the ownership statute. The Board brought the case here, claiming that the statute was constitutionally acceptable under modern cases. After reviewing the various circumstances under which the finality requirement has been deemed satisfied despite the fact that litigation had not terminated in the state courts, we entertained the case over claims that we had no jurisdiction. The federal issue would not survive the remand, whatever the result of the state administrative proceedings. The Board might deny the license on state-law grounds, thus foreclosing the federal issue, and the Court also ascertained that under state law the Board could not bring the federal issue here in the event the applicant satisfied the requirements of state law except for the invalidated ownership statute. Under these circumstances, the issue was ripe for review.[10]

Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further

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[10] *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), was a diversity action in the federal courts in the course of which there arose the question of the validity of a state statute requiring plaintiffs in stockholder suits to post security for costs as a prerequisite to bringing the action. The District Court held the state law inapplicable, the Court of Appeals reversed, and this Court, after granting certiorari, held that the issue of security for costs was separable from and independent of the merits and that if review were to be postponed until the termination of the litigation, "it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Id.*, at 546.

litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

In *Construction Laborers* v. *Curry,* 371 U. S. 542 (1963), the state courts temporarily enjoined labor union picketing over claims that the National Labor Relations Board had exclusive jurisdiction of the controversy. The Court took jurisdiction for two independent reasons. First, the power of the state court to proceed in the face of the preemption claim was deemed an issue separable from the merits and ripe for review in this Court, particularly "when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts." *Id.,* at 550. Second, the Court was convinced that in any event the union had no defense to the entry of a permanent injunction other than the preemption claim that had already been ruled on in the state courts. Hence the case was for all practical purposes concluded in the state tribunals.

In *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555 (1963), two national banks were sued, along with others, in the courts of Travis County, Tex. The claim asserted was conspiracy to defraud an insurance company. The banks as a preliminary matter asserted that a special federal venue statute immunized them from suit in Travis County and that they could properly be sued only in another county. Although trial was still to be had and the banks might well prevail on the merits, the Court, relying on *Curry,* entertained the issue as a "sep-

arate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.*, at 558. Moreover, it would serve the policy of the federal statute "to determine now in which state court appellants may be tried rather than to subject them . . . to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Ibid.*

Miami Herald Publishing Co. v. *Tornillo,* 418 U. S. 241 (1974), is the latest case in this category.[11] There a candidate for public office sued a newspaper for refusing, allegedly contrary to a state statute, to carry his reply to the paper's editorial critical of his qualifications. The trial court held the act unconstitutional, denying both injunctive relief and damages. The State Supreme Court reversed, sustaining the statute against the challenge based upon the First and Fourteenth Amendments and remanding the case for a trial and appropriate relief, including damages. The newspaper brought the case here. We sustained our jurisdiction, relying on the principles elaborated in the *North Dakota* case and observing:

"Whichever way we were to decide on the merits, it

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[11] Meanwhile *Hudson Distributors* v. *Eli Lilly,* 377 U. S. 386 (1964), another case of this genre, had been decided. There a retailer sued to invalidate a state fair trade act as inconsistent with the federal antitrust laws and not saved by a federal statute authorizing state fair trade legislation under certain conditions. The defendant manufacturer cross-petitioned for enforcement of the state act against the plaintiff-retailer. The trial court struck down the statute, but a state appellate court reversed and remanded for trial on the cross-petition. The Ohio Supreme Court affirmed that decision. Relying on *Curry* and *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555 (1963), this Court found the state-court judgment to be ripe for review, although the retailer might prevail at the trial. 377 U. S., at 389 n. 4.

> would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of § 104.38 could only further harm the operation of a free press. *Mills* v. *Alabama*, 384 U. S. 214, 221–222 (1966) (DOUGLAS, J., concurring). See also *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 418 n. (1971)." 418 U. S., at 247 n. 6.[12]

In light of the prior cases, we conclude that we have jurisdiction to review the judgment of the Georgia Supreme Court rejecting the challenge under the First and Fourteenth Amendments to the state law authorizing damage suits against the press for publishing the name of a rape victim whose identity is revealed in the course of a public prosecution. The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all. Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final

[12] The import of the Court's holding in *Tornillo* is underlined by its citation of the concurring opinion in *Mills* v. *Alabama*. There, MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BRENNAN, stated that even if the appellant had a defense and might prevail at trial, jurisdiction was properly noted in order to foreclose unwarranted restrictions on the press should the state court's constitutional judgment prove to be in error.

decision of the First Amendment claim until after trial will "leave unanswered . . . an important question of freedom of the press under the First Amendment," "an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." *Tornillo, supra,* at 247 n. 6. On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends. Given these factors—that the litigation could be terminated by our decision on the merits [13] and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

[13] Mr. Justice Rehnquist, *post,* at 507–508, is correct in saying that this factor involves consideration of the merits in determining jurisdiction. But it does so only to the extent of determining that the issue is substantial and only in the context that if the state court's final decision on the federal issue is incorrect, federal law forecloses further proceedings in the state court. That the petitioner who protests against the state court's decision on the federal question might prevail on the merits on nonfederal grounds in the course of further proceedings anticipated in the state court and hence obviate later review of the federal issue here is not preclusive of our jurisdiction. *Curry, Langdeau, North Dakota State Board of Pharmacy, California* v. *Stewart,* 384 U. S. 436 (1966) (decided with *Miranda* v. *Arizona*), and *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974), make this clear. In those cases, the federal issue having been decided, arguably wrongly, and being determinative of the litigation if decided the other way, the finality rule was satisfied.

The author of the dissent, a member of the majority in *Tornillo,* does not disavow that decision. He seeks only to distinguish it by indicating that the First Amendment issue at stake there was more important and pressing than the one here. This seems to embrace the thesis of that case and of this one as far as the approach to finality is concerned, even though the merits and the avoidance doctrine are to some extent involved.

See *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148 (1964); *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S., at 124; *Mills* v. *Alabama*, 384 U. S., at 221–222 (DOUGLAS, J., concurring).[14]

III

Georgia stoutly defends both § 26–9901 and the State's common-law privacy action challenged here. Its claims are not without force, for powerful arguments can be made, and have been made, that however it may be ultimately defined, there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.[15] Indeed, the central thesis of the root article by Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890), was that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses.[16]

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[14] In finding that we have appellate jurisdiction, we also take jurisdiction over any aspects of the case which would otherwise fall solely within our certiorari jurisdiction. See *Flournoy* v. *Wiener*, 321 U. S. 253, 263 (1944); *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 547 (1922); cf. *Palmore* v. *United States*, 411 U. S. 389, 397 n. 6 (1973); *Mishkin* v. *New York*, 383 U. S. 502, 512 (1966).

[15] See T. Emerson, The System of Freedom of Expression 544–562 (1970); Konvitz, Privacy and the Law: A Philosophical Prelude, 31 Law & Contemp. Prob. 272 (1966); Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962 (1964).

[16] "Of the desirability—indeed of the necessity—of some such protection [of the right of privacy], there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by

More compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy. In 1967, we noted that "[i]t has been said that a 'right of privacy' has been recognized at common law in 30 States plus the District of Columbia and by statute in four States." *Time, Inc.* v. *Hill,* 385 U. S. 374, 383 n. 7. We there cited the 1964 edition of Prosser's Law of Torts. The 1971 edition of that same source states that "[i]n one form or another, the right of privacy is by this time recognized and accepted in all but a very few jurisdictions." W. Prosser, Law of Torts 804 (4th ed.) (footnote omitted). Nor is it irrelevant

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intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence."

here that the right of privacy is no recent arrival in the jurisprudence of Georgia, which has embraced the right in some form since 1905 when the Georgia Supreme Court decided the leading case of *Pavesich* v. *New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68.

These are impressive credentials for a right of privacy,[17] but we should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph, a physical or other tangible intrusion into a private area, or a publication of otherwise private information that is also false although perhaps not defamatory. The version of the privacy tort now before us—termed in Georgia "the tort of public disclosure," 231 Ga., at 60, 200 S. E. 2d, at 130—is that in which the plaintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities. Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent, and the appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities.

It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; [18] and the message of *New York*

[17] See also *Time, Inc.* v. *Hill*, 385 U. S. 374, 404 (1967) (opinion of Harlan, J.); *id.*, at 412–415 (Fortas, J., dissenting).

[18] See Restatement (Second) of Torts § 582 (Tent. Draft No. 20, Apr. 25, 1974); W. Prosser, Law of Torts § 116 (4th ed. 1971). Under the common law, truth was not a complete defense to prose-

Times Co. v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and like cases is that the defense of truth is constitutionally required where the subject of the publication is a public official or public figure. What is more, the defamed public official or public figure must prove not only that the publication is false but that it was knowingly so or was circulated with reckless disregard for its truth or falsity. Similarly, where the interest at issue is privacy rather than reputation and the right claimed is to be free from the publication of false or misleading information about one's affairs, the target of the publication must prove knowing or reckless falsehood where the materials published, although assertedly private, are "matters of public interest." *Time, Inc.* v. *Hill*, *supra*, at 387–388.[19]

The Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure. *Garrison* held that where criticism is of a public official and his conduct of public business, "the interest in private reputation is over-

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cutions for criminal libel, although it was in civil actions. Several jurisdictions in this country have provided, however, that the defense of truth in civil actions requires a showing that the publication was made for good motives or for justifiable ends. See *id.*, at 796–797.

[19] In another "false light" invasion of privacy case before us this Term, *Cantrell* v. *Forest City Publishing Co.*, 419 U. S. 245, 250–251 (1974), we observed that we had, in that case, "no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc.* v. *Hill* applies to all false-light cases. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323."

borne by the larger public interest, secured by the Constitution, in the dissemination of truth," 379 U. S., at 73 (footnote omitted), but recognized that "different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels." *Id.*, at 72 n. 8. In similar fashion, *Time, Inc.* v. *Hill, supra,* expressly saved the question whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed. 385 U. S., at 383 n. 7.

Those precedents, as well as other considerations, counsel similar caution here. In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society. Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.

In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility

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is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See *Sheppard* v. *Maxwell,* 384 U. S. 333, 350 (1966).

Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized. This Court, in an opinion written by Mr. Justice Douglas, has said:

> "A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.* There is no special perquisite of the judiciary which enables

> it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig* v. *Harney,* 331 U. S. 367, 374 (1947) (emphasis added).

See also *Sheppard* v. *Maxwell, supra,* at 362–363; *Estes* v. *Texas,* 381 U. S. 532, 541–542 (1965); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Bridges* v. *California,* 314 U. S. 252 (1941).

The developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings. The Warren and Brandeis article, *supra,* noted that the proposed new right would be limited in the same manner as actions for libel and slander where such a publication was a privileged communication: "the right to privacy is not invaded by any publication made in a court of justice . . . and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege." [20]

The Restatement of Torts, § 867, embraced an action for privacy.[21] Tentative Draft No. 13 of the Second Restatement of Torts, §§ 652A–652E, divides the privacy tort into four branches; [22] and with respect to the wrong of giving unwanted publicity about private life, the com-

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[20] 4 Harv. L. Rev., at 216–217.

[21] Restatement of Torts § 867 (1939).

[22] Restatement (Second) of Torts §§ 652A–652E (Tent. Draft No. 13, Apr. 27, 1967). The four branches are: unreasonable intrusion upon the seclusion of another (§ 652B), appropriation of the other's name or likeness (§ 652C), unreasonable publicity given to the other's private life (§ 652D), and publicity which unreasonably places the other in a false light before the public (§ 652E). See § 652A. The same categorization is suggested in W. Prosser, Law of Torts § 117 (4th ed. 1971); Prosser, Privacy, 48 Calif. L. Rev. 383 (1960).

mentary to § 652D states: "There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record . . . ." [23] The same is true of the separate tort of physically or otherwise intruding upon the seclusion or private affairs of another. Section 652B, Comment *c*, provides that "there is no liability for the examination of a public record concerning the plaintiff, or of documents which the plaintiff is required to keep and make available for public inspection." [24] According to this draft, ascertaining and publishing the contents of public records are simply not within the reach of these kinds of privacy actions.[25]

Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade

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[23] Restatement (Second) of Torts, *supra*, § 652D, Comment *c*, at 114.

[24] *Id.*, § 652B, Comment *c*, at 104.

[25] See also W. Prosser, Law of Torts, *supra*, at 810–811. For decisions emphasizing as a defense to actions claiming invasion of privacy the fact that the information in question was derived from official records available to the public, see *Hubbard* v. *Journal Publishing Co.*, 69 N. M. 473, 368 P. 2d 147 (1962) (information regarding sexual assault by a boy upon his younger sister derived from official juvenile-court records open to public inspection); *Edmiston* v. *Time, Inc.*, 257 F. Supp. 22 (SDNY 1966) (fair and true report of court opinion); *Bell* v. *Courier-Journal & Louisville Times Co.*, 402 S. W. 2d 84 (Ky. 1966); *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880 (SDNY), aff'd, 386 F. 2d 449 (CA2 1967), cert. denied, 391 U. S. 915 (1968); *Frith* v. *Associated Press*, 176 F. Supp. 671 (EDSC 1959); *Meetze* v. *Associated Press*, 230 S. C. 330, 95 S. E. 2d 606 (1956); *Thompson* v. *Curtis Publishing Co.*, 193 F. 2d 953 (CA3 1952); *Garner* v. *Triangle Publications*, 97 F. Supp. 546 (SDNY 1951); *Berg* v. *Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (Minn. 1948).

when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press. The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition. See *United States* v. *O'Brien,* 391 U. S. 367, 376–377 (1968). The publication of truthful information available on the public record contains none of the indicia of those limited categories of expression, such as "fighting" words, which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942) (footnote omitted).

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.[26] Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast. See *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S., at 258.

Appellant Wassell based his televised report upon notes taken during the court proceedings and obtained the name of the victim from the indictments handed to him at his request during a recess in the hearing. Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection. Under these cir-

[26] We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile-court proceedings.

cumstances, the protection of freedom of the press provided by the First and Fourteenth Amendments bars the State of Georgia from making appellants' broadcast the basis of civil liability.[27]

Reversed.

MR. CHIEF JUSTICE BURGER concurs in the judgment.

MR. JUSTICE POWELL, concurring.

I join in the Court's opinion, as I agree with the holding and most of its supporting rationale.[1] My understanding of some of our decisions concerning the law of defamation, however, differs from that expressed in today's opinion. Accordingly, I think it appropriate to state separately my views.

I am in entire accord with the Court's determination that the First Amendment proscribes imposition of civil liability in a privacy action predicated on the truthful publication of matters contained in open judicial records. But my impression of the role of truth in defamation actions brought by private citizens differs from the Court's. The Court identifies as an "open" question the issue of "whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distin-

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[27] Appellants have contended that whether they derived the information in question from public records or instead through their own investigation, the First and Fourteenth Amendments bar any sanctions from being imposed by the State because of the publication. Because appellants have prevailed on more limited grounds, we need not address this broader challenge to the validity of § 26–9901 and of Georgia's right of action for public disclosure.

[1] At the outset, I note my agreement that *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974), supports the conclusion that the issue presented in this appeal is final for review. 28 U. S. C. § 1257.

guished from a public official or a public figure." *Ante,* at 490. In my view, our recent decision in *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974), largely resolves that issue.

Gertz is the most recent of a line of cases in which this Court has sought to resolve the conflict between the State's desire to protect the reputational interests of its citizens and the competing commands of the First Amendment. In each of the many defamation actions considered in the 10 years following *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), state law provided that truth was a defense to the action.[2] Today's opinion reiterates what we previously have recognized, see *Garrison* v. *Louisiana,* 379 U. S. 64, 74 (1964)—that the defense of truth is constitutionally required when the subject of the alleged defamation is a public figure. *Ante,* at 489–490. Indeed, even if not explicitly recognized, this determination is implicit in the Court's articulation of a standard of recovery that rests on knowing or

[2] In *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967), the Court considered a state cause of action that afforded protection against unwanted publicity rather than damage to reputation through the publication of false statements of fact. In such actions, however, the State also recognized that truth was an absolute defense against liability for publication of reports concerning newsworthy people or events. *Id.,* at 383. The Court's abandonment of the "matter of general or public interest" standard as the determinative factor for deciding whether to apply the *New York Times* malice standard to defamation litigation brought by private individuals, *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 346 (1974); see also *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29, 79 (1971) (MARSHALL, J., dissenting), calls into question the conceptual basis of *Time, Inc.* v. *Hill.* In neither *Gertz* nor our more recent decision in *Cantrell* v. *Forest City Publishing Co.,* 419 U. S. 245 (1974), however, have we been called upon to determine whether a State may constitutionally apply a more relaxed standard of liability under a false-light theory of invasion of privacy. See *id.,* at 250–251; *Gertz, supra,* at 348; *ante,* at 490 n. 19.

reckless disregard of the truth. I think that the constitutional necessity of recognizing a defense of truth is equally implicit in our statement of the permissible standard of liability for the publication or broadcast of defamatory statements whose substance makes apparent the substantial danger of injury to the reputation of a private citizen.

In *Gertz* we held that the First Amendment prohibits the States from imposing strict liability for media publication of allegedly false statements that are claimed to defame a private individual. While providing the required "breathing space" for First Amendment freedoms, the *Gertz* standard affords the States substantial latitude in compensating private individuals for wrongful injury to reputation.[3] "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U. S., at 347. The requirement that the state standard of liability be related to the defendant's failure to avoid publication of "defamatory falsehood" limits the grounds on which a normal action for defamation can be brought. It is fair to say that if the statements are true, the standard contemplated by *Gertz* cannot be satisfied.

In *Gertz* we recognized the need to establish a broad rule of general applicability, acknowledging that such an

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[3] Our recent opinions dealing with First Amendment limitations on state defamation actions all center around the common premise that while the Constitution requires that false ideas be corrected only by the competitive impact of other ideas, the First Amendment affords no constitutional protection for false statements of fact. See *Gertz, supra,* at 339–340. Beginning with this common assumption, the decisions of this Court have undertaken to identify a standard of care with respect to the truth of the published facts that will afford the required "breathing space" for First Amendment values.

approach necessarily requires treating alike cases that involve differences as well as similarities. *Id.*, at 343–344. Of course, no rule of law is infinitely elastic. In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance to be struck. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions. But in cases in which the interests sought to be protected are similar to those considered in *Gertz*, I view that opinion as requiring that the truth be recognized as a complete defense.

MR. JUSTICE DOUGLAS, concurring in the judgment.

I agree that the state judgment is "final," and I also agree in the reversal of the Georgia court.* On the

*While I join in the narrow result reached by the Court, I write separately to emphasize that I would ground that result upon a far broader proposition, namely, that the First Amendment, made applicable to the States through the Fourteenth, prohibits the use of state law "to impose damages for merely discussing public affairs . . . ." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 295 (1964) (Black, J., concurring). See also *Cantrell* v. *Forest City Publishing Co.*, 419 U. S. 245, 254 (1974) (DOUGLAS, J., dissenting); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 355 (1974) (DOUGLAS, J., dissenting); *Time, Inc.* v. *Hill*, 385 U. S. 374, 398 (1967) (Black, J., concurring); *id.*, at 401 (DOUGLAS, J., concurring); *Garrison* v. *Louisiana*, 379 U. S. 64, 80 (1964) (DOUGLAS, J., concurring). In this context, of course, "public affairs" must be broadly construed— indeed, the term may be said to embrace "any matter of sufficient general interest to prompt media coverage . . . ." *Gertz* v. *Robert Welch, Inc., supra*, at 357 n. 6 (DOUGLAS, J., dissenting). By its now-familiar process of balancing and accommodating First Amendment

merits, the case for me is on all fours with *New Jersey State Lottery Comm'n* v. *United States,* 491 F. 2d 219 (CA3 1974), vacated and remanded, *ante,* p. 371. For the reasons I stated in my dissent from our disposition of that case, there is no power on the part of government to suppress or penalize the publication of "news of the day."

MR. JUSTICE REHNQUIST, dissenting.

Because I am of the opinion that the decision which is the subject of this appeal is not a "final" judgment or decree, as that term is used in 28 U. S. C. § 1257, I would dismiss this appeal for want of jurisdiction.

Radio Station WOW, Inc. v. *Johnson,* 326 U. S. 120 (1945), established that in a "very few" circumstances review of state-court decisions could be had in this Court even though something "further remain[ed] to be determined by a State court." *Id.,* at 124. Over the years, however, and despite vigorous protest by Mr. Justice Harlan,[1] this Court has steadily discovered new exceptions to the finality requirement, such that they can hardly any longer be described as "very few." Whatever may be the unexpressed reasons for this process of expansion, see, *e. g., Hudson Distributors* v. *Eli Lilly,* 377 U. S. 386, 401 (1964) (Harlan, J., dissenting), it has frequently been the subject of no more formal an express explanation than cursory citations to preceding cases in

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freedoms with state or individual interests, the Court raises a specter of liability which must inevitably induce self-censorship by the media, thereby inhibiting the rough-and-tumble discourse which the First Amendment so clearly protects.

[1] See *Construction Laborers* v. *Curry,* 371 U. S. 542, 553 (1963); *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555, 572 (1963); *Hudson Distributors* v. *Eli Lilly,* 377 U. S. 386, 395 (1964); *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 420 (1971).

the line. Especially is this true of cases in which the Court, as it does today, relies on *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963).[2] Although the Court's opinion today does accord detailed consideration to this problem, I do not believe that the reasons it expresses can support its result.

I

The Court has taken what it terms a "pragmatic" approach to the finality problem presented in this case. In so doing, it has relied heavily on *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148 (1964). As the Court acknowledges, *ante*, at 478 n. 7, *Gillespie* involved 28 U. S. C. § 1291, which restricts the appellate jurisdiction of the federal courts of appeals to "final decisions of the district courts." Although acknowledging this distinction, the Court accords it no importance and adopts *Gillespie*'s approach without any consideration of whether the finality requirement for this Court's jurisdiction over a "judgment or decree" of a state court is grounded on more serious concerns than is the limitation of court of appeals jurisdiction to final "decisions" of the district courts.[3] I believe that the underlying concerns are differ-

[2] See, *e. g.*, *American Radio Assn.* v. *Mobile S. S. Assn.*, 419 U. S. 215, 217 n. 1 (1974); *Hudson Distributors* v. *Eli Lilly*, *supra*, at 389 n. 4.

[3] The textual distinction between §§ 1291 and 1257, the former referring to "final decisions," while the latter refers to "final judgments or decrees," first appeared in the Evarts Act, Act of Mar. 3, 1891, 26 Stat. 826, which created the courts of appeals. Section 6 of that Act provided that courts of appeals should exercise appellate jurisdiction over "final decision" of the federal trial courts. The House version of the Act had referred to "final judgment or decree," 21 Cong. Rec. 3402 (1890), but the Senate Judiciary Committee changed the wording without formal explanation. See *id.*, at 10218. Perhaps significance can be attached to the fact that under the House bill the courts of appeals would have been independent of the federal trial courts, being manned by full-time appellate judges;

ent, and that the difference counsels a more restrictive approach when § 1257 finality is at issue.

According to *Gillespie,* the finality requirement is imposed as a matter of minimizing "the inconvenience and costs of piecemeal review." This proposition is undoubtedly sound so long as one is considering the administration of the federal court system. Were judicial efficiency the only interest at stake there would be less inclination to challenge the Court's resolution in this case, although, as discussed below, I have serious reservations that the standards the Court has formulated are effective for achieving even this single goal. The case before us, however, is an appeal from a state court, and this fact introduces additional interests which must be accommodated in fashioning any exception to the literal application of the finality requirement. I consider § 1257 finality to be but one of a number of congressional provisions reflecting concern that uncontrolled federal judicial interference with state administrative and judicial functions would have untoward consequences for our federal system.[4] This is by no means a novel view of the § 1257 finality requirement. In *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S., at 124, Mr. Justice Frankfurter's

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the Senate version, on the other hand, generally provided that court of appeals duties would be performed by the trial judges within each circuit. See § 3, 26 Stat. 827.

The first Judiciary Act, Act of Sept. 24, 1789, 1 Stat. 73, used the terms "judgment" and "decree" in defining the appellate jurisdiction of both the Supreme Court, § 25, and the original circuit courts. § 22.

[4] See, *e. g.,* 28 U. S. C. § 1341 (limitation on power of district courts to enjoin state taxing systems); 28 U. S. C. § 1739 (requiring that state judicial proceedings be accorded full faith and credit in federal courts); 28 U. S. C. §§ 2253–2254 (prescribing various restrictions on federal habeas corpus for state prisoners); 28 U. S. C. § 2281 (three-judge district court requirement); 28 U. S. C. § 2283 (restricting power of federal courts to enjoin state-court proceedings).

opinion for the Court explained the finality requirement as follows:

> "This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. *This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court.* Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U. S. C. § 344 (a). *This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.*" (Emphasis added.)

In *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 67 (1948), Mr. Justice Frankfurter, speaking for the Court, again expressed this view:

> "This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations."

That comity and federalism are significant elements of § 1257 finality has been recognized by other members of the Court as well, perhaps most notably by Mr. Justice Harlan. See, *e. g., Hudson Distributors* v. *Eli Lilly,* 377 U. S., at 397–398 (dissenting); *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555, 572 (1963) (dissenting). In the latter dissent, he argued that one basis of the finality rule was that it foreclosed "this Court from passing on constitutional issues that may be dissipated by the final outcome of a case, thus helping to keep to a minimum undesirable federal-state conflicts." One need cast no doubt on the Court's decision in such cases as *Langdeau* to recognize that Mr. Justice Harlan was focusing on a consideration which should be of significance in the Court's disposition of this case.

"Harmonious state-federal relations" are no less important today than when Mr. Justice Frankfurter penned *Radio Station WOW* and *Republic Gas Co.* Indeed, we have in recent years emphasized and re-emphasized the importance of comity and federalism in dealing with a related problem, that of district court interference with ongoing state judicial proceedings. See *Younger* v. *Harris,* 401 U. S. 37 (1971); *Samuels* v. *Mackell,* 401 U. S. 66 (1971). Because these concerns are important, and because they provide "added force" to § 1257's finality requirement, I believe that the Court has erred by simply importing the approach of cases in which the only concern is efficient judicial administration.

II

But quite apart from the considerations of federalism which counsel against an expansive reading of our jurisdiction under § 1257, the Court's holding today enunciates a virtually formless exception to the finality requirement, one which differs in kind from those previously carved out. By contrast, *Construction Laborers* v. *Curry, supra,*

and *Mercantile National Bank* v. *Langdeau, supra,* are based on the understandable principle that where the proper forum for trying the issue joined in the state courts depends on the resolution of the federal question raised on appeal, sound judicial administration requires that such a question be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation. *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415 (1971), and *Mills* v. *Alabama,* 384 U. S. 214 (1966), rest on the premise that where as a practical matter the state litigation has been concluded by the decision of the State's highest court, the fact that in terms of state procedure the ruling is interlocutory should not bar a determination by this Court of the merits of the federal question.

Still other exceptions, as noted in the Court's opinion, have been made where the federal question decided by the highest court of the State is bound to survive and be presented for decision here regardless of the outcome of future state-court proceedings, *Radio Station WOW, supra; Brady* v. *Maryland,* 373 U. S. 83 (1963), and for the situation in which later review of the federal issue cannot be had, whatever the ultimate outcome of the subsequent proceedings directed by the highest court of the State, *California* v. *Stewart,* 384 U. S. 436 (1966) (decided with *Miranda* v. *Arizona*); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U. S. 156 (1973). While the totality of these exceptions certainly indicates that the Court has been willing to impart to the language "final judgment or decree" a great deal of flexibility, each of them is arguably consistent with the intent of Congress in enacting § 1257, if not with the language it used, and each of them is relatively workable in practice.

To those established exceptions is now added one so

formless that it cannot be paraphrased, but instead must be quoted:

> "Given these factors—that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality." *Ante,* at 486.

There are a number of difficulties with this test. One of them is the Court's willingness to look to the merits. It is not clear from the Court's opinion, however, exactly how great a look at the merits we are to take. On the one hand, the Court emphasizes that if we reverse the Supreme Court of Georgia the litigation will end, *ante,* at 485–486, and it refers to cases in which the federal issue has been decided "arguably wrongly." *Ante,* at 486 n. 13. On the other hand, it claims to look to the merits "only to the extent of determining that the issue is substantial." *Ibid.* If the latter is all the Court means, then the inquiry is no more extensive than is involved when we determine whether a case is appropriate for plenary consideration; but if no more is meant, our decision is just as likely to be a costly intermediate step in the litigation as it is to be the concluding event. If, on the other hand, the Court really intends its doctrine to reach only so far as cases in which our decision in all probability will terminate the litigation, then the Court is reversing the traditional sequence of judicial decisionmaking. Heretofore, it has generally been thought that a court first assumed jurisdiction of a case, and then went on to decide the merits of the questions it presented. But henceforth in deter-

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mining our own jurisdiction we may be obliged to determine whether or not we agree with the merits of the decision of the highest court of a State.

Yet another difficulty with the Court's formulation is the problem of transposing to any other case the requirement that "failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." *Ante,* at 486. Assuming that we are to make this determination of "serious doubt" at the time we note probable jurisdiction of such an appeal, is it enough that the highest court of the State has ruled against any federal constitutional claim? If that is the case, then because § 1257 by other language imposes that requirement, we will have completely read out of the statute the limitation of our jurisdiction to a "final judgment or decree." Perhaps the Court's new standard for finality is limited to cases in which a First Amendment freedom is at issue. The language used by Congress, however, certainly provides no basis for preferring the First Amendment, as incorporated by the Fourteenth Amendment, to the various other Amendments which are likewise "incorporated," or indeed for preferring any of the "incorporated" Amendments over the due process and equal protection provisions which are embodied literally in the Fourteenth Amendment.

Another problem is that in applying the second prong of its test, the Court has not engaged in any independent inquiry as to the consequences of permitting the decision of the Supreme Court of Georgia to remain undisturbed pending final state-court resolution of the case. This suggests that in order to invoke the benefit of today's rule, the "shadow" in which an appellant must stand need be neither deep nor wide. In this case nothing more is

at issue than the right to report the name of the victim of a rape. No hindrance of any sort has been imposed on reporting the fact of a rape or the circumstances surrounding it. Yet the Court unquestioningly places this issue on a par with the core First Amendment interest involved in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974), and *Mills* v. *Alabama, supra,* that of protecting the press in its role of providing uninhibited political discourse.[5]

But the greatest difficulty with the test enunciated today is that it totally abandons the principle that constitutional issues are too important to be decided save when absolutely necessary, and are to be avoided if there are grounds for decision of lesser dimension.[6] The long line of cases which established this rule makes clear that it is a principle primarily designed, not to benefit the lower courts, or state-federal relations, but rather to safeguard this Court's own process of constitutional adjudication.

> "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised

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[5] As pointed out in *Tornillo,* 418 U. S., at 247 n. 6, not only did uncertainty about Florida's "right of reply" statute interfere with this important press function, but delay by this Court would have left the matter unresolved during the impending 1974 elections. In *Mills,* the Court observed that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 384 U. S., at 218.

[6] One important distinction between this case and *Construction Laborers* v. *Curry,* 371 U. S. 542 (1963), has already been discussed, *supra,* at 505–506. Another is that the federal issue here is constitutional, whereas that in *Curry* was statutory.

by a party whose interests entitle him to raise it." *Blair* v. *United States,* 250 U. S. 273, 279 (1919).

"The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners,* 113 U. S. 33, 39; *Abrams* v. *Van Schaick,* 293 U. S. 188; *Wilshire Oil Co.* v. *United States,* 295 U. S. 100. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton* v. *United States,* 196 U. S. 283, 295." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring).

In this case there has yet to be an adjudication of liability against appellants, and unlike the appellant in *Mills* v. *Alabama,* they do not concede that they have no nonfederal defenses. Nonetheless, the Court rules on their constitutional defense. Far from eschewing a constitutional holding in advance of the necessity for one, the Court construes § 1257 so that it may virtually rush out and meet the prospective constitutional litigant as he approaches our doors.

III

This Court is obliged to make preliminary determinations of its jurisdiction at the time it votes to note probable jurisdiction. At that stage of the proceedings, prior to briefing on the merits or oral argument, such determinations must of necessity be based on relatively cursory acquaintance with the record of the proceedings below. The need for an understandable and workable application of a jurisdictional provision such as § 1257 is therefore far greater than for a similar interpretation of statutes dealing with substantive law.[7] We, of course, re-

[7] Cf. *United States* v. *Sisson,* 399 U. S. 267, 307 (1970):

"Clarity is to be desired in any statute, but in matters of jurisdic-

tain the authority to dismiss a case for want of a final judgment after having studied briefs on the merits and having heard oral argument, but I can recall not a single instance of such a disposition during the last three Terms of the Court. While in theory this may be explained by saying that during these Terms we have never accorded plenary consideration to a § 1257 case which was not a "final judgment or decree," I would guess it just as accurate to say that after the Court has studied briefs and heard oral argument, it has an understandable tendency to proceed to a decision on the merits in preference to dismissing for want of jurisdiction. It is thus especially disturbing that the rule of this case, unlike the more workable and straightforward exceptions which the Court has previously formulated, will seriously compound the already difficult task of accurately determining, at a preliminary stage, whether an appeal from a state-court judgment is a "final judgment or decree."

A further aspect of the difficulties which the Court is generating is illustrated by a petition for certiorari recently filed in this Court, *Time, Inc.* v. *Firestone,* No. 74–944. The case was twice before the Florida Supreme Court. That court's first decision was rendered in December 1972; it rejected Time's First Amendment defense to a libel action, and remanded for further proceedings on state-law issues. The second decision was rendered in 1974, and dealt with the state-law issues litigated on remand. Before this Court, Time seeks review of the First Amendment defense rejected by the Florida Supreme Court in December 1972. Under the Court's decision today, one could conclude that the 1972 judgment was itself a final decision from which review might

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tion it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case."

have been had. If it was, then petitioner Time is confronted by 28 U. S. C. § 2101 (c), which restricts this Court's jurisdiction over state civil cases to those in which review is sought within 90 days of the entry of a reviewable judgment.

I in no way suggest either my own or the Court's views on our jurisdiction over *Time, Inc.* v. *Firestone.* This example is simply illustrative of the difficulties which today's decision poses not only for this Court, but also for a prudent counsel who is faced with an adverse interlocutory ruling by a State's highest court on a federal issue asserted as a dispositive bar to further litigation. I suppose that such counsel would be unwilling to presume that this Court would flout both the meaning of words and the command of Congress by employing loose standards of finality to obtain jurisdiction, but strict ones to prevent its loss. He thus would be compelled to judge his situation in light of today's formless, unworkable exception to the finality requirement. I would expect him frequently to choose to seek immediate review in this Court, solely as a matter of assuring that his federal contentions are not lost for want of timely filing. The inevitable result will be totally unnecessary additions to our docket and serious interruptions and delays of the state adjudicatory process.

Although unable to persuade my Brethren that we do not have in this case a final judgment or decree of the Supreme Court of Georgia, I nonetheless take heart from the fact that we are concerned here with an area in which "*stare decisis* has historically been accorded considerably less than its usual weight." *Gonzalez* v. *Employees Credit Union,* 419 U. S. 90, 95 (1974). I would dismiss for want of jurisdiction.

UNITED STATES *v.* GUANA-SANCHEZ

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

No. 73–820. Argued January 14, 1975—Decided March 3, 1975

484 F. 2d 590, certiorari dismissed as improvidently granted.

Paul L. Friedman argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Gerald P. Norton.*

Joseph Beeler, by appointment of the Court, 419 U. S. 961, argued the cause for respondent. With him on the brief was *Donald J. Martin.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

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

**Sanford Jay Rosen* and *Melvin L. Wulf* filed a brief for the Mexican American Legal Defense and Educational Fund et al. as *amici curiae* urging affirmance.

CASSIUS *v.* ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 74–5140. Argued January 21, 1975—Decided March 3, 1975

110 Ariz. 485, 520 P. 2d 1109, certiorari dismissed as improvidently granted.

Frederick S. Klein argued the cause for petitioner *pro hac vice*. With him on the briefs was *John M. Neis*.

William J. Schafer III argued the cause for respondent. With him on the brief were *Bruce E. Babbitt*, Attorney General of Arizona, *N. Warner Lee*, former Attorney General, and *Grove M. Callison*, Assistant Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL dissent.

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

Syllabus

UNITED STATES *v.* MAINE ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 35, Orig. Argued February 24–25, 1975—Decided March 17, 1975

The United States, to the exclusion of defendant Atlantic Coastal States, *held* to have sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limits of inland coastal waters, extending seaward to the outer edge of the Continental Shelf, that area, like the seabed adjacent to the coastline, being in the domain of the Nation rather than of the separate States. *United States* v. *California*, 332 U. S. 19; *United States* v. *Louisiana*, 339 U. S. 699; *United States* v. *Texas*, 339 U. S. 707. And this rule that the paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty is confirmed by both the Submerged Lands Act of 1953 and the Outer Continental Shelf Lands Act of 1953. Pp. 519–528.

WHITE, J., delivered the opinion of the Court, in which all other Members joined except DOUGLAS, J., who took no part in the consideration or decision of the case.

Solicitor General Bork argued the cause for the United States. With him on the brief were *Assistant Attorney General Johnson, Deputy Solicitor General Wallace, Keith A. Jones,* and *Bruce C. Rashkow.*

Brice M. Clagett argued the cause for defendants. With him on the briefs for the Common Counsel States were *Michael Boudin, W. Laird Stabler, Jr.,* Attorney General, and *Charles Brandt,* Assistant Attorney General of Delaware, *Jon A. Lund,* Attorney General, and *Lee M. Schepps,* Assistant Attorney General of Maine, *Francis B. Burch,* Attorney General, and *Henry R. Lord,* Deputy Attorney General of Maryland, *Robert H. Quinn,* former Attorney General, *Francis X. Bellotti,* Attorney General,

and *Henry Herrmann,* Special Assistant Attorney General of Massachusetts, *Warren B. Rudman,* Attorney General, and *David H. Souter,* Deputy Attorney General of New Hampshire, *William F. Hyland,* Attorney General, and *Elias Abelson,* Assistant Attorney General of New Jersey, *Louis J. Lefkowitz,* Attorney General, and *Joseph T. Hopkins,* Assistant Attorney General of New York, *Richard J. Israel,* Attorney General, and *W. Slater Allen, Jr.,* Assistant Attorney General of Rhode Island, *Andrew P. Miller,* Attorney General, and *Gerald L. Baliles,* Deputy Attorney General of Virginia. On the brief for defendants the States of North Carolina et al. were *Rufus Edmisten,* Attorney General, and *Jean A. Benoy,* Deputy Attorney General of North Carolina, *Daniel R. McLeod,* Attorney General, and *Edward B. Latimer,* Assistant Attorney General of South Carolina, and *Arthur K. Bolton,* Attorney General, and *Alfred L. Evans, Jr.,* Assistant Attorney General of Georgia.*

Mr. Justice White delivered the opinion of the Court.

Seeking to invoke the jurisdiction of this Court under Art. III, § 2, of the Constitution and 28 U. S. C. § 1251 (b), the United States in April 1969 asked leave to file a complaint against the 13 States bordering on the Atlantic Ocean—Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland,

*Briefs of *amici curiae* were filed by *William J. Guste, Jr.,* Attorney General of Louisiana, *Norman C. Gorsuch,* Attorney General of Alaska, *Slade Gorton,* Attorney General of Washington, *John L. Hill,* Attorney General of Texas, *Daniel R. McLeod,* Attorney General of South Carolina, *Andrew P. Miller,* Attorney General of Virginia, *Robert H. Quinn,* former Attorney General of Massachusetts, and *Evelle J. Younger,* Attorney General of California; and by *Frederick Moring* for the Associated Gas Distributors.

Virginia, North Carolina, South Carolina, Georgia, and Florida.[1] We granted leave to file, 395 U. S. 955, on June 16, 1969. The complaint asserted a separate cause of action against each of the States which alleged that:

> "[T]he United States is now entitled, to the exclusion of the defendant State, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast, extending seaward to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources."

It was further alleged that each of the States claimed some right or title to the relevant area and was interfering with the rights of the United States. It was therefore prayed that a decree be entered declaring the rights of the United States and that such further relief be awarded as might prove proper.[2]

The defendants answered, each generally denying proprietary rights of the United States in the seabed in the area beyond the three-mile marginal sea. Each of them, except Florida,[3] claimed for itself, as successor in title

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[1] The State of Connecticut was not made a defendant, apparently because that State borders on Long Island Sound, which is considered inland water rather than open sea.

[2] The United States also demanded an accounting for all sums that the States may have derived from the area in question. This claim the Special Master recommends be denied for failure of proof. The United States does not except to this recommendation, and we approve it.

[3] The State of Florida claimed that by virtue of the Act of June 25, 1868, 15 Stat. 73, Congress had approved the maritime boundaries for that State which at certain places included more than three miles of the Atlantic Ocean and had thereby granted to the State all of the seabed within those boundaries. Florida also claimed in its answer

to certain grantees of the Crown of England (and in the case of New York, to the Crown of Holland), the exclusive right of dominion and control over the seabed underlying the Atlantic Ocean seaward from its coastline to the limits of the jurisdiction of the United States, asserting as well that any attempt by the United States to interfere with these rights would in itself violate the Constitution of the United States.[4]

Without acting on the motion for judgment filed by the United States that asserted that there was no material issue of fact to be resolved, we entered an order appointing the Honorable Albert B. Maris as Special Master and referred the case to him with authority to request further pleadings, to summon witnesses, and to take such evidence and submit such reports as he might deem appropriate. 398 U. S. 947 (1970). Before the Special Master, the United States contended that based on *United States* v. *California,* 332 U. S. 19 (1947), *United States* v. *Louisiana,* 339 U. S. 699 (1950), and *United States* v. *Texas,* 339 U. S. 707 (1950), it was entitled to judgment in accordance with its motion. The defendant States asserted that their cases were distinguishable from the prior cases and that in any event, *California, Louisiana,* and *Texas* were erroneously decided and should be

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that the Florida Straits were not in the Atlantic Ocean as claimed by the United States but in the Gulf of Mexico. Subsequently, the controversy between the United States and Florida was severed and consolidated with the proceeding in No. 9, Original, which was then concerned with the seabed rights of the State of Florida in the Gulf of Mexico, 403 U. S. 949, 950 (1971). The consolidated proceedings were given a new number—No. 52, Original. We have acted on the Special Master's Report in that case. See *post,* p. 531.

[4] The States of Rhode Island, North Carolina, and Georgia each submitted an additional special defense applicable only to itself. We agree with the Special Master's rejection of these special defenses, and they will not be mentioned further.

overruled. They offered, and the Special Master received, voluminous documentary evidence to support their claims that, contrary to the Court's prior decisions, they acquired dominion over the offshore seabed prior to the adoption of the Constitution and at no time relinquished it to the United States. At the conclusion of the proceeding before him, the Special Master submitted a Report (hereinafter Report) which the United States supports in all respects, but to which the States have submitted extensive and detailed exceptions. The controversy is now before us on the Report, the exceptions to it, and the briefs and oral arguments of the parties.

In his Report, the Special Master concluded that the *California, Louisiana,* and *Texas* cases, which he deemed binding on him, governed this case and required that judgment be entered for the United States. Assuming, however, that those cases were open to re-examination, the Special Master went on independently to examine the legal and factual contentions of the States and concluded that they were without merit and that the Court's prior cases should be reaffirmed.

We fully agree with the Special Master that *California, Louisiana,* and *Texas* rule the issues before us. We also decline to overrule those cases as the defendant States request us to do.

United States v. *California, supra,* involved an original action brought in this Court by the United States seeking a decree declaring its paramount rights, to the exclusion of California, to the seabed underlying the Pacific Ocean and extending three miles from the coastline and from the seaward limits of the State's inland waters. California answered, claiming ownership of the disputed seabed. The basis of its claim, as the Court described it, was that the three-mile belt lay within the historic boundaries of the State; "that the original thirteen states acquired from

the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an 'equal footing' with the original states, California at that time became vested with title to all such lands." 332 U. S., at 23. The Court rejected California's claim. The original Colonies had not "separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it." *Id.*, at 31. As the Court viewed our history, dominion over the marginal sea was first accomplished by the National Government rather than by the Colonies or by the States. Moreover, the Court went on to hold that the "protection and control of [the marginal sea] has been and is a function of national external sovereignty," *id.*, at 34, and that in our constitutional system paramount rights over the ocean waters and their seabed were vested in the Federal Government.

The United States later brought actions to confirm its title to the seabed adjacent to the coastline of other States. *United States* v. *Louisiana, supra,* was one of them. There Louisiana claimed title to the seabed under waters extending 27 miles into the Gulf of Mexico, the basis of the claim being that before and since the time of its admission to the Union, Louisiana had exercised dominion over the ocean area in question and that its legislature had formally included the 27-mile belt within the boundaries of the State. The Court gave judgment for the United States, holding that *United States* v. *California* was controlling and emphasizing that paramount rights in the marginal sea and seabed were incidents of national sovereignty:

> "As we pointed out in *United States* v. *California,* the issue in this class of litigation does not turn on

> title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. 332 U. S. pp. 31–34. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area." 339 U. S., at 704.

Louisiana had "no stronger claim to ownership of the marginal sea than the original thirteen colonies or California had," *id.*, at 705; and its claim, like theirs, gave way to the overriding rule that "the three-mile belt is in the domain of the Nation rather than that of the separate States," *ibid.* *A fortiori,* the waters and seabed beyond that limit were governed by the same rule.

In a companion case, *United States* v. *Texas, supra,* the Court again reaffirmed the holding and rationale of *United States* v. *California* and again rejected the claims of the State based on its historic boundaries at the time of the State's admission to the Union:

> "If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it. Such is the rationale of the *California* decision which we have applied to Louisiana's case. The same result must be reached here if 'equal footing' with the various States is to be achieved. Unless any claim or title which the Republic of Texas had

> to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States. Yet neither the original thirteen States (*United States* v. *California, supra,* pp. 31–32) nor California nor Louisiana enjoys such an advantage." 339 U. S., at 719.

The Special Master was correct in concluding that these cases, unless they are to be overruled, completely dispose of the States' claims of ownership here. These decisions considered and expressly rejected the assertion that the original States were entitled to the seabed under the three-mile marginal sea. They also held that under our constitutional arrangement paramount rights to the lands underlying the marginal sea are an incident to national sovereignty and that their control and disposition in the first instance are the business of the Federal Government rather than the States.

The States seriously contend that the prior cases, as well as the Special Master, were in error in denying that the original Colonies had substantial rights in the seabed prior to independence, and afterwards, by grant from or succession to the sovereignty of the Crown. Given the dual basis of the *California* decision, however, and of those that followed it, the States' claims of ownership prior to the adoption of the Constitution are not dispositive. Whatever interest the States might have had immediately prior to statehood, the Special Master was correct in reading the Court's cases to hold that as a matter of "purely legal principle . . . the Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense" and that "it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers

the federal government has paramount rights in the marginal sea." Report 23.

United States v. *Texas* unmistakably declares this constitutional proposition. There, Texas claimed that prior to joining the Union, it was an independent sovereign with boundaries extending a substantial distance in the Gulf of Mexico—boundaries which Congress had allegedly recognized when Texas was admitted to the Union. In deciding against the State, the Court did not reject the prestatehood rights of Texas as it had the rights of the 13 Original States in the *California* case. On the contrary, the Court was quite willing to "assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had *dominium* and *imperium* in and over this belt which the United States now claims." 339 U. S., at 717. Such prior ownership nevertheless did not survive becoming a member of the Union:

> "When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an 'equal footing' with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States." *Id.*, at 717–718.

The Court stood squarely on the *California* and *Louisiana* cases for this conclusion; and in our view, the Special Master correctly read these authorities, unless they were

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to be overruled in all respects, as foreclosing the present efforts of the States to demonstrate error in the Court's understanding of history in the *California* case.

Assuming the possibility, however, that the Court might re-examine the constitutional premise of *California* and similar cases, the Special Master proceeded, with admirable diligence and lucidity, to address the historical evidence presented by the States aimed primarily at establishing that the Colonies had legitimate claims to the marginal sea prior to independence and statehood and that the new States never surrendered these rights to the Federal Government. The Special Master's ultimate conclusion was that the Court's view of our history expressed in the *California* case was essentially correct and that if prior cases were open to re-examination, they should be reaffirmed in all respects.

We need not retrace the Special Master's analysis of historical evidence, for we are firmly convinced that we should not undertake to re-examine the constitutional underpinnings of the *California* case and of those cases which followed and explicated the rule that paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty. That premise, as we have indicated, has been repeated time and again in the cases. It is also our view, contrary to the contentions of the States, that the premise was embraced rather than repudiated by Congress in the Submerged Lands Act of 1953, 67 Stat. 29, 43 U. S. C. § 1301. In that legislation, it is true, Congress transferred to the States the rights to the seabed underlying the marginal sea; however, this transfer was in no wise inconsistent with paramount national power but was merely an exercise of that authority. As the Special Master said, the Court in its prior cases "did not indicate that the federal government by Act of Congress

might not, as it did by the subsequently enacted Submerged Lands Act, grant to the riparian states rights to the resources of the federal area, subject to the reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs." Report 16. The question before the Court in the *California* case was "whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited." 332 U. S., at 29. The decision there was that the National Government had the power at issue, the Court declining to speculate that "Congress, which has constitutional control over Government property, will execute its powers in such a way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *Id.,* at 40.

The Submerged Lands Act did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act and released the States from any liability to account for any prior income received from state leases that had been granted with respect to the marginal sea.[5] But in further exercise of paramount national authority, the Act expressly declared that nothing in the Act

> "shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of [the marginal sea], all of which natural resources appertain to the

[5] The Submerged Lands Act was held constitutional in *Alabama* v. *Texas,* 347 U. S. 272 (1954).

> United States, and the jurisdiction and control of which by the United States is confirmed." 43 U. S. C. § 1302.

This declaration by Congress is squarely at odds with the assertions of the States in the present case. So, too, is the provision of the Act by which the grant to the States is expressly limited to the seabed within three miles (or three marine leagues in some cases) of the coastline, whether or not the States' historic boundaries might extend farther into the ocean. § 1301 (b). Moreover, in the course of litigation dealing with the reach and impact of the Act, the Court has said as plainly as may be that "the Act concededly did not impair the validity of the *California, Louisiana,* and *Texas* cases, which are admittedly applicable to all coastal States . . . ." *United States* v. *Louisiana,* 363 U. S. 1, 7 (1960); see also *id.,* at 83 n. 140. We agree with the Special Master when he said: "It is quite obvious that Congress could reserve to the federal government all the rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf states) only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case." Report 19.

Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when a few months later it enacted the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* Section 3 of the Act

> "declared [it] to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition

as provided in this subchapter." 43 U. S. C. § 1332 (a).

The Act then proceeds to set out detailed provisions for the exercise of exclusive jurisdiction in the area and for the leasing and development of the resources of the seabed.

Of course, the defendant States were not parties to *United States* v. *California* or to the relevant decisions, and they are not precluded by res judicata from litigating the issues decided by those cases. But the doctrine of *stare decisis* is still a powerful force in our jurisprudence; and although on occasion the Court has declared—and acted accordingly—that constitutional decisions are open to re-examination, we are convinced that the doctrine has peculiar force and relevance in the present context. It is apparent that in the almost 30 years since *California,* a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the "interminable litigation" arising over the controversy of the ownership of the lands underlying the marginal sea. See H. R. Rep. No. 215, 83d Cong., 1st Sess., 2 (1953). Both the Submerged Lands Act and the Outer Continental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion m.c.f. of natural gas, 13 million long tons of sulfur, and over four million long tons of salt.[6] In 1973 alone, 1,081,000 barrels of oil

[6] S. Rep. No. 93–1140, p. 4 (1974).

and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf.[7] Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.[8] We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity [9] by calling into question, at this date, the constitutional premise of prior decisions. We add only that the Atlantic States, by virtue of the *California, Louisiana,* and *Texas* cases, as well as by reason of the Submerged Lands Act, have been on notice of the substantial body of authoritative law, both constitutional and statutory, which is squarely at odds with their claims to the seabed beyond the three-mile marginal sea. Neither the States nor their putative lessees have been in the slightest misled. Judgment shall be entered for the United States.

So ordered.

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

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[7] *Id.*, at 5.

[8] 86 Stat. 1280, 16 U. S. C. § 1451 *et seq.* (1970 ed., Supp. II). For a summary of legislation affecting the Outer Continental Shelf, see Outer Continental Shelf Oil and Gas Development and the Coastal Zone, Senate Committee on Commerce, 93d Cong., 2d Sess., 55–58 (Comm. Print 1974).

[9] We have long held that the doctrine of *stare decisis* carries particular force where the effect of re-examination of a prior rule would be to overturn long-accepted commercial practice. See, *e. g., M'Gruder* v. *Bank of Washington,* 9 Wheat. 598, 602 (1824); *Rock Spring Distilling Co.* v. *W. A. Gaines & Co.,* 246 U. S. 312, 320 (1918).

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

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 9, Orig. Argued February 24, 1975—Decided March 17, 1975

The United States' and Louisiana's exceptions to the Special Master's Report overruled, his recommendations accepted, and the parties directed to prepare and file a decree for entry by this Court, establishing a baseline along Louisiana's entire coast from which the territorial waters under its jurisdiction pursuant to the Submerged Lands Act can be measured. If the parties cannot agree upon the decree's form, they shall refer to the Special Master any remaining disputes for appropriate proceedings and further recommendations.

Louis F. Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Johnson,* and *Bruce C. Rashkow.*

Oliver P. Stockwell and *Frederick W. Ellis,* Special Assistant Attorneys General of Louisiana, argued the cause for defendants. With them on the briefs were *William J. Guste, Jr.,* Attorney General, and *Paul M. Hebert, Victor A. Sachse,* and *William E. Shaddock,* Special Assistant Attorneys General.

DECREE.

Upon consideration of the Report filed July 31, 1974, by Walter P. Armstrong, Jr., Special Master, of the exceptions filed thereto by the United States and by the State of Louisiana, and after oral argument thereon, IT IS NOW ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The exceptions filed by the United States to the Report and recommendations of the Special Master are overruled.

2. The exceptions filed by the State of Louisiana to the Report and recommendations of the Special Master are overruled.

3. The recommendations contained in the Report of the Special Master are accepted.

4. The parties are directed to prepare and file a decree, for entry by this Court, establishing "a baseline along the entire coast of the State of Louisiana from which the extent of the territorial waters under the jurisdiction of the State of Louisiana pursuant to the Submerged Lands Act can be measured." Report of the Special Master 53. If the parties cannot agree upon the form of the decree, then they shall refer any remaining disputes to the Special Master for his recommendations. In the event of such a referral, the Special Master is authorized to hold such hearings, take such evidence, and conduct such proceedings as he may deem appropriate and, in due course, to report his recommendations to this Court.

It is so ordered.

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

UNITED STATES *v.* FLORIDA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 52, Orig. Argued February 25, 1975—Decided March 17, 1975

In this case in which a decree is sought defining the seaward boundary of the submerged lands of the Continental Shelf in the Atlantic Ocean and the Gulf of Mexico in which Florida has rights to natural resources, Florida's exceptions to the recommendations of the Special Master are overruled, but the exceptions of the United States raise contentions not previously presented to the Special Master and are therefore referred to him for further proceedings.

Keith A. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Johnson, Bruce C. Rashkow,* and *Michael W. Reed.*

Robert L. Shevin, Attorney General of Florida, argued the cause for defendant. With him on the briefs were *W. Robert Olive, Jr.,* Special Assistant Attorney General, and *Daniel S. Dearing.**

**Brice M. Clagett, Michael Boudin, W. Laird Stabler, Jr.,* Attorney General, and *Jerome O. Herlihy,* Chief Deputy Attorney General of Delaware, *Arthur K. Bolton,* Attorney General, and *Alfred L. Evans, Jr.,* Assistant Attorney General of Georgia, *Jon A. Lund,* Attorney General, and *Lee M. Schepps,* Assistant Attorney General of Maine, *Francis B. Burch,* Attorney General, and *Henry R. Lord,* Deputy Attorney General of Maryland, *Robert H. Quinn,* former Attorney General, and *Henry Herrmann,* Special Assistant Attorney General of Massachusetts, *Warren B. Rudman,* Attorney General, and *David H. Souter,* Deputy Attorney General of New Hampshire, *William F. Hyland,* Attorney General, and *Elias Abelson,* Assistant Attorney General of New Jersey, *Louis J. Lefkowitz,* Attorney General, and *Joseph T. Hopkins,* Assistant Attorney General of New York, *Robert Morgan,* Attorney General, and *Jean A. Benoy,*

PER CURIAM.

Before the Court for consideration are the exceptions of the State of Florida and of the United States to the Report of the Special Master filed February 19, 1974. Oral argument has been had.

The case consolidates two proceedings. In the first, the United States seeks a decree defining the seaward boundary of the submerged lands of the Continental Shelf in the Atlantic Ocean in which Florida has rights to the natural resources. 395 U. S. 955 (1969). In the second, the State of Florida and the United States seek a decree defining more specifically than does the decree entered in *United States* v. *Louisiana,* 364 U. S. 502 (1960), the seaward boundary of the submerged lands of the Continental Shelf in the Gulf of Mexico in which Florida has rights to the natural resources. 403 U. S. 949 (1971).

In its exceptions to the Report, the State of Florida maintains that in his recommendations the Special Master should have recognized that the said boundaries extend to the boundaries defined in the State's 1868 Constitution, rather than to the limits specified in the Submerged Lands Act of 1953, § 2 (b), 67 Stat. 29, 43 U. S. C. § 1301 (b); that the Special Master should have recognized that the Florida Keys and the Straits of Florida southwest of longitude 25°40′ N. are part of the Gulf of Mexico, rather than of the Atlantic Ocean; that the Special Master erred in construing the 1868 Constitution of the State as to its Atlantic Ocean boundary

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Deputy Attorney General of North Carolina, *Richard J. Israel,* Attorney General, and *W. Slater Allen, Jr.,* Assistant Attorney General of Rhode Island, *Daniel R. McLeod,* Attorney General, and *Edward B. Latimer,* Assistant Attorney General of South Carolina, *Andrew P. Miller,* Attorney General, and *Gerald L. Baliles,* Deputy Attorney General of Virginia, filed a brief for the State of Delaware et al. as *amici curiae.*

and as to its boundary between the Dry Tortugas Islands and Cape Romano; and that the Special Master erred in failing to recognize "Florida Bay" as a historic bay and thus as inland waters of the State.

Having considered each of these exceptions, we conclude that they are correctly answered in the Report of the Special Master. The exceptions of the State of Florida are therefore overruled.

In its exceptions to the Report, the United States maintains that the Special Master erred in recommending the recognition of a portion of Florida Bay as a "juridical" bay, and in recommending the drawing of "closing lines" around three groups of islands that make up the Florida Keys. It appears that these recommendations of the Special Master were made without benefit of the contentions now advanced by the United States and the opposing contentions now presented by the State of Florida. The exceptions of the United States are therefore referred to the Special Master for his prompt consideration. He is authorized to conduct any supplemental proceedings he may find useful with respect to the exceptions of the United States and is requested to file a supplemental report restricted to the issues raised in those exceptions.

It is so ordered.

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

ESTELLE, CORRECTIONS DIRECTOR *v.* DORROUGH

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

No. 74–479. Decided March 17, 1975

A Texas statute provides for the automatic dismissal of an appeal by a felony defendant if he escapes from custody pending the appeal, except that the appeal will be reinstated if he voluntarily surrenders within 10 days of his escape, or if he is under sentence of life imprisonment or death the appellate court in its discretion may reinstate the appeal if he returns to custody within 30 days of his escape. *Held:* The statute does not violate the Equal Protection Clause of the Fourteenth Amendment.

(a) It is not rendered unconstitutional by its separate treatment of prisoners under sentence of life imprisonment or death. Texas can reasonably balance its concern with deterring escapes and encouraging surrenders with its alternative interest in allowing the validity of particularly severe sentences to be tested by appellate review.

(b) Nor is the statute rendered unconstitutional by its limiting the appeal-dismissal requirement to those prisoners with appeals pending at the time of their escape. Texas, as part of its policy to deter escapes, is free to impose more severe sanctions on those prisoners whose escape is reasonably calculated to disrupt the very appellate process that they themselves have set in motion, than it does on those who first escape, return, and then invoke the appellate process.

Certiorari granted; 497 F. 2d 1007, reversed.

PER CURIAM.

Respondent Jerry Mack Dorrough was convicted in 1963 in a Texas District Court of robbery and sentenced to a term of imprisonment for 25 years. After he was sentenced and had filed an appeal to the Texas Court of Criminal Appeals, he escaped from the Dallas County jail by stealing a federal mail truck. He was recaptured

two days after his escape. After his recapture, the Texas Court of Criminal Appeals removed his appeal from its docket pursuant to the provisions of Texas Code of Criminal Procedure Ann., Art. 44.09 (1966), which provides for the automatic dismissal of such pending appeals by an escaped felon upon escape with provision for reinstatement of the appeal if the felon voluntarily surrenders within 10 days of his escape.[1]

After recapture, respondent was tried and convicted on federal charges and given a 25-year federal sentence which he is currently serving. The State of Texas has filed a detainer warrant with federal authorities against Dorrough in order to compel him to serve the remainder of his state sentence upon release from federal custody. In 1972, respondent filed in the United States District Court

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[1] Texas Code of Criminal Procedure Ann., Art. 44.09, provides:

"If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death or confinement in an institution operated by the Department of Corrections for life, the court may in its discretion reinstate the appeal if the defendant is recaptured or voluntarily surrenders within thirty days after such escape."

This provision was adopted by Texas in 1879 replacing a somewhat similar common-law rule discussed in *Ex parte Wood,* 19 Tex. Ct. App. 46 (1885). The clause authorizing discretionary reinstatement of an appeal from a sentence of death or life imprisonment was added by amendment in 1933. Laws 1933, c. 34. Since the statute provides that jurisdiction shall "no longer attach" upon escape, the escape itself divests the court of jurisdiction with later dismissal being a mere formality. *Lafferty* v. *State,* 123 Tex. Cr. R. 570, 60 S. W. 2d 222 (1933); *Ex parte Gurley,* 104 Tex. Cr. R. 578, 286 S. W. 222 (1926).

for the Northern District of Texas a complaint which was treated by that court as a petition for writ of habeas corpus, alleging that the 1963 dismissal of his appeal under Art. 44.09 denied him equal protection of the law in violation of the Fourteenth Amendment.[2] The United States District Court denied relief, holding that Art. 44.09 was a rational exercise of legislative power.[3] The United States Court of Appeals for the Fifth Circuit reversed. It held that Art. 44.09 denied respondent equal protection of the law, and ordered that the State's detainer warrant would be voided unless Texas provided respondent with either a direct appeal or a new trial.[4] Petitioner has now sought review by certiorari, pursuant to 28 U. S. C. § 1254 (1), of the judgment of the Court of Appeals. For the reasons stated, we grant the writ and reverse the judgment.

The Court of Appeals correctly recognized that there is no federal constitutional right to state appellate review of state criminal convictions. *McKane* v. *Durston,* 153 U. S. 684, 687 (1894); *Griffin* v. *Illinois,* 351 U. S. 12, 18

[2] *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U. S. 484 (1973), indicates that one under a state detainer warrant is considered to be in custody for the purpose of federal habeas relief. The District Court concluded that respondent had properly exhausted his state remedies, and the petitioner did not urge failure of exhaustion in the Court of Appeals.

[3] The only contention presented to the District Court as evidenced by its opinion was the constitutionality of Art. 44.09 discussed herein. Respondent seeks here to raise other issues not raised below, at least some of which were considered and rejected by other courts during the course of his five prior actions in the federal system. See 327 F. 2d 667 (CA5 1964); 344 F. 2d 125 (CA5 1965); 397 F. 2d 811 (CA5), cert. denied, 394 U. S. 1019 (1969); 440 F. 2d 1063 (CA5), cert. denied, 404 U. S. 840 (1971); 440 F. 2d 1336 (CA5), cert. denied, 404 U. S. 915 (1971).

[4] The decision of the District Court is unreported. The decision of the Court of Appeals is reported at 497 F. 2d 1007.

(1956); *Ross* v. *Moffitt,* 417 U. S. 600, 610–611 (1974). Disposition by dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American law. 18 Geo. Wash. L. Rev. 427, 429 (1950). This Court itself has long followed the practice of declining to review the convictions of escaped criminal defendants. *Smith* v. *United States,* 94 U. S. 97 (1876); *Bonahan* v. *Nebraska,* 125 U. S. 692 (1887); *Eisler* v. *United States,* 338 U. S. 189 (1949); *id.,* at 883; cf. *Allen* v. *Rose,* 419 U. S. 1080 (1974). Thus in *Molinaro* v. *New Jersey,* 396 U. S. 365 (1970), we dismissed the appeal of an escaped criminal defendant, stating that no persuasive reason exists to adjudicate the merits of such a case and that an escape "disentitles the defendant to call upon the resources of the Court for determination of his claims." *Id.,* at 366. In *Allen* v. *Georgia,* 166 U. S. 138 (1897), we upheld as against a constitutional due process attack a state court's dismissal of the appeal of an escaped prisoner and its refusal to reinstate the appeal upon his later recapture. See also *National Union* v. *Arnold,* 348 U. S. 37, 43 (1954).

The Texas courts have found similar ends served by Art. 44.09. It discourages the felony of escape and encourages voluntary surrenders.[5] It promotes the efficient, dignified operation of the Texas Court of Criminal Appeals.[6]

The Court of Appeals, however, found two classifications created by the statute to lack any rational relation to its purposes and hence concluded that the statute was unconstitutional as violative of the Equal Protec-

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[5] *Rodriguez* v. *State,* 457 S. W. 2d 555, 556 (Tex. Crim. App. 1970).

[6] *Loyd* v. *State,* 19 Tex. Ct. App. R. 137, 155 (1885). See also 18 Geo. Wash. L. Rev. 427, 430 (1950).

tion Clause.[7] That court recognized that appeals from state criminal convictions are not "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1, 33–34 (1973), and that this Court in dealing with equal protection challenges to state regulation of the right of appeal in criminal cases had applied the traditional rational-basis test. *Rinaldi* v. *Yeager,* 384 U. S. 305 (1966). There this Court said:

> " 'The Constitution does not require things which are different in fact . . . to be treated in law as

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[7] 497 F. 2d, at 1012–1013. The court below specifically rejected the notion that immediate dismissal with refusal to reinstate appeals of escaped defendants was constitutionally objectionable and rested its decision wholly on the asserted lack of rational connection between the statutory classifications and the statute's purposes.

But our Brother STEWART resurrects this rejected argument and adopts it in his dissent, saying that the Texas statute may not rationally be said to discourage the felony of escape and encourage voluntary surrender. Such a judgment, of course, is one in the first instance for the legislature, *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955), and we may strike down such a legislative judgment only if we conclude that it is indeed irrational. We do not believe that it is. Nor is it accurate to suggest that the only purpose served by the Texas statute is the deterrence of escapes: it is also designed to secure the State's interest in orderly judicial procedure. The right of appeal from a judgment of conviction in both the federal and state systems is almost uniformly conditioned, for example, upon the filing of a notice of appeal within a prescribed time limit. See Fed. Rule App. Proc. 4 (b); n. 10, *infra.* The vindication of orderly procedure secured by the Texas statute under attack here is no less a permissible choice for the legislature than is the vindication of that interest by such procedural requirements. In a case indistinguishable from the present one on this issue, this Court in *Allen* v. *Georgia,* 166 U. S. 138, 141 (1897), upheld the refusal of the Georgia courts to reinstate the appeal of a recaptured prisoner, stating that "it seems but a light punishment for such offence to hold" that he has abandoned such appeal.

> though they were the same.' *Tigner* v. *Texas,* 310 U. S. 141, 147. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' *Baxstrom* v. *Herold,* 383 U. S. 107, 111; *Carrington* v. *Rash,* 380 U. S. 89, 93; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415." *Id.,* at 309.

The Court of Appeals thought that this test rendered the statute invalid for two reasons. First, while the statute provides for reinstatement of the appeal of most escaped felons only if they voluntarily surrender within 10 days, the Texas Court of Criminal Appeals may in its discretion reinstate the appeals of prisoners under a sentence of life imprisonment or death if they are returned to custody within 30 days.[8] Second, the statute applies only to those prisoners with appeals pending at the time of their escape; prisoners who have not invoked the appellate process by filing an appeal at the time of their escape may still appeal after recapture if applicable appellate time limits have not run. We disagree with the analysis of the Court of Appeals, and find that neither of these distinctions offends the Equal Protection Clause.

Insofar as the separate treatment of prisoners under a sentence of life imprisonment or death is concerned, we see no reason why the Texas Legislature was not free to separate these two most severe sentences from other

[8] See n. 1, *supra.* The statute merely allows the court in its discretion to reinstate such appeals. In the past, the court has both granted leave to reinstate and refused it under a test of "good cause shown." *Bland* v. *State,* 224 S. W. 2d 479 (Tex. Crim. App. 1949); *Foster* v. *State,* 497 S. W. 2d 291 (Tex. Crim. App. 1973).

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terms of imprisonment, and provide an additional period of discretionary review for them but not for the remainder. The Court of Appeals determined that under Texas law a prisoner serving a sentence for a term greater than 60 years would not be eligible for parole any sooner than a prisoner under life sentence, and from that fact concluded that there could be no rational distinction between those serving a life term and those serving a term in excess of sixty years. 497 F. 2d 1007, 1012–1013. It is not altogether clear how respondent, who himself has been sentenced to 25 years, could assert the rights of those under term sentences of 60 years or more.[9] But apart from this difficulty, we see no reason why the Texas Legislature could not focus on the actual severity of the sentence imposed in making distinctions, rather than on the collateral consequence of sentence elaborated by the Court of Appeals. The State of Texas could reasonably balance its concern with deterring escapes and encouraging surrenders with its alternative interest in allowing the validity of particularly severe sentences to be tested by appellate review. In doing so, it was not required to draw lines with "mathematical nicety." *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78–79 (1911); *Morey* v. *Doud*, 354 U. S. 457, 463–464 (1957).

Nor do we find the statutory limitation of the dismissal requirement to those prisoners with appeals pending at the time of their escape violative of the Equal Protection Clause. The Court of Appeals felt that the statute was "underinclusive" for this reason, since a prisoner who had not invoked the appellate process by filing an appeal at the time of his escape might still appeal after recapture if the prescribed time for filing an appeal had not expired.

Criminal defendants in Texas are subject to relatively

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[9] Cf. *United States* v. *Raines*, 362 U. S. 17, 21–24 (1960).

stringent time limits for filing their appeals.[10] Since an escaped defendant cannot comply with the required appellate steps during the time he is not confined, these time limits serve much the same function as Art. 44.09. Whatever difference in treatment exists between the class of prisoners who escape, return, and are nonetheless able to file an appeal, and those whose appeals are dismissed pursuant to Art. 44.09, is sufficiently rational to withstand a challenge based on the Equal Protection Clause. Texas was free to deal more severely with those who simultaneously invoked the appellate process and escaped from its custody than with those who first escaped from its custody, returned, and then invoked the appellate process within the time permitted by law. While each class of prisoners sought to escape, the first did so in the very midst of their invocation of the appellate process, while the latter did so before returning to custody and commencing that process. If Texas is free to adopt a policy which deters escapes by prisoners, as all of our cases make clear that it is, it is likewise free to impose more severe sanctions on those whose escape is reasonably calculated to disrupt the very appellate process which

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[10] See Tex. Code of Crim. Proc. Ann., Arts. 40.05, 40.09 (1966 ed., and Supp. 1974–1975), 44.08 *et seq.* For example, in the cases cited by the lower court as involving pre-appeal escapes with subsequent appeals, the appellants forfeited substantially all of their appeal rights through failure to file a timely record or bill of exceptions. *Webb* v. *State,* 460 S. W. 2d 903 (Tex. Crim. App. 1970); *McGee* v. *State,* 445 S. W. 2d 187 (Tex. Crim. App. 1969). In Texas the trial judge has the power to file the record with the Court of Criminal Appeals and if he does so prior to recapture of an escaped prisoner, the appeal is dismissed under Art. 44.09. *Webb* v. *State,* 449 S. W. 2d 230 (Tex. Crim. App. 1969); *Redman* v. *State,* 449 S. W. 2d 256 (Tex. Crim. App. 1970); *Ballage* v. *State,* 459 S. W. 2d 823 (Tex. Crim. App. 1970).

they themselves have set in motion.[11] *Ross* v. *Moffitt*, 417 U. S., at 610.

The motion of respondent for leave to proceed *in forma pauperis* and the petition for certiorari are granted, and the judgment of the Court of Appeals for the Fifth Circuit is

Reversed.

MR. JUSTICE DOUGLAS, dissenting, agrees with much of the dissenting opinion of MR. JUSTICE STEWART, but unlike him, would also affirm the judgment for the reasons stated by the Court of Appeals, 497 F. 2d 1007, 1012–1014 (CA5 1974).

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

If the shortcomings of the challenged Texas statute were only those addressed by the Court, I could join the Court's opinion. For I agree that Art. 44.09 is not rendered unconstitutional by its more lenient treatment of escaped felons under sentence of death or life imprisonment, nor by its asserted "underinclusive" inapplicability to a felon who escapes and is returned to custody involuntarily before his appeal is filed. But I think the Court has failed to come to grips with the real constitutional defect in the challenged statute.

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[11] The peculiar problems posed by escape of a prisoner during the ongoing appellate process were explored in *Loyd* v. *State*, 19 Tex. Ct. App. R., at 155, in the course of upholding the constitutionality of this statute:

"[L]et us suppose that the convict, pending his appeal, should escape and remain at large twenty or thirty days; what disposition should be made of his appeal? . . . Should this court wait until his return to custody? How long must it wait? Until it suits the prisoner's convenience? . . . [W]e are of the opinion that [Art. 44.09] is not only reasonable but eminently wise."

See also *Allen* v. *Georgia*, 166 U. S., at 141.

In summarily reversing the judgment before us the Court relies upon decisions establishing the long-settled "practice of declining to review the convictions of escaped criminal defendants." *Ante,* at 537. See *Smith* v. *United States,* 94 U. S. 97 (1876); *Bonahan* v. *Nebraska,* 125 U. S. 692 (1887); *Molinaro* v. *New Jersey,* 396 U. S. 365 (1970). See also *Allen* v. *Georgia,* 166 U. S. 138 (1897). But these decisions have universally been understood to mean only that a court may properly dismiss an appeal of a fugitive convict *when, and because,* he is not within the custody and control of the court. Until today, this Court has never intimated that under the rule of *Smith, Bonahan,* and *Molinaro* a court might dismiss an appeal of an escaped criminal defendant at a time when he has been returned to custody, and thus to the court's power and control.*

The rationale for the dismissal of an appeal when the appellant is at large is clearly stated in the *Smith* decision:

> "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error

*The Court in *Molinaro* v. *New Jersey* relied upon a Note, 18 Geo. Wash. L. Rev. 427, 430 (1950), which is cited in the Court's opinion today. *Ante,* at 537. The rule and its rationale are correctly stated in that Note: "A review of criminal appeal cases both in state and federal courts shows that when an appellant has escaped from custody and cannot be brought before the court, his case is not left pending indefinitely. In the absence of any statutory regulation, dismissal is granted in some form . . . . The basic theory behind all criminal cases has always been that there must be a defendant in the power and under the control of the court, and that there be someone who can respond to the judgment." 18 Geo. Wash. L. Rev., at 428–429.

> has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case." 94 U. S., at 97.

See also *Bonahan* v. *Nebraska,* 125 U. S. 692 (1887).

Here, as the Court notes, Dorrough was recaptured two days after his flight. And, as the Court also notes, his appeal was dismissed *after* his recapture. In this situation, the rule of *Smith-Bonahan-Molinaro* provides no support whatever for the Texas law that deprived Dorrough of his right to appeal.

If the challenged statute can be sustained, it must rest upon the alternative ground advanced by the Court—that, as a punitive and deterrent measure enacted in the exercise of the State's police power, it "discourages the felony of escape and encourages voluntary surrenders." But the statute imposes totally irrational punishments upon those subject to its application. If an escaped felon has been convicted in violation of law, the loss of his right to appeal results in his serving a sentence that under law was erroneously imposed. If, on the other hand, his trial was free of reversible error, the loss of his right to appeal results in no punishment at all. And those whose convictions would have been reversed if their appeals had not been dismissed serve totally disparate sentences, dependent not upon the circumstances of their escape, but upon whatever sentences may have been meted out under their invalid convictions. In my view, this random pattern of punishment cannot be considered a rational means of enforcing the State's interest

in deterring and punishing escapes. Cf. *McLaughlin* v. *Florida,* 379 U. S. 184, 191 (1964); *Rinaldi* v. *Yeager,* 384 U. S. 305, 309 (1966); *U. S. Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 538 (1973).

A closely analogous case was considered by the Supreme Court of Idaho in *In re Mallon,* 16 Idaho 737, 740–741, 102 P. 374 (1909). There the court considered a statute providing:

> "'. . . Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison.'"

The court concluded that the statute at issue was unconstitutional. Similarly the Supreme Court of Kansas in *State* v. *Lewin,* 53 Kan. 679, 37 P. 168 (1894), held unconstitutional a statute providing that upon escape a convict was to be punished by imposition of the full term of the sentence under which he had initially been imprisoned, without credit for any time served before the escape.

Under these Idaho and Kansas statutes, two men escaping at the same time and in the same manner could receive wholly different sentences, not related at all to the gravity of the offense of escape. That is precisely the vice of the Texas statute at issue in the present case.

I would affirm the judgment of the Court of Appeals.

SOUTHEASTERN PROMOTIONS, LTD. *v.* CONRAD ET AL.

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

No. 73–1004. Argued October 17, 1974—Decided March 18, 1975

Petitioner, a promoter of theatrical productions, applied to respondents, members of a municipal board charged with managing a city auditorium and a city-leased theater, to present a musical production at the theater. Upon the basis of outside reports from which it concluded that the production would not be "in the best interest of the community," respondents rejected the application. Petitioner's subsequent motion for a preliminary injunction was denied following a hearing by the District Court, which did not review the merits of respondents' decision but concluded that petitioner had not met the burden of proving irreparable injury. Petitioner then sought a permanent injunction permitting it to use the auditorium. Several months later, respondents filed their first responsive pleading, and the District Court, after a three-day hearing on the content of the musical, concluded that the production contained obscene conduct not entitled to First Amendment protection and denied injunctive relief. The Court of Appeals affirmed. *Held:*

1. Respondents' denial of use of the municipal facilities for the production, which was based on the board members' judgment of the musical's content, constituted a prior restraint. *Shuttlesworth* v. *Birmingham,* 394 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296. Pp. 552–558.

2. A system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system," *Freedman* v. *Maryland,* 380 U. S. 51, 58, *viz.,* (1) the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor; (2) any restraint before judicial review can be imposed only for a specified brief period and only to preserve the status quo; and (3) a prompt judicial determination must be assured. Since those safeguards in several respects were lacking here, respondents' action violated petitioner's First Amendment rights. Pp. 558–562.

486 F. 2d 894, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part and concurring in the result in part, *post,* p. 563. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post,* p. 564. REHNQUIST, J., filed a dissenting opinion, *post,* p. 570.

Henry P. Monaghan argued the cause for petitioner. With him on the brief was *John Alley.*

Randall L. Nelson argued the cause for respondents. With him on the brief was *Eugene N. Collins.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether First Amendment rights were abridged when respondents denied petitioner the use of a municipal facility in Chattanooga, Tenn., for the showing of the controversial rock musical "Hair." It is established, of course, that the Fourteenth Amendment has made applicable to the States the First Amendment's guarantee of free speech. *Douglas* v. *City of Jeannette,* 319 U. S. 157, 162 (1943).

I

Petitioner, Southeastern Promotions, Ltd., is a New York corporation engaged in the business of promoting and presenting theatrical productions for profit. On October 29, 1971, it applied for the use of the Tivoli, a privately owned Chattanooga theater under long-term lease to the city, to present "Hair" there for six days beginning November 23. This was to be a road company showing of the musical that had played for three

**Irwin Karp* filed a brief for the Authors League of America, Inc., as *amicus curiae* urging reversal.

years on Broadway, and had appeared in over 140 cities in the United States.[1]

Respondents are the directors of the Chattanooga Memorial Auditorium, a municipal theater.[2] Shortly after receiving Southeastern's application, the directors met, and, after a brief discussion, voted to reject it. None of them had seen the play or read the script, but they understood from outside reports that the musical, as produced elsewhere, involved nudity and obscenity on stage. Although no conflicting engagement was scheduled for the Tivoli, respondents determined that the production would not be "in the best interest of the community." Southeastern was so notified but no written statement of reasons was provided.

On November 1 petitioner, alleging that respondents' action abridged its First Amendment rights, sought a pre-

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[1] Twice previously, petitioner informally had asked permission to use the Tivoli, and had been refused. In other cities, it had encountered similar resistance and had successfully sought injunctions ordering local officials to permit use of municipal facilities. See *Southeastern Promotions, Ltd.* v. *City of Mobile,* 457 F. 2d 340 (CA5 1972); *Southeastern Promotions, Ltd.* v. *City of West Palm Beach,* 457 F. 2d 1016 (CA5 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City,* 459 F. 2d 282 (CA10 1972); *Southeastern Promotions, Ltd.* v. *City of Charlotte,* 333 F. Supp. 345 (WDNC 1971); *Southeastern Promotions, Ltd.* v. *City of Atlanta,* 334 F. Supp. 634 (ND Ga. 1971). See also *P. B. I. C., Inc.* v. *Byrne,* 313 F. Supp. 757 (Mass. 1970), vacated and remanded for further consideration, 413 U. S. 905 (1973). But see *Southeastern Promotions, Ltd.* v. *Oklahoma City,* Civil Action No. 72–105 (WD Okla. Mar. 27, 1972), rev'd, 459 F. 2d 282, *supra.*

The musical had been presented in two Tennessee cities, Memphis and Nashville.

[2] Code of the city of Chattanooga § 2–238. The board's members are appointed by the mayor and confirmed by the city's board of commissioners. § 2–237. The chairman, respondent Conrad, is commissioner of public utilities, grounds, and buildings. § 2–236.

liminary injunction from the United States District Court for the Eastern District of Tennessee. Respondents did not then file an answer to the complaint.[3] A hearing was held on November 4. The District Court took evidence as to the play's content, and respondent Conrad gave the following account of the board's decision:

> "We use the general terminology in turning down the request for its use that we felt it was not in the best interest of the community and I can't speak beyond that. That was the board's determination.
>
> "Now, I would have to speak for myself, the policy to which I would refer, as I mentioned, basically indicates that we will, as a board, allow those productions which are clean and healthful and culturally uplifting, or words to that effect. They are quoted in the original dedication booklet of the Memorial Auditorium." App. 25.[4]

The court denied preliminary relief, concluding that petitioner had failed to show that it would be irreparably

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[3] Neither did it file at that time a formal motion to dismiss. That motion was made later, on November 22, some time after the initial hearing. An answer was finally filed, pursuant to court order, on March 31, 1972.

[4] The Memorial Auditorium, completed in 1924, was dedicated to the memory of Chattanooga citizens who had "offered their lives" in World War I. The booklet referred to is entitled Souvenir of Dedication of Soldiers & Sailors Auditorium Chattanooga, Tenn. It contains the following:

"It will be [the board's] endeavor to make [the auditorium] the community center of Chattanooga; where civic, educational, religious, patriotic and charitable organizations and associations may have a common meeting place to discuss and further the upbuilding and general welfare of the city and surrounding territory.

"It will not be operated for profit, and no effort to obtain financial returns above the actual operating expenses will be permitted. Instead its purpose will be devoted for cultural advancement, and for clean, healthful, entertainment which will make for the upbuilding of a better citizenship." Exhibit 2, p. 40.

harmed pending a final judgment since scheduling was "purely a matter of financial loss or gain" and was compensable.

Southeastern some weeks later pressed for a permanent injunction permitting it to use the larger auditorium, rather than the Tivoli, on Sunday, April 9, 1972. The District Court held three days of hearings beginning April 3. On the issue of obscenity *vel non*, presented to an advisory jury, it took evidence consisting of the full script and libretto, with production notes and stage instructions, a recording of the musical numbers, a souvenir program, and the testimony of seven witnesses who had seen the production elsewhere. The jury returned a verdict that "Hair" was obscene. The District Court agreed. It concluded that conduct in the production—group nudity and simulated sex—would violate city ordinances and state statutes [5] making public nudity and

[5] Chattanooga Code:

"Sec. 6–4. Offensive, indecent entertainment.

"It shall be unlawful for any person to hold, conduct or carry on, or to cause or permit to be held, conducted or carried on any motion picture exhibition or entertainment of any sort which is offensive to decency, or which is of an obscene, indecent or immoral nature, or so suggestive as to be offensive to the moral sense, or which is calculated to incite crime or riot."

"Sec. 25–28. Indecent exposure and conduct.

"It shall be unlawful for any person in the city to appear in a public place in a state of nudity, or to bathe in such state in the daytime in the river or any bayou or stream within the city within sight of any street or occupied premises; or to appear in public in an indecent or lewd dress, or to do any lewd, obscene or indecent act in any public place."

Tennessee Code Ann. (Supp. 1971):

"39–1013. Sale or loan of material to minor—Indecent exhibits.—It shall be unlawful:

"(a) for any person knowingly to sell or loan for monetary consideration or otherwise exhibit or make available to a minor:

"(1) any picture, photograph, drawing, sculpture, motion picture

obscene acts criminal offenses.[6] This criminal conduct, the court reasoned, was neither speech nor symbolic speech, and was to be viewed separately from the musi-

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film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;

"(2) any book, pamphlet, magazine, printed matter, however reproduced, or sound recording, which contains any matter enumerated in paragraph (1) hereof above, or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;

"(b) for any person knowingly to exhibit to a minor for a monetary consideration, or knowingly to sell to a minor an admission ticket or pass or otherwise to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors."

"39–3003. Obscene material—Knowingly selling, distributing or exhibiting—Penalty.—It shall be a misdemeanor for any person to knowingly sell, distribute, display, exhibit, possess with the intent to sell, distribute, display or exhibit; or to publish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material."

Subsequent to our grant of the petition for certiorari in this case, the Supreme Court of Tennessee held that § 39–3007 of the Tennessee Code, which defined "obscene material," as those words were used in § 39–3003 and related sections, was unconstitutional for failure to satisfy the specificity requirements of *Miller* v. *California,* 413 U. S. 15 (1973). *Art Theater Guild, Inc.* v. *State ex rel. Rhodes,* 510 S. W. 2d 258 (1974). Thereafter, a new obscenity statute, Acts 1974 (Adj. S), c. 510, was enacted by the Tennessee Legislature; § 14 of that act specifically repealed the above quoted § 39–3003.

[6] Respondents also contended that production of the musical would violate the standard lease that petitioner would be required to sign. The relevant provision of that lease reads:

"This agreement is made and entered into upon the following express covenants and conditions, all and every one of which the lessee hereby covenants and agrees to and with the lessor to keep and perform:

"1. That said lessee will comply with all laws of the United States

cal's speech elements. Being pure conduct, comparable to rape or murder, it was not entitled to First Amendment protection. Accordingly, the court denied the injunction. 341 F. Supp. 465 (1972).

On appeal, the United States Court of Appeals for the Sixth Circuit, by a divided vote, affirmed. 486 F. 2d 894 (1973). The majority relied primarily on the lower court's reasoning. Neither the judges of the Court of Appeals nor the District Court saw the musical performed. Because of the First Amendment overtones, we granted certiorari. 415 U. S. 912 (1974).

Petitioner urges reversal on the grounds that (1) respondents' action constituted an unlawful prior restraint, (2) the courts below applied an incorrect standard for the determination of the issue of obscenity *vel non,* and (3) the record does not support a finding that "Hair" is obscene. We do not reach the latter two contentions, for we agree with the first. We hold that respondents' rejection of petitioner's application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards. Accordingly, on this narrow ground, we reverse.

II

Respondents' action here is indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions. See *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 150–151 (1969); *Staub* v. *City of Baxley,* 355 U. S. 313, 322 (1958); *Kunz* v. *New York,* 340 U. S. 290, 293–294 (1951); *Schneider* v. *State,* 308 U. S. 147, 161–162

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and of the State of Tennessee, all ordinances of the City of Chattanooga, and all rules and requirements of the police and fire departments or other municipal authorities of the City of Chattanooga." Exhibit 3.

(1939); *Lovell* v. *Griffin,* 303 U. S. 444, 451–452 (1938). In these cases, the plaintiffs asked the courts to provide relief where public officials had forbidden the plaintiffs the use of public places to say what they wanted to say. The restraints took a variety of forms, with officials exercising control over different kinds of public places under the authority of particular statutes. All, however, had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.

Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.

In each of the cited cases the prior restraint was embedded in the licensing system itself, operating without acceptable standards. In *Shuttlesworth* the Court held unconstitutional a Birmingham ordinance which conferred upon the city commission virtually absolute power to prohibit any "parade," "procession," or "demonstration" on streets or public ways. It ruled that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." 394 U. S., at 150–151. In *Hague* v. *CIO,* 307 U. S. 496 (1939), a Jersey City ordinance that forbade public assembly in the streets or parks without a permit from the local director of safety, who was empowered to refuse the permit upon his opinion that he would thereby prevent " 'riots, disturbances or disorderly

assemblage,'" was held void on its face. *Id.*, at 516 (opinion of Roberts, J.).

In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), a unanimous Court held invalid an act which proscribed the solicitation of money or any valuable thing for "any alleged religious, charitable or philanthropic cause" unless that cause was approved by the secretary of the public welfare council. The elements of the prior restraint were clearly set forth:

> "It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion." *Id.*, at 305.

The elements of prior restraint identified in *Cantwell* and other cases were clearly present in the system by which the Chattanooga board regulated the use of its theaters. One seeking to use a theater was required to apply to the board. The board was empowered to determine whether the applicant should be granted permission—in effect, a license or permit—on the basis of its review of the content of the proposed production. Approval of the application depended upon the board's affirmative action. Approval was not a matter of routine; instead, it involved the "appraisal of facts, the exercise of judgment, and the formation of an opinion" by the board.[7]

[7] With respect to petitioner's musical, respondents' determination was that the production would not be "in the best interest of

The board's judgment effectively kept the musical off stage. Respondents did not permit the show to go on and rely on law enforcement authorities to prosecute for anything illegal that occurred. Rather, they denied the application in anticipation that the production would violate the law. See *New York Times Co.* v. *United States,* 403 U. S. 713, 735–738 (1971) (WHITE, J., concurring).

Respondents' action was no less a prior restraint because the public facilities under their control happened to be municipal theaters. The Memorial Auditorium and the Tivoli were public forums designed for and dedicated to expressive activities. There was no question as to the usefulness of either facility for petitioner's production. There was no contention by the board that these facilities could not accommodate a production of this size. None of the circumstances qualifying as an established exception to the doctrine of prior restraint was present. Petitioner was not seeking to use a facility primarily serving a competing use. See, *e. g., Cameron* v. *Johnson,* 390 U. S. 611 (1968); *Adderley* v. *Florida,* 385 U. S. 39 (1966); *Brown* v. *Louisiana,* 383 U. S. 131 (1966). Nor was rejection of the application based on any regulation of time, place, or manner related to the nature of the facility or applications from other users. See *Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1941); *Poulos* v. *New Hampshire,* 345 U. S. 395, 408 (1953). No rights

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the community." That determination may have been guided by other criteria: (1) their own requirement, in the words of respondent Conrad, that a production be "clean and healthful and culturally uplifting," App. 25; or (2) the provisions of the statutes and ordinances prohibiting public nudity and obscenity. Whether or not their exercise of discretion was sufficiently controlled by law, *Shuttlesworth* v. *Birmingham,* 394 U. S. 147 (1969), there can be no doubt that approval of an application required some judgment as to the content and quality of the production.

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of individuals in surrounding areas were violated by noise or any other aspect of the production. See *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). There was no captive audience. See *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 304, 306–308 (1974); *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467–468 (1952) (DOUGLAS, J., dissenting).

Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U. S., at 163.

Thus, it does not matter for purposes of this case that the board's decision might not have had the effect of total suppression of the musical in the community. Denying use of the municipal facility under the circumstances present here constituted the prior restraint.[8]

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[8] Also important, though unessential to our conclusion, are the classificatory aspects of the board's decision. A licensing system need not effect total suppression in order to create a prior restraint. In *Interstate Circuit* v. *Dallas,* 390 U. S. 676, 688 (1968), it was observed that the evils attendant on prior restraint "are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." In that case, the Court held that a prior restraint was created by a system whereby an administrative board in Texas classified films as "suitable for young persons" or "not suitable for young persons." The "not suitable" films were not suppressed, but exhibitors were required to have

That restraint was final. It was no mere temporary bar while necessary judicial proceedings were under way.[9]

Only if we were to conclude that live drama is unprotected by the First Amendment—or subject to a totally different standard from that applied to other forms of expression—could we possibly find no prior restraint here. Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 503 (1952); see *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969). By its nature, theater usually is the acting out—or singing out—

special licenses and to advertise their classification in order to show them. Similarly, in *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963), the Court held that a system of "informal censorship" working by exhortation and advice sufficiently inhibited expression to constitute a prior restraint and warrant injunctive relief. There, the Court held unconstitutional a system in which a commission was charged with reviewing material "manifestly tending to the corruption of the youth"; it did not have direct regulatory or suppressing functions, but operated by persuasion and intimidation, and these informal methods were found effective.

In the present case, the board classified the musical as unfit for showing in municipal facilities. It did not make a point of publicizing its finding that "Hair" was not in the "best interest" of the public, but the classification stood as a warning to all concerned, private theater owners and general public alike. There is little in the record to indicate the extent to which the board's action may have affected petitioner's ability to obtain a theater and attract an audience. The board's classification, whatever the magnitude of its effect, was not unlike that in *Interstate Circuit* and *Bantam Books.*

[9] This case is clearly distinguishable from *Heller* v. *New York,* 413 U. S. 483 (1973). There, state authorities seized a copy of a film, temporarily, in order to preserve it as evidence. *Id.,* at 490. The Court held that there was not "any form of 'final restraint,' in the sense of being enjoined from exhibition or threatened with destruction." *Ibid.* Here, the board did not merely detain temporarily a copy of the script or libretto for the musical. Respondents reached a final decision to bar performance.

of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard. For, as was said in *Burstyn, supra,* at 503, when the Court was faced with the question of what First Amendment standard applies to films:

> "[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule."

III

Labeling respondents' action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional *per se.* *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 n. 10 (1963). See *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 716 (1931); *Times Film Corp.* v. *Chicago,* 365 U. S. 43 (1961). We have rejected the contention that the First Amendment's protection "includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture . . . even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government . . . ." *Id.,* at 46–47.

Any system of prior restraint, however, "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U. S., at 70; *New York Times Co.* v. *United States,* 403 U. S., at 714; *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971); *Carroll* v. *Princess Anne,* 393 U. S. 175, 181 (1968); *Near* v. *Minnesota ex rel. Olson,* 283 U. S., at 716. The presumption against prior restraints is heavier—and the degree of protection

broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See *Speiser* v. *Randall,* 357 U. S. 513 (1958).

In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S., at 71. We do not decide whether the performance of "Hair" fits within such an exception or whether, as a substantive matter, the board's standard for resolving that question was correct, for we conclude that the standard, whatever it may have been, was not implemented by the board under a system with appropriate and necessary procedural safeguards.

The settled rule is that a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman* v. *Maryland,* 380 U. S. 51, 58 (1965). See *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 367 (1971); *Blount* v. *Rizzi,* 400 U. S. 410, 419–421 (1971); *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139, 141–142 (1968). See also *Heller* v. *New York,* 413 U. S. 483, 489–490 (1973); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S., at 70–71; *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957). In *Freedman* the Court struck down a state scheme for the licensing of motion pictures, holding "that, because only a

judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U. S., at 58. We held in *Freedman,* and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured.

Although most of our cases have pertained to motion picture licensing or censorship, this Court has applied *Freedman* to the system by which federal customs agents seize imported materials, *United States* v. *Thirty-seven Photographs, supra,* and to that by which postal officials restrict use of the mails, *Blount* v. *Rizzi, supra.* In *Blount* we held unconstitutional provisions of the postal laws designed to control use of the mails for commerce in obscene materials. The provisions enabled the Postmaster General to halt delivery of mail to an individual and prevent payment of money orders to him. The administrative order became effective without judicial approval, and the burden of obtaining judicial review was placed upon the user.

If a scheme that restricts access to the mails must furnish the procedural safeguards set forth in *Freedman,* no less must be expected of a system that regulates use of a public forum. Respondents here had the same powers of licensing and censorship exercised by postal officials in *Blount,* and by boards and officials in other cases.

The theory underlying the requirement of safeguards is applicable here with equal if not greater force. An administrative board assigned to screening stage produc-

tions—and keeping off stage anything not deemed culturally uplifting or healthful—may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression.[10] And if judicial review is made unduly onerous, by reason of delay or otherwise, the board's determination in practice may be final.

Insistence on rigorous procedural safeguards under these circumstances is "but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan,* 372 U. S., at 66. Because the line between unconditionally guaranteed speech and speech that may be legitimately regulated is a close one, the "separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser* v. *Randall,* 357 U. S., at 525. The perils of prior restraint are well illustrated by this case, where neither the Board nor the lower courts could have known precisely the extent of nudity or simulated sex in the musical, or even that either would appear, before the play was actually performed.[11]

Procedural safeguards were lacking here in several respects. The board's system did not provide a procedure for prompt judicial review. Although the District Court commendably held a hearing on petitioner's motion for a preliminary injunction within a few days of the

[10] See Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 522–524 (1970); Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648, 656–659 (1955).

[11] There was testimony that the musical as performed differed "substantially" from the script, App. 79–80, and that the show was varied to fit the anticipated tastes of different audiences in different parts of the country. *Id.,* at 93. The musical's nude scene, apparently the most controversial portion, was played under varying conditions. No actor was under contractual obligation to perform it, and the number doing so changed from one performance to another, as did the lighting, and the duration of the scene. *Id.,* at 97–98, 23.

board's decision, it did not review the merits of the decision at that time. The question at the hearing was whether petitioner should receive *preliminary* relief, *i. e.*, whether there was likelihood of success on the merits and whether petitioner would suffer irreparable injury pending full review. Effective review on the merits was not obtained until more than five months later. Throughout, it was petitioner, not the board, that bore the burden of obtaining judicial review. It was petitioner that had the burden of persuasion at the preliminary hearing if not at the later stages of the litigation. Respondents did not file a formal answer to the complaint for five months after petitioner sought review. During the time prior to judicial determination, the restraint altered the status quo. Petitioner was forced to forgo the initial dates planned for the engagement and to seek to schedule the performance at a later date. The delay and uncertainty inevitably discouraged use of the forum.

The procedural shortcomings that form the basis for our decision are unrelated to the standard that the board applied. Whatever the reasons may have been for the board's exclusion of the musical, it could not escape the obligation to afford appropriate procedural safeguards. We need not decide whether the standard of obscenity applied by respondents or the courts below was sufficiently precise or substantively correct, or whether the production is in fact obscene. See *Hamling* v. *United States,* 418 U. S. 87 (1974); *Jenkins* v. *Georgia,* 418 U. S. 153 (1974); *Lewis* v. *City of New Orleans,* 415 U. S. 130 (1974); *Miller* v. *California,* 413 U. S. 15 (1973); *Gooding* v. *Wilson,* 405 U. S. 518 (1972). The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances.

Reversed.

MR. JUSTICE DOUGLAS, dissenting in part and concurring in the result in part.

While I agree with the Court's conclusion that the actions of the respondents constituted an impermissible prior restraint upon the performance of petitioner's rock musical, I am compelled to write separately in order to emphasize my view that the injuries inflicted upon petitioner's First Amendment rights cannot be treated adequately or averted in the future by the simple application of a few procedural band-aids. The critical flaw in this case lies, not in the absence of procedural safeguards, but rather in the very nature of the content screening in which respondents have engaged.

The Court today treads much the same path which it walked in *Freedman* v. *Maryland,* 380 U. S. 51 (1965), and the sentiment which I expressed on that occasion remains equally relevant: "I do not believe any form of censorship—no matter how speedy or prolonged it may be—is permissible." *Id.,* at 61–62 (concurring opinion). See also *Star* v. *Preller,* 419 U. S. 956 (1974) (dissenting opinion); *Times Film Corp.* v. *Chicago,* 365 U. S. 43, 78 (1961) (dissenting opinion).

A municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk; the forms of expression adopted in such a forum may be more expensive and more structured than those typically seen in our parks and streets, but they are surely no less entitled to the shelter of the First Amendment. As soon as municipal officials are permitted to pick and choose, as they are in all existing socialist regimes, between those productions which are "clean and healthful and culturally uplifting" in content and those which are not, the path is cleared for a regime of censorship under which full voice can be given only to those views which meet with the approval of the powers that be.

There was much testimony in the District Court concerning the pungent social and political commentary which the musical "Hair" levels against various sacred cows of our society: the Vietnam war, the draft, and the puritanical conventions of the Establishment. This commentary is undoubtedly offensive to some, but its contribution to social consciousness and intellectual ferment is a positive one. In this respect, the musical's often ribald humor and trenchant social satire may someday merit comparison to the most highly regarded works of Aristophanes, a fellow debunker of established tastes and received wisdom, yet one whose offerings would doubtless meet with a similarly cold reception at the hands of Establishment censors. No matter how many procedural safeguards may be imposed, any system which permits governmental officials to inhibit or control the flow of disturbing and unwelcome ideas to the public threatens serious diminution of the breadth and richness of our cultural offerings.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

Although in Part II of its opinion the Court lectures on the evils of standardless licensing systems, understandably this is not the ultimate basis for decision. However broad discretion the Chattanooga authorities may otherwise have, plainly they are subject to the laws against obscenity and public nudity, and the standard lease requires that productions such as "Hair" not violate the law. In this respect, the licensing system is not without standards. As might be expected, therefore, the issue in the case, as defined by the District Court and the Court of Appeals, was not whether local authorities had undue discretion but whether they correctly refused to license "Hair" on the ground that the production would fail to satisfy "Paragraph (1) of the standard lease form

requiring the lessee to comply with all state and local laws in its use of the leased premises," these laws being the laws against obscenity, public nudity, and display of sexually oriented materials to minors. In so framing the question, the courts below reflected the prayer of the complaint, App. 13–14, which sought a declaration that the musical was protected expression under the First Amendment, did not violate any city ordinance, and was not obscene. An injunction requiring local authorities to make the municipal facilities available for the production of "Hair" was also sought.

The District Court and the Court of Appeals considered the issue tendered and held that the contemplated production of "Hair" did not qualify for a lease under the relevant state and local laws. Here, the majority does not address this question, but nevertheless reverses on the ground that the Chattanooga permit system is "lacking in constitutionally required minimal procedural safeguards." *Ante,* at 552. The Court's understanding of our prior cases is unexceptionable, but reaching a decision on this ground is inappropriate. In the first place, no such issue appears to have been tendered to the District Court or to have been decided by either the District Court or the Court of Appeals. As already indicated, the complaint sought a declaration that "Hair" did not violate the relevant ordinances and statutes as well as an injunction permitting the use of municipal facilities for the showing of the musical. Secondly, however inadequate the Chattanooga system might be under *Freedman* v. *Maryland,* 380 U. S. 51 (1965), the parties have now been to court; and, after trial, "Hair" has been held violative of Tennessee statutes by both the District Court and the Court of Appeals. This Court does not now reverse or disapprove these decisions in this respect; and assuming their correctness, as is therefore appropriate, is it the Court's intention in reversing the judgment

of the Court of Appeals to order that "Hair," which has been held obscene after trial, must be issued a license for showing in the municipal facilities of Chattanooga? If this is the case, it is a very odd disposition, one which I cannot join. On the record before us, it would be error to enter any judgment the effect of which is to require the Chattanooga authorities to permit the showing of "Hair" in the municipal auditorium.

The Court asserts that "Hair" contains a nude scene and that this is "the most controversial portion" of the musical. This almost completely ignores the District Court's description of the play as involving not only nudity but repeated "simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse . . . ." [1]

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[1] 341 F. Supp. 465, 472–474 (ED Tenn. 1972):

"Findings of Fact

"Turning first to the issue of obscenity, the script, libretto, stage instructions, musical renditions, and the testimony of the witnesses reflect the following relevant matters (It should be noted that the script, libretto, and stage instructions do not include but a small portion of the conduct hereinafter described as occurring in the play):

"The souvenir program as formerly distributed in the lobby (Exhibit No. 1) identified the performers by picture and biographical information, one female performer identifying herself as follows:

" 'Hobbies are picking my nose, fucking, smoking dope, astro projection. All that I am or ever hope to be, I owe to my mother.'

"It was testified that distribution of this program had now been discontinued. Prior to the opening of the play, and to the accompaniment of music appropriate to the occasion, a 'tribe' of New York 'street people' start gathering for the commencement of the performance. In view of the audience the performers station themselves in various places, some mingling with the audience, with a female performer taking a seated position on center stage with her legs spread wide to expose to the audience her genital area, which is covered with the design of a cherry. Thus the stage is set for all that follows. The performance then begins to the words and music of the song 'Aquarius,' the melody of which, if not the words, have

Given this description of "Hair," the First Amendment in my view does not compel municipal authorities to permit production of the play in municipal facilities. Whether or not a production as described by the District Court is obscene and may be forbidden to adult audiences,

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become nationally, if not internationally, popular, according to the evidence. The theme of the song is the coming of a new age, the age of love, the age of 'Aquarius.' Following this one of the street people, Burger, introduces himself by various prefixes to his name, including 'Up Your Burger,' accompanied by an anal finger gesture and 'Pittsburger,' accompanied by an underarm gesture. He then removes his pants and dressed only in jockey shorts identifies his genitals by the line, 'What is this God-damned thing? 3,000 pounds of Navajo jewelry? Ha! Ha! Ha!' Throwing his pants into the audience he then proceeds to mingle with the audience and, selecting a female viewer, exclaims, 'I'll bet you're scared shitless.'

"Burger then sings a song, 'Looking For My Donna,' and the tribe chants a list of drugs beginning with 'hashish' and ending with 'Methadrine, Sex, You, WOW!' (Exhibit No. 4, p. 1–5) Another male character then sings the lyric.

" 'SODOMY, FELLATIO, CUNNILINGUS, PEDERASTY—FATHER, WHY DO THESE WORDS SOUND SO NASTY? MASTURBATION CAN BE FUN. JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE.' (Exhibit No. 4, p. 1–5)

"The play then continues with action, songs, chants, and dialogue making reference by isolated words, broken sentences, rhyme, and rapid changes to such diverse subjects as love, peace, freedom, war, racism, air pollution, parents, the draft, hair, the flag, drugs, and sex. The story line gradually centers upon the character Claude and his response and the response of the tribe to his having received a draft notice. When others suggest he burn his draft card, he can only bring himself to urinate upon it. The first act ends when all performers, male and female, appear nude upon the stage, the nude scene being had without dialogue and without reference to dialogue. It is also without mention in the script. Actors simulating police then appear in the audience and announce that they are under arrest for watching this 'lewd, obscene show.'

"The second act continues with song and dialogue to develop the story of Claude's draft status, with reference interspersed to such diverse topics as interracial love, a drug 'trip,' impersonation of

it is apparent to me that the State of Tennessee could constitutionally forbid exhibition of the musical to chil-

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various figures from American history,[*] religion, war, and sex. The play ends with Claude's death as a result of the draft and the street people singing the song, 'Let the Sunshine In,' a song the testimony reflects has likewise become popular over the Nation.

"Interspersed throughout the play, as reflected in the script, is such 'street language' as 'ass' (Exhibit No. 4, pp. 1–20, 21 and 2–16), 'fart' (Exhibit No. 4, p. 1–26), and repeated use of the words 'fuck'[**] and the four letter word for excretion (Exhibit No. 4, pp. 1–7, 9 and 41). In addition, similar language and posters containing such language were used on stage but not reflected in the script.

"Also, throughout the play, and not reflected in the script, are repeated acts of simulated sexual intercourse. These were testified to by every witness who had seen the play. They are often unrelated to any dialogue and accordingly could not be placed with accuracy in the script. The overwhelming evidence reflects that simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse are committed throughout the play, often without reference to any dialogue, song, or story line in the play. Such acts are committed both standing up and lying down, accompanied by all the bodily movements included in such acts, all the while the actors and actresses are in close bodily contact. At one point the character Burger performs

"[*]Lincoln is regaled with the following lyrics: 'I's free now thanks to you, Massa Lincoln, emancipator of the slave, yeah, yeah, yeah! Emanci—mother fucking—pater of the slave, yeah, yeah, yeah! Emanci—mother fucking—pater of the slave, yeah, yeah, yeah!' With Lincoln responding, 'Bang my ass . . . I ain't dying for no white man!' "

"[**]A woman taking her departure says to the tribe, 'Fuck off, kids.' (Exhibit No. 4, p. 1–35). The following dialogue occurs as Claude nears his death scene:

" 'Burger: I hate the fucking world, don't you?

" 'Claude: I hate the fucking world, I hate the fucking winter, I hate these fucking streets.

" 'Burger: I wish the fuck it would snow at least.

" 'Claude: Yeah, I wish the fuck it would snow at least.

" 'Burger: Yeah, I wish the fuck it would.

" 'Claude: Oh, fuck!

" 'Burger: Oh, fucky, fuck, fuck!' (Exhibit No. 4, p. 2–22)"

dren,[2] *Ginsberg* v. *New York,* 390 U. S. 629 (1968), and that Chattanooga may reserve its auditorium for productions suitable for exhibition to all the citizens of the city, adults and children alike. "Hair" does not qualify in this respect, and without holding otherwise, it is improvident for the Court to mandate the showing of "Hair" in the Chattanooga auditorium.[3]

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a full and complete simulation of masturbation while using a red microphone placed in his crotch to simulate his genitals. The evidence again reflects that this is unrelated to any dialogue then occurring in the play. The evidence further reflects that repeated acts of taking hold of other actors' genitals occur, again without reference to the dialogue. While three female actresses sing a song regarding interracial love, three male actors lie on the floor immediately below them repeatedly thrusting their genitals at the singers. At another point in the script (Exhibit No. 4, p. 2–22) the actor Claude pretends to have lost his penis. The action accompanying this line is to search for it in the mouths of other actors and actresses."

[2] The producer, director, and president of petitioner, Southeastern Promotions, Ltd., did not insist in the District Court that petitioner was entitled to exhibit the play to minors contrary to local law. His testimony, Tr. 7–8, was that if there was "a standing ordinance related to the exclusion of minors, we would certainly abide by it . . . ."

[3] As appears from Tr. of Oral Arg. 16–17, petitioner's counsel was of the view that the issue of obscenity must be reached:

"So it would appear that the question of obscenity is not avoided even if the Court agrees with petitioner that the standards used were ultimately bad. Since on remand the respondents are going to press obscenity as the basis for denying access to HAIR and the lower courts are going to sustain that position, we therefore urge this Court to address itself to the question of the appropriate standards, not only to prevent a waste of resources and judicial economy, but because of widespread public interest in resolving this issue. There are very few plays that can afford the expense of litigation all the way to this Court."

MR. JUSTICE REHNQUIST, dissenting.

The Court treats this case as if it were on all fours with *Freedman* v. *Maryland,* 380 U. S. 51 (1965), which it is not. *Freedman* dealt with the efforts of the State of Maryland to prohibit the petitioner in that case from showing a film "at his Baltimore theater," *id.,* at 52. Petitioner here did not seek to show the musical production "Hair" at *its* Chattanooga theater, but rather at a Chattanooga theater owned by the city of Chattanooga.

The Court glosses over this distinction by treating a community-owned theater as if it were the same as a city park or city street, which it is not. The Court's decisions have recognized that city streets and parks are traditionally open to the public, and that permits or licenses to use them are not ordinarily required. "[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *Texas,* 318 U. S. 413, 416 (1943). The Court has therefore held that where municipal authorities seek to exact a license or permit for those who wish to use parks or streets for the purpose of exercising their right of free speech, the standards governing the licensing authority must be objective, definite, and nondiscriminatory. *Shuttlesworth* v. *City of Birmingham,* 394 U. S. 147 (1969). But until this case the Court has not equated a public auditorium, which must of necessity schedule performances by a process of inclusion and exclusion, with public streets and parks.

In *Pickering* v. *Board of Education,* 391 U. S. 563, 568 (1968), the Court recognized that the government as an

employer was to be viewed differently from the government as a lawmaker for the citizenry in general:

> "[I]t cannot be gainsaid 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 regulation of the speech of the citizenry in general."

See, *e. g., Communications Association* v. *Douds,* 339 U. S. 382, 402–403 (1950); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 95 (1947); *Konigsberg* v. *State Bar,* 366 U. S. 36, 50–51 (1961). Here we deal with municipal action by the city of Chattanooga, not prohibiting or penalizing the expression of views in dramatic form by citizens at large, but rather managing its municipal auditorium. In *Adderley* v. *Florida,* 385 U. S. 39, 47–48 (1966), the Court said:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property .... The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."

The Court avoids the impact of cases such as *Adderley* by insisting that the municipal auditorium and the theater were "public forums designed for and dedicated to expressive activities," *ante,* at 555, and that the rejection of petitioner's application was not based on "any regulation of time, place, or manner related to the nature of the facility or applications from other users." *Ibid.* But the apparent effect of the Court's decision is to tell the managers of municipal auditoriums that they may

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exercise no selective role whatsoever in deciding what performances may be booked. The auditoriums in question here have historically been devoted to "clean, healthful entertainment"; [1] they have accepted only productions not inappropriate for viewing by children so that the facilities might serve as a place for entertaining the whole family. Viewed apart from any constitutional limitations, such a policy would undoubtedly rule out much worthwhile adult entertainment. But if it is the desire of the citizens of Chattanooga, who presumably have paid for and own the facilities, that the attractions to be shown there should not be of the kind which would offend any substantial number of potential theatergoers, I do not think the policy can be described as arbitrary or unreasonable.[2] Whether or not the production of the version of "Hair" here under consideration is obscene, the findings of fact made by the District Court and affirmed on appeal do indicate that it is not entertainment designed for the whole family.[3]

If every municipal theater or auditorium which is "designed for and dedicated to expressive activities" becomes subject to the rule enunciated by the Court in this case, consequences unforeseen and perhaps undesired by the Court may well ensue. May an opera house limit its

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[1] See the Court's opinion, *ante,* at 549 n. 4.

[2] Limitations on the use of municipal auditoriums by government must be sufficiently reasonable to satisfy the Due Process Clause and cannot unfairly discriminate in violation of the Equal Protection Clause. A municipal auditorium which opened itself to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment. There is no allegation in the instant case that the auditoriums accepted equally graphic productions while unfairly discriminating against "Hair" because of its expressions of political and social belief.

[3] The findings of fact of the District Court were reported at 341 F. Supp. 465, 472–474 (ED Tenn. 1972), and were repeated by the Court of Appeals at 486 F. 2d 894, 895–897 (CA6 1973).

productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come, first served basis? These questions are real ones in light of the Court's opinion, which by its terms seems to give no constitutionally permissible role in the way of selection to the municipal authorities.

But these substantive aspects of the Court's opinion are no more troubling than the farrago of procedural requirements with which it has saddled municipal authorities. Relying on *Freedman,* the Court holds that those charged with the management of the auditorium have the burden of instituting judicial proceedings, that "restraint" prior to judicial review can be imposed only for a specified brief period, and that a prompt final judicial determination must be assured. *Ante,* at 560.

If these standards are applicable only where a lease for a production is refused on the grounds that the production is putatively obscene, the Court has performed the rather novel feat of elevating obscene productions to a preferred position under the First Amendment. If these procedures must be invoked every time the management of a municipal theater declines to lease the facilities, whether or not because of the putative obscenity of the performance, other questions are raised. What will be the issues to be tried in these proceedings? Is the Court actually saying that unless the city of Chattanooga could criminally punish a person for staging a performance in a theater which he owned, it may not deny a lease to that same person in order for him to stage that performance in a theater owned by the city?

A municipal theater may not be run by municipal authorities as if it were a private theater, free to judge on a content basis alone which plays it wishes to have performed and which it does not. But, just as surely, that element of it which is "theater" ought to be accorded

some constitutional recognition along with that element of it which is "municipal." I do not believe fidelity to the First Amendment requires the exaggerated and rigid procedural safeguards which the Court insists upon in this case. I think that the findings of the District Court and the Court of Appeals support the conclusion that petitioner was denied a lease for constitutionally adequate and nondiscriminatory reasons. I would therefore affirm the judgment of the Court of Appeals.

Syllabus

BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* ALCALA ET AL.

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

No. 73–1708. Argued January 22, 1975—Decided March 18, 1975

For the purposes of eligibility for benefits under the Aid to Families with Dependent Children (AFDC) program, § 406 (a) of the Social Security Act defines "dependent child" as "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother," or certain other designated relatives, and (2) who is under the age of 18, or under the age of 21 and a student. *Held:* The term "dependent child," as so defined, does not include unborn children, and hence States receiving federal financial aid under the AFDC program are not required to offer welfare benefits to pregnant women for their unborn children. Pp. 578–586.

(a) Under the axiom that words used in a statute are to be given their ordinary meaning absent persuasive reasons to the contrary, and reading the definition of "dependent child" in its statutory context, it is apparent that Congress used the word "child" to refer to an individual already born, with an existence separate from its mother. Pp. 580–581.

(b) This conclusion is also supported by the limited purpose of the AFDC program to substitute for the practice of removing needy children from their homes, and to free widowed and divorced mothers from the necessity of working, so that they could remain home to supervise their children, and by the fact that the Social Security Act also provides federal funding for prenatal and postnatal health services to mothers and infants, explicitly designed to reduce infant and maternal mortality, rather than for "maternity benefits" to support expectant mothers. Pp. 581–584.

(c) The doctrine that accords weight to consistent administrative interpretation of a statute does not apply to a Department of Health, Education, and Welfare (HEW) regulation allowing States the option of paying AFDC benefits to pregnant women on

behalf of unborn children, where HEW says that the regulation is not based on a construction of the term "dependent child" but on HEW's general authority to make rules for efficient administration of the Act, and where legislative history tends to rebut the claim that Congress by silence has acquiesced in the view that unborn children qualify for AFDC payments. Pp. 584–586.

494 F. 2d 743, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 587. DOUGLAS, J., took no part in the consideration or decision of the case.

Richard C. Turner, Attorney General of Iowa, argued the cause for petitioners. With him on the brief was *Lorna Lawhead Williams,* Special Assistant Attorney General.

Robert Bartels argued the cause and filed a brief for respondents.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question presented by this case is whether States receiving federal financial aid under the program of Aid to Families with Dependent Children (AFDC) must

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Bork, Keith A. Jones,* and *John B. Rhinelander* for the United States; by *Robert L. Shevin,* Attorney General, *Eva Dunkerley Peck,* and *Chester G. Senf* for the State of Florida; by *Andrew P. Miller,* Attorney General of Virginia, and *Stuart H. Dunn* and *Karen C. Kincannon,* Assistant Attorneys General, for Lukhard, Director of the Department of Welfare, Commonwealth of Virginia; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

George R. Moscone filed a brief for the American Association for Maternal and Child Health et al. as *amici curiae* urging affirmance.

offer welfare benefits to pregnant women for their unborn children. As the case comes to this Court, the issue is solely one of statutory interpretation.

I

Respondents, residents of Iowa, were pregnant at the time they filed this action. Their circumstances were such that their children would be eligible for AFDC benefits upon birth. They applied for welfare assistance but were refused on the ground that they had no "dependent children" eligible for the AFDC program. Respondents then filed this action against petitioners, Iowa welfare officials. On behalf of themselves and other women similarly situated, respondents contended that the Iowa policy of denying benefits to unborn children conflicted with the federal standard of eligibility under § 406 (a) of the Social Security Act, as amended, 42 U. S. C. § 606 (a), and resulted in a denial of due process and equal protection under the Fourteenth Amendment.[1] The District Court certified the class and granted declaratory and injunctive relief. The court held that unborn children are "dependent children" within the meaning of § 406 (a) and that by denying them AFDC benefits Iowa had departed impermissibly from the federal standard of eligibility. The District Court did not reach respondents' constitutional claims. 362 F. Supp. 180 (SD Iowa 1973). The Court of Appeals for the Eighth Circuit affirmed. 494 F. 2d 743 (1974). We granted certiorari to resolve the conflict among the federal courts that have considered the question.[2] 419 U. S. 823. We

[1] The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3). See *Hagans* v. *Lavine*, 415 U. S. 528 (1974).

[2] The cases are cited in *Parks* v. *Harden*, 504 F. 2d 861, 863 n. 4 (CA5 1974).

conclude that the statutory term "dependent child" does not include unborn children, and we reverse.

II

The Court has held that under § 402 (a)(10) of the Social Security Act, 42 U. S. C. § 602 (a)(10), federal participation in state AFDC programs is conditioned on the State's offering benefits to all persons who are eligible under federal standards. The State must provide benefits to all individuals who meet the federal definition of "dependent child" and who are "needy" under state standards, unless they are excluded or aid is made optional by another provision of the Act. *New York Dept. of Social Services* v. *Dublino,* 413 U. S. 405, 421–422 (1973); *Carleson* v. *Remillard,* 406 U. S. 598 (1972); *Townsend* v. *Swank,* 404 U. S. 282 (1971); *King* v. *Smith,* 392 U. S. 309 (1968). The definition of "dependent child" appears in § 406 (a) of the Act:

> "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment . . . ." 42 U. S. C. § 606 (a).

The section makes no mention of pregnant women or unborn children as such.

Respondents contend, citing dictionary definitions,[3] that the word "child" can be used to include unborn children. This is enough, they say, to make the statute ambiguous and to justify construing the term "dependent child" in light of legislative purposes and administrative interpretation.[4] They argue that both factors support their position in this case. First, paying benefits to needy pregnant women would further the purpose of the AFDC program because it would enable them to safeguard the health of their children through prenatal care and adequate nutrition. Second, for over 30 years the Department of Health, Education, and Welfare (HEW) has offered States an option to claim federal matching funds for AFDC payments to pregnant women.[5]

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[3] *E. g.,* Webster's Third New International Dictionary (1961), which includes as one definition of "child," "an unborn or recently born human being: FETUS, INFANT, BABY." This, of course, is only one of many definitions for the word "child," and its use with reference to unborn children is not the most frequent. Webster's New International Dictionary (2d ed. 1957) qualified the definition quoted above by adding: "now chiefly in phrases. Cf. WITH CHILD, CHILDBIRTH." Respondents have candidly furnished citations to other current dictionaries that do not indicate that the word "child" is used to refer to unborn children. Respondents acknowledge that reliance on dictionaries cannot solve the question presented in this case. At most, the dictionaries demonstrate the possible ambiguity in the term "dependent child."

[4] See *United States* v. *Southern Ute Indians,* 402 U. S. 159, 173 n. 8 (1971); *Studebaker* v. *Perry,* 184 U. S. 258, 269 (1902); *Merritt* v. *Welsh,* 104 U. S. 694, 702–703 (1882).

[5] The current regulation provides that "[f]ederal financial participation is available in . . . [p]ayments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis." 45 CFR § 233.90 (c)(2)(ii). Although the regulation itself does not say expressly that aid to unborn children is optional with the States, HEW's administrative practice makes clear

A

Several of the courts that have faced this issue have read *King, Townsend,* and *Carleson, supra,* to establish a special rule of construction applicable to Social Security Act provisions governing AFDC eligibility. They have held that persons who are arguably included in the federal eligibility standard must be deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous. See *Carver* v. *Hooker,* 369 F. Supp. 204, 210–215 (NH 1973), aff'd, 501 F. 2d 1244 (CA1 1974); *Stuart* v. *Canary,* 367 F. Supp. 1343, 1345 (ND Ohio 1973); *Green* v. *Stanton,* 364 F. Supp. 123, 125–126 (ND Ind. 1973), aff'd *sub nom. Wilson* v. *Weaver,* 499 F. 2d 155 (CA7 1974). But see *Mixon* v. *Keller,* 372 F. Supp. 51, 55 (MD Fla. 1974). This departure from ordinary principles of statutory interpretation is not supported by the Court's prior decisions. *King, Townsend,* and *Carleson* establish only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional. The method of analysis used to define the federal standard of eligibility is no different from that used in solving any other problem of statutory construction.

Our analysis of the Social Security Act does not support a conclusion that the legislative definition of "dependent child" includes unborn children. Following the axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons

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that this regulation allows States to exclude unborn children from their AFDC programs. As of 1971 HEW had approved 34 state plans, including Iowa's, that furnished no aid to unborn children. 494 F. 2d 743, 745 (CA8 1974).

to the contrary, *Banks* v. *Chicago Grain Trimmers,* 390 U. S. 459, 465 (1968); *Minor* v. *Mechanics Bank of Alexandria,* 1 Pet. 46, 64 (1828), and reading the definition of "dependent child" in its statutory context, we conclude that Congress used the word "child" to refer to an individual already born, with an existence separate from its mother.

As originally enacted in 1935, the Social Security Act made no provision for the needs of the adult taking care of a "dependent child." It authorized aid only for the child and offered none to support the mother.[6] C. 531, § 406, 49 Stat. 629. The Act expressly contemplated that the first eligible child in a family would receive greater benefits than succeeding children, recognizing the lower per capita cost of support in families with more than one child, § 403 (a), but the Act included no similar provision recognizing the incremental cost to a pregnant woman of supporting her "child." The Act also spoke of children "living with" designated relatives, § 406 (a), and referred to residency requirements dependent on the child's place of birth. § 402 (b). These provisions would apply awkwardly, if at all, to pregnant women and unborn children. The failure to provide explicitly for the special circumstances of pregnant women strongly suggests that Congress had no thought of providing AFDC benefits to "dependent children" before birth.[7]

The purposes of the Act also are persuasive. The AFDC program was originally conceived to substitute for the practice of removing needy children from

[6] The Act was amended in 1950 to authorize payment for the needs of the child's caretaker. Act of Aug. 28, 1950, § 323, 64 Stat. 551.

[7] A number of other provisions of the Act would be similarly inapplicable to unborn children. See *Murrow* v. *Clifford,* 502 F. 2d 1066, 1075–1076 (CA3 1974) (Rosenn, J., concurring and dissenting).

their homes and placing them in institutions, and to free widowed and divorced mothers from the necessity of working, so that they could remain home to supervise their children. This purpose is expressed clearly in President Roosevelt's message to Congress recommending the legislation, H. R. Doc. No. 81, 74th Cong., 1st Sess., 29–30 (1935), and in committee reports in both Houses of Congress, S. Rep. No. 628, 74th Cong., 1st Sess., 16–17 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). See *Wisdom* v. *Norton*, 507 F. 2d 750, 754–755 (CA2 1974); Note, Eligibility of the Unborn for AFDC Benefits: The Statutory and Constitutional Issues, 54 B. U. L. Rev. 945, 955–958 (1974). The restricted purpose of the AFDC program is evidenced in the Act itself by the limitations on aid. The Act originally authorized aid only for children living with designated relatives.[8] The list of relatives has grown, *supra*, at 578, but there is still no general provision for AFDC payments to needy children living with distant relatives or unrelated persons, or in institutions.[9]

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[8] The original definition of "dependent child" was:

"a child under the age of sixteen who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt, in a place of residence maintained by one or more of such relatives as his or their own home . . . ." § 406 (a), 49 Stat. 629.

[9] The Act now authorizes, in addition to payments for children in the homes of designated relatives, foster care payments for children who have been removed from the homes of relatives. 42 U. S. C. § 608. It also provides financial support for child-welfare services, in a form different from the direct payments in the general AFDC program, for "homeless, dependent, or neglected children." 42 U. S. C. §§ 622, 625.

The statement of purposes in the Act, amended several times since

Congress did not ignore the needs of pregnant women or the desirability of adequate prenatal care. In Title V of the Social Security Act, now codified as 42 U. S. C. §§ 701–708 (1970 ed. and Supp. III), Congress provided federal funding for prenatal and postnatal health services to mothers and infants, explicitly designed to reduce infant and maternal mortality.[10] See S. Rep. No. 628, *supra,* at 20. In selecting this form of aid for pregnant women, Congress had before it proposals to follow the lead of some European countries that provided "maternity benefits" to support expectant mothers for a specified period before and after childbirth. Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 182, 965–971 (1935). If Congress had intended to include a similar program in the Social Security Act, it very likely would have done so explicitly

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1935, still indicates that Congress has not undertaken to provide support for all needy children:

"For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." 42 U. S. C. § 601.

[10] As Judge Weinfeld's opinion for the Second Circuit in *Wisdom* v. *Norton,* 507 F. 2d 750, 755 (1974), points out, one of the major reasons for making welfare payments on behalf of an unborn child would be to enable its mother to purchase adequate prenatal care. The fact that Congress explicitly provided medical care for expectant mothers in Title V is evidence "of a congressional intent *not* to include unborn children under AFDC but to provide for maternity care in a different section of the statute." *Id.,* at 755 n. 27.

rather than by relying on the term "dependent child," at best a highly ambiguous way to refer to unborn children.

B

Respondents have also relied on HEW's regulation allowing payment of AFDC benefits on behalf of unborn children. They ask us to defer to the agency's longstanding interpretation of the statute it administers. Respondents have provided the Court with copies of letters and interoffice memoranda that preceded adoption of this policy in 1941 by HEW's predecessor, the Bureau of Public Assistance. These papers suggest that the agency initially may have taken the position that the statutory phrase "dependent children" included unborn children.[11]

A brief filed by the Solicitor General on behalf of HEW in this case disavows respondents' interpretation of the Act. HEW contends that unborn children are not included in the federal eligibility standard and that the regulation authorizing federal participation in AFDC payments to pregnant women is based on the agency's general authority to make rules for efficient administration of the Act. 42 U. S. C. § 1302. The regulation is consistent with this explanation. It appears in a subsection with other rules authorizing temporary aid, at the option of the States, to individuals in the process of gaining or losing eligibility for the AFDC program. For example, one of the accompanying rules authorizes States to pay AFDC bene-

[11] At oral argument petitioners' counsel objected to the inclusion of these materials in respondents' brief, noting that they were not in the record and had not been authenticated. Tr. of Oral Arg. 43–45. Respondents suggested that at least some of the materials are proper subjects for judicial notice. In the view we take of the case these materials are not dispositive, and it is unnecessary to resolve their status.

fits to a relative 30 days before the eligible child comes to live in his home. 45 CFR § 233.90 (c)(2). HEW's current explanation of the regulation deprives respondents' argument of any significant support from the principle that accords persuasive weight to a consistent, longstanding interpretation of a statute by the agency charged with its administration. See *FMB* v. *Isbrandtsen Co.*, 356 U. S. 481, 499–500 (1958); *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932).

Nor can respondents make a convincing claim of congressional acquiescence in HEW's prior policy. In 1972, in the context of major Social Security legislation, both Houses of Congress passed bills to revise the AFDC system. One section of the bill passed in the Senate would have amended the definition of "dependent child" expressly to exclude unborn children. H. R. 1, 92d Cong., 1st Sess. (1972) (as amended by Senate); 118 Cong. Rec. 33990, 33995 (1972); see S. Rep. No. 92–1230, pp. 108, 467 (1972). The House bill would have substituted an entirely new definition of eligibility under the Administration's "Family Assistance Plan." H. R. 1, 92d Cong., 1st Sess. (1972); 117 Cong. Rec. 21450, 21463 (1971). The accompanying committee report specified that under the new definition unborn children would not be eligible for aid. H. R. Rep. No. 92–231, p. 184 (1971). Both bills passed the respective Houses of Congress, but none of the AFDC amendments appeared in the final legislation, Pub. L. 92–603, 86 Stat. 1329, because the House and Senate conferees were unable to agree on the underlying principle of welfare reform. All efforts to amend AFDC were postponed for another session of Congress. See 118 Cong. Rec. 36813–36825, 36926–36936 (1972); *Mixon* v. *Keller*, 372 F. Supp., at 55. Under the circumstances, failure to enact the relatively minor provision relating to unborn children cannot be regarded as ap-

proval of HEW's practice of allowing optional benefits. To the extent this legislative history sheds any light on congressional intent, it tends to rebut the claim that Congress by silence has acquiesced in the former HEW view that unborn children are eligible for AFDC payments.[12]

C

In this case respondents did not, and perhaps could not, challenge HEW's policy of allowing States the option of paying AFDC benefits to pregnant women. We therefore have no occasion to decide whether HEW has statutory authority to approve federal participation in state programs ancillary to those expressly provided in the Social Security Act, see *Wisdom* v. *Norton,* 507 F. 2d, at 756, or whether 42 U. S. C. § 1302 authorizes HEW to fund benefits for unborn children as a form of temporary aid to individuals who are in the process of qualifying under federal standards. See *Parks* v. *Harden,* 504 F. 2d 861, 875–877 (CA5 1974) (Ainsworth, J., dissenting).

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[12] Several of the courts that have adopted the position urged here by respondents have interpreted the action of the 92d Congress as evidence of a "belief that unborn children are currently eligible under the Act 'and that only by amending its language can their status as eligible individuals be altered.'" *Parks* v. *Harden,* 504 F. 2d, at 872. See also *Carver* v. *Hooker,* 501 F. 2d 1244, 1247 (CA1 1974); *Wilson* v. *Weaver,* 358 F. Supp. 1147, 1155 (ND Ill. 1973), aff'd, 499 F. 2d 155 (CA7 1974). The House bill does not lend itself to this interpretation because it was not designed to amend the existing AFDC structure but to create an entirely different system. The Senate bill was framed as an amendment to the eligibility provisions in § 406 (a), but there is no evidence that its drafters believed unborn children were included in the existing definition of dependent children. It would be equally plausible to suppose that they thought HEW had misinterpreted the Act, and wanted to make the original intent clear. See *Wilson* v. *Weaver,* 499 F. 2d, at 161 (Pell, J., dissenting).

III

Neither the District Court nor the Court of Appeals considered respondents' constitutional arguments. Rather than decide those questions here, where they have not been briefed and argued, we remand the case for consideration of the equal protection and due process issues that were raised but not decided below.

Reversed and remanded.

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

MR. JUSTICE MARSHALL, dissenting.

As the majority implicitly acknowledges, the evidence available to help resolve the issue of statutory construction presented by this case does not point decisively in either direction. When it passed the Social Security Act in 1935 Congress gave no indication that it meant to include or exclude unborn children from the definition of "dependent child." Nor has it shed any further light on the question other than to consider, and fail to pass, legislation that would indisputably have excluded unborn children from coverage.

The majority has parsed the language and touched on the legislative history of the Act in an effort to muster support for the view that unborn children were not meant to benefit from the Act. Even given its best face, however, this evidence provides only modest support for the majority's position. The lengthy course of administrative practice cuts quite the other way. Although the question is a close one, I agree with the conclusion reached by five of the six Courts of Appeals that have

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considered this issue,[1] and would accordingly affirm the judgment below.

The majority makes only passing reference to the administrative practice of 30 years' duration, under which unborn children were deemed eligible for federal AFDC payments where state programs provided funds for them. According to the majority, this longstanding administrative practice is deprived of any significant weight by HEW's present suggestion that it has always treated unborn children as being outside the statutory definition of "dependent child." The agency's characterization of its former position, however, misrepresents the history of the administrative practice.

As early as 1941 the Bureau of Public Assistance faced the problem of whether unborn children were covered by § 406 (a) of the Act. At that time, the Board determined that under the Act federal funds could be provided to the States for aid to unborn children. The agency's governing regulation in the HEW Handbook of Public Assistance Administration expressly included unborn children among those eligible for aid "on the basis of the same eligibility conditions as apply to other children." Pt. IV, § 3412 (6) (1946). The language of the regulation and the inclusion of unborn children among five other classes of children eligible for AFDC payments under the definition of "dependent child" make it evident that the

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[1] Besides the court below, the Courts of Appeals holding that unborn children are within the eligibility terms of § 406 (a) include the First, the Fourth, the Fifth, and the Seventh Circuits, see *Carver* v. *Hooker,* 501 F. 2d 1244 (CA1 1974); *Doe* v. *Lukhard,* 493 F. 2d 54 (CA4 1974); *Parks* v. *Harden,* 504 F. 2d 861 (CA5 1974); *Wilson* v. *Weaver,* 499 F. 2d 155 (CA7 1974). Only the Second Circuit has taken the opposite view, *Wisdom* v. *Norton,* 507 F. 2d 750 (1974).

agency deemed unborn children to come within the terms of § 406 (a) of the Act.[2]

This regulation remained unchanged until 1971, when it was placed in the Code of Federal Regulations as 45 CFR § 233.90 (c)(2)(ii). Although its language was altered somewhat, the regulation still provided that, in electing States, federal participation would be available for unborn children once the fact of pregnancy was confirmed by medical diagnosis. It was only when a series of lawsuits were filed seeking to have AFDC made available to unborn children in those States that did not provide for them in their local AFDC plans that the agency contended that unborn children were not really within the eligibility provisions of § 406 (a) after all.

After this Court's decisions in *King* v. *Smith,* 392 U. S. 309 (1968), *Townsend* v. *Swank,* 404 U. S. 282 (1971), and *Carleson* v. *Remillard,* 406 U. S. 598 (1972), it appeared obvious that if any class of potential beneficiaries was within the Act's eligibility provisions, the States were required to provide aid to them. Thus, if HEW had chosen to stick with its previous interpretation that unborn children were within the eligibility provision of § 406 (a), it would have had to require that all participating States grant benefits for unborn children. On the other hand, if it were determined that unborn children were not eligible under the Act, federal financing would not be available even in those States that provided

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[2] Among the other "situations within the scope of the [statutory] term 'deprivation' [of parental support or care]" were "Children Living With Both Natural Parents," § 3412 (1); "Children Living With Either Father or Mother," § 3412 (2); and "Children of Unmarried Parents," § 3412 (5). In discussing the eligibility of the last group, the regulations noted: "The act provides for the use of aid to dependent children as a maintenance resource available on equal terms to all children who meet eligibility conditions." *Ibid.*

AFDC payments for them. In order to preserve the status quo, the agency came up with the inventive solution of ascribing the "unborn children" regulation to its rulemaking power under § 1102 of the Act, and thus avoiding the mandatory effects of a finding of "eligibility" under § 406 (a).

This ingenious but late-blooming tactical switch does little, in my view, to cancel out the effect of the long and consistent prior course of administrative interpretation of the Act. Since the agency's position in this case and related cases is evidently designed to preserve its authority to extend federal aid on an optional basis in spite of *King, Townsend,* and *Carleson,* I would view somewhat skeptically the agency's assertion that it has never deemed unborn children to be within the eligibility provisions of § 406 (a).

Even if the agency's new position is not discounted as a reaction to the exigencies of the moment, the policies underlying the doctrine of administrative interpretation require more than simply placing a thumb on the side of the scale that the agency currently favors.[3] The agency's

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[3] The reasons for assigning weight to an administrative agency's interpretation vary in part according to the role that Congress intended the agency to play in the lawmaking process. Where the act in question is an open-ended statute under which Congress did not "bring to a close the making of the law," but left the "rounding out of its command to another, smaller and specialized agency," *FTC* v. *Ruberoid Co.,* 343 U. S. 470, 486 (1952) (Jackson, J., dissenting), the agency's shift in position, even at a late date, should be given substantial weight. See *NLRB* v. *J. Weingarten, Inc., ante,* at 265–266; *Phelps Dodge Corp.* v. *NLRB,* 313 U. S. 177, 193–194 (1941). Plainly, however, Congress did not intend the term "dependent child" in this detailed and often-amended statute to be subject to re-examination and redefinition as the agency's perceptions of social needs changed. In cases such as this one, where the agency is intended merely to carry out the congressional mandate, a long-standing course of administrative interpretation is relevant primarily

determination that unborn children are eligible for matching federal aid was made early in the life of the program, and the administrators of the Act determined only a few years after the Act's passage that making AFDC payments available to unborn children was consistent with the statutory purposes. This contemporaneous and long-applied construction of the eligibility provision and purposes of the Act is entitled to great weight—particularly in the case of a statute that has been before the Congress repeatedly and has been amended numerous times. The majority contends that because of the details of the unsuccessful 1972 legislative effort to exclude unborn children from coverage, the respondents can claim little benefit from the natural inference that the statute still included them among those eligible for aid. This may be so, but in light of the history of the administrative interpretation of § 406 (a), I cannot agree that the Act, in its present form, should be read to exclude the unborn from eligibility.

I dissent.

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as a contemporaneous construction of the Act by persons dealing intimately with its terms on a day-to-day basis.

HUFFMAN ET AL. *v.* PURSUE, LTD.

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

No. 73–296. Argued December 10, 1974—Decided March 18, 1975

Ohio's public nuisance statute provides, *inter alia,* that a place exhibiting obscene films is a nuisance, requires up to a year's closure of any place determined to be a nuisance, and also provides for the sale of personalty used in conducting the nuisance. Appellant officials instituted a proceeding under the statute in state court against appellee's predecessor as operator of a theater displaying pornographic films. Concluding that the defendant had displayed obscene movies, the trial court rendered a judgment in appellants' favor and ordered the theater closed for a year and the seizure and sale of the personal property used in its operation. Appellee, which had taken over operation of the theater prior to the judgment, rather than appealing within the state system, immediately filed suit in Federal District Court under 42 U. S. C. § 1983, alleging that appellants' use of the nuisance statute constituted a deprivation of constitutional rights under the color of state law, and seeking injunctive and declaratory relief. Without considering whether it should have stayed its hand in deference to the federalism principles set forth in *Younger* v. *Harris,* 401 U. S. 37, the District Court declared the nuisance statute unconstitutional on First Amendment grounds and enjoined the execution of the state court's judgment insofar as it closed the theater to films that had not been adjudged obscene in prior adversary hearings. *Held:* Under the circumstances, the principles of *Younger* are applicable even though the state proceeding is civil in nature, and the District Court should have applied the tests laid down in *Younger* in determining whether to proceed to the merits and should not have entertained the action unless appellee established that early intervention was justified under the exceptions recognized in *Younger,* where the state proceeding is conducted with an intent to harass or in bad faith, or the challenged statute is flagrantly and patently unconstitutional. Pp. 603–613.

(a) The component of *Younger,* which rests upon the threat to our federal system if federal judicial interference with state crim-

inal proceedings were permitted, applies equally to a civil proceeding such as this, which is more akin to a criminal prosecution than are most civil cases. Pp. 603–605.

(b) Apart from any right which appellee might have had to appeal to this Court if it had remained in state court, it should not, in view of the comity and federalism interests that *Younger* seeks to protect, be permitted the luxury of federal litigation of issues presented by ongoing state proceedings. But even assuming, *arguendo*, that litigants are entitled to a federal forum for resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings. Pp. 605–607.

(c) Regardless of when the state trial court's judgment became final, *Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies before seeking relief in federal district court. The considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes, as appellee did here, that his chances of prevailing on appeal are not auspicious. Pp. 607–611.

(d) Since the District Court did not rule on the *Younger* issue, this case is appropriate for remand so that court may consider whether irreparable injury can be shown in light of an intervening Ohio Supreme Court decision, and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind. Pp. 611–613.

Vacated and remanded.

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 statement, *post*, p. 618. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 613.

James J. Clancy argued the cause for appellants. With him on the brief were *Lawrence S. Huffman pro se*, *Richard M. Bertsch*, and *Albert S. Johnston III*.

Gilbert H. Deitch argued the cause for appellee. With him on the brief was *Robert Eugene Smith.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires that we decide whether our decision in *Younger* v. *Harris,* 401 U. S. 37 (1971), bars a federal district court from intervening in a state civil proceeding such as this, when the proceeding is based on a state statute believed by the district court to be unconstitutional. A similar issue was raised in *Gibson* v. *Berryhill,* 411 U. S. 564 (1973), but we were not required to decide it because there the enjoined state proceedings were before a biased administrative body which could not provide a necessary predicate for a *Younger* dismissal, that is, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Id.,* at 577. Similarly, in *Speight* v. *Slaton,* 415 U. S. 333 (1974), we noted probable jurisdiction to consider the applicability of *Younger* to noncriminal cases, but remanded for reconsideration in light of a subsequent decision of the Georgia Supreme Court which struck down the challenged statute on similar facts. Today we do reach the issue, and conclude that in the circumstances presented here the principles of *Younger* are applicable even though the state proceeding is civil in nature.[1]

**Barbara Scott* and *James Bouras* filed a brief for the Motion Picture Association of America, Inc., as *amicus curiae* urging affirmance.

[1] Other recent cases raising issues of the applicability of *Younger* in the noncriminal context include *Mitchum* v. *Foster,* 407 U. S. 225 (1972), and *Sosna* v. *Iowa,* 419 U. S. 393 (1975). In *Mitchum,* a 42 U. S. C. § 1983 action to enjoin a pending nuisance proceeding was remanded for further proceedings; the District Court had denied relief solely on the basis of the anti-injunction statute, 28 U. S. C. § 2283, see n. 15, *infra.* Our opinion specified that we were in no

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Appellants are the sheriff and prosecuting attorney of Allen County, Ohio. This case arises from their efforts to close the Cinema I Theatre, in Lima, Ohio. Under the management of both its current tenant, appellee Pursue, Ltd., and appellee's predecessor, William Dakota, the Cinema I has specialized in the display of films which may fairly be characterized as pornographic,[2] and which in numerous instances have been adjudged obscene after adversary hearings.

Appellants sought to invoke the Ohio public nuisance statute, Ohio Rev. Code Ann. § 3767.01 *et seq.* (1971), against appellee. Section 3767.01 (C) [3] provides that

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way questioning or qualifying "the principles of equity, comity, and federalism" canvassed in *Younger*. 407 U. S., at 243.

In *Sosna* we directed the parties to address the *Younger* issue, 415 U. S. 911 (1974), reflecting our concern as to whether the constitutional merits should be reached in light of Sosna's failure to appeal the state trial court's adverse ruling through the state appellate network. Because both parties urged that we proceed to the merits, we did not reach the issue. *Sosna*, 419 U. S., at 396–397, n. 3.

[2] See *Miller* v. *California*, 413 U. S. 15, 18–19, n. 2 (1973), which discusses the distinction between "pornography" and "obscenity."

[3] "§ 3767.01 Definitions.

"As used in all sections of the Revised Code relating to nuisances:

. . . . . .

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition, films or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any news-

a place which exhibits obscene [4] films is a nuisance, while § 3767.06 [5] requires closure for up to a year of any place determined to be a nuisance. The statute also

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paper, magazine, or other publication entered as second class matter by the post-office department."

[4] As interpreted by the Ohio Supreme Court, *State ex rel. Keating* v. *A Motion Picture Film Entitled "Vixen,"* 27 Ohio St. 2d 278, 272 N. E. 2d 137 (1971), the determination of obscenity is to be based on the definition contained in Ohio's criminal statutes, Ohio Rev. Code Ann. § 2905.34 (Supp. 1972), now § 2907.01 (1975). On this Court's remand of *Keating,* 413 U. S. 905 (1973), following our decision in *Miller* v. *California, supra,* the Ohio Supreme Court concluded that the statute's definition comported with *Miller*'s constitutional standards. 35 Ohio St. 2d 215, 301 N. E. 2d 880 (1973).

[5] "§ 3767.06 Content of judgment and order.

"If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized must appear and claim the same within ten days after such order of abatement is made and prove innocence, to the satisfaction of the

provides for preliminary injunctions pending final determination of status as a nuisance,[6] for sale of all personal property used in conducting the nuisance,[7] and for release from a closure order upon satisfaction of certain conditions (including a showing that the nuisance will not be re-established).[8]

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court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court."

[6] Ohio Rev. Code Ann. § 3767.04 (1971).

[7] § 3767.06 (1971), *supra*, n. 5.

[8] *Ibid.* The referenced portion of § 3767.04 (1971) provides:

"The owner of any real or personal property closed or restrained or to be closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, or, in vacation, by the judge, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge is rendered on the application for a permanent injunction, then the court, or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such per-

Appellants instituted a nuisance proceeding in the Court of Common Pleas of Allen County against appellee's predecessor, William Dakota. During the course of the somewhat involved legal proceedings which followed, the Court of Common Pleas reviewed 16 movies which had been shown at the theater. The court rendered a judgment that Dakota had engaged in a course of conduct of displaying obscene movies at the Cinema I, and that the theater was therefore to be closed, pursuant to Ohio Rev. Code Ann. § 3767.06 (1971), "for any purpose for a period of one year unless sooner released by Order of [the] Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio." The judgment also provided for the seizure and sale of personal property used in the theater's operations.[9]

Appellee, Pursue, Ltd., had succeeded to William Dakota's leasehold interest in the Cinema I prior to entry of the state-court judgment. Rather than appealing that judgment within the Ohio court system, it immediately filed suit in the United States District Court for the Northern District of Ohio. The complaint was based on 42 U. S. C. § 1983 and alleged that appellants' use of Ohio's nuisance statute constituted a deprivation of constitutional rights under the color of state law. It sought injunctive relief and a declaratory judgment that the statute was unconstitutional and unenforceable.[10] Since

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sonal property. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected."

[9] *State ex rel. Huffman* v. *Dakota,* No. 72 CIV 0326 (Ct. Com. Pleas, Allen County, Ohio, Nov. 30, 1972).

[10] Because the state-court judgment was primarily directed against a property interest to which Pursue had succeeded, the District Court concluded that Pursue had standing to challenge the nuisance statute. Similarly, counsel for Pursue conceded at oral argument that Pursue

the complaint was directed against the constitutionality of a state statute, a three-judge court was convened.[11] The District Court concluded that while the statute was not vague, it did constitute an overly broad prior restraint on First Amendment rights insofar as it permanently or temporarily prevented the showing of films which had not been adjudged obscene in prior adversary hearings. Cf. *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931). Fashioning its remedy to match the perceived constitutional defect, the court permanently enjoined the execution of that portion of the state court's judgment that closed the Cinema I to films which had not been adjudged obscene.[12] The judgment and opinion of the District Court give no indication that it considered whether it should have stayed its hand in deference to the principles of federalism which find expression in *Younger* v. *Harris,* 401 U. S. 37 (1971).

On this appeal, appellants raise the *Younger* problem, as well as a variety of constitutional and statutory issues. We need consider only the applicability of *Younger.*

II

Younger and its companion cases[13] considered the propriety of federal-court intervention in pending state

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could have appealed the judgment of the Court of Common Pleas within the Ohio court system.

[11] Pending the convening of the three-judge court, a single judge of the Northern District of Ohio stayed the judgment of the Court of Common Pleas, except insofar as that judgment applied to films which had been declared obscene in a prior adversary hearing. The stay order was entered on the day that the action was filed, one day after entry of judgment by the Court of Common Pleas.

[12] No. C 72–432 (ND Ohio, Apr. 20, 1973).

[13] *Samuels* v. *Mackell,* 401 U. S. 66 (1971); *Boyle* v. *Landry,* 401 U. S. 77 (1971); *Perez* v. *Ledesma,* 401 U. S. 82 (1971); *Dyson* v. *Stein,* 401 U. S. 200 (1971); *Byrne* v. *Karalexis,* 401 U. S. 216 (1971).

criminal prosecutions. The issue was not a novel one, and the Court relied heavily on *Fenner* v. *Boykin,* 271 U. S. 240 (1926), and subsequent cases [14] which endorsed its holding that federal injunctions against the state criminal law enforcement process could be issued only "under extraordinary circumstances where the danger of irreparable loss is both great and immediate." *Id.,* at 243. *Younger* itself involved a challenge to a prosecution under the California Criminal Syndicalism Act, which allegedly was unconstitutional on its face. In an opinion for the Court by Mr. Justice Black, we observed that "it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 401 U. S., at 45. We noted that not only had a congressional statute manifested an interest in permitting state courts to try state cases,[15] but that there had also long existed a strong judicial policy against federal interference with state criminal proceedings. We recognized that this judicial policy is based in part on the traditional doctrine that a court of equity should stay its hand when a movant

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[14] See, *e. g., Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89 (1935); *Beal* v. *Missouri P. R. Co.,* 312 U. S. 45 (1941); *Watson* v. *Buck,* 313 U. S. 387 (1941); *Williams* v. *Miller,* 317 U. S. 599 (1942); *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943).

[15] Title 28 U. S. C. § 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." We held in *Mitchum* v. *Foster,* 407 U. S. 225 (1972), that 42 U. S. C. § 1983 contained an expressly authorized congressional exception. Thus, while the statute does express the general congressional attitude which was recognized in *Younger,* it does not control the case before us today.

has an adequate remedy at law, and that it "particularly should not act to restrain a criminal prosecution." *Id.*, at 43. But we went on to explain that this doctrine "is reinforced by an even more vital consideration," an aspect of federalism which we described as

> "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*, at 44.

Central to *Younger* was the recognition that ours is a system in which

> "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Ibid.*

We reaffirmed the requirement of *Fenner* v. *Boykin* that extraordinary circumstances must be present to justify federal injunctive relief against state criminal prosecutions. Echoing *Fenner,* we stated that a movant must show not merely the "irreparable injury" which is a normal prerequisite for an injunction, but also must show that the injury would be " 'great and immediate.' " 401 U. S., at 46. The opinion also suggested that only in extraordinary situations could the necessary injury be shown if the prosecution was conducted in good faith and without an intent to harass. *Id.*, at 54. It was particularly noted that the "cost, anxiety, and inconvenience of having to defend against

a single criminal prosecution" was not the type of injury that could justify federal interference. *Id.*, at 46.[16]

In *Younger* we also considered whether the policy of noninterference had been modified by our decision in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), at least insofar as First Amendment attacks on statutes thought to be facially invalid are concerned. We observed that the arrests and threatened prosecutions in *Dombrowski* were alleged to have been in bad faith and employed as a means of harassing the federal-court plaintiffs. That case was thus within the traditional narrow exceptions to the doctrine that federal courts should not interfere with state prosecutions. We acknowledged in *Younger* that it is " 'of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it,' " and that such a situation might justify federal intervention, 401 U. S., at 53–54. But we unequivocally held that facial invalidity of a statute is not itself an exceptional circumstance justifying federal interference with state criminal proceedings.

In *Steffel* v. *Thompson,* 415 U. S. 452 (1974), we considered whether *Younger* required exceptional circumstances to justify federal declaratory relief against state criminal statutes when a prosecution was not pending. In concluding that it did not, we had occasion to identify more specifically some of the means by which federal interference with state proceedings might violate the principles of comity and federalism on which *Younger* is based. We noted that "the relevant principles of equity,

[16] While these standards governing federal interference were largely shaped in the context of prayers for federal injunctions against state proceedings, it is clear that with respect to pending prosecutions the same standards apply to interference in the form of declaratory relief. See *Samuels* v. *Mackell,* 401 U. S. 66 (1971).

comity, and federalism 'have little force in the absence of a pending state proceeding.'" *Id.*, at 462. We explained:

> "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." *Ibid.*

It is against this background that we consider the propriety of federal-court intervention with the Ohio nuisance proceeding at issue in this case.

III

The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. For example, *Massachusetts State Grange* v. *Benton,* 272 U. S. 525 (1926), involved an effort to enjoin the operation of a state daylight savings act. Writing for the Court, Mr. Justice Holmes cited *Fenner* v. *Boykin, supra,* and emphasized a rule that "should be very strictly observed," 272 U. S., at 529, "that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." *Id.*, at 527.

Although Mr. Justice Holmes was confronted with a bill seeking an injunction against state executive officers, rather than against state judicial proceedings,

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we think that the relevant considerations of federalism are of no less weight in the latter setting. If anything, they counsel more heavily toward federal restraint, since interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles." Cf. *Steffel* v. *Thompson, supra,* at 462.

The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding. *Younger,* however, also rests upon the traditional reluctance of courts of equity, even within a unitary system, to interfere with a criminal prosecution. Strictly speaking, this element of *Younger* is not available to mandate federal restraint in civil cases. But whatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding. Cf. *Younger* v. *Harris,* 401 U. S., at 55 n. 2 (STEWART, J., concurring). Similarly, while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice

system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws.[17]

IV

In spite of the critical similarities between a criminal prosecution and Ohio nuisance proceedings, appellee nonetheless urges that there is also a critical difference between the two which should cause us to limit *Younger* to criminal proceedings. This difference, says appellee, is that whereas a state-court criminal defendant may, after exhaustion of his state remedies, present his constitutional claims to the federal courts through habeas corpus, no analogous remedy is available to one, like appellee, whose constitutional rights may have been infringed in a state proceeding which cannot result in custodial detention or other criminal sanction.

A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right. 28 U. S. C. § 1257 (2). Thus, appellee in this case was assured of eventual consideration of its claim by this Court. But quite apart from appellee's right to appeal had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which,

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[17] The relation of a proceeding which is nominally "civil" to a State's criminal laws has been relied on by lower federal courts in resolving *Younger* problems. See *MTM, Inc.* v. *Baxley,* 365 F. Supp. 1182 (ND Ala. 1973), probable jurisdiction noted, 415 U. S. 975 (1974); *Palaio* v. *McAuliffe,* 466 F. 2d 1230 (CA5 1972).

as we have already explained, is quite costly in terms of the interests which *Younger* seeks to protect.

Appellee's argument, that because there may be no civil counterpart to federal habeas it should have contemporaneous access to a federal forum for its federal claim, apparently depends on the unarticulated major premise that every litigant who asserts a federal claim is entitled to have it decided on the merits by a federal, rather than a state, court. We need not consider the validity of this premise in order to reject the result which appellee seeks. Even assuming, *arguendo,* that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings.[18] We do not understand why the federal forum must be available prior to completion of the state proceedings in which the federal issue arises, and the considerations canvassed in *Younger* militate against such a result.

The issue of whether federal courts should be able to interfere with ongoing state proceedings is quite distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state-court dispositions of federal questions. *Younger* turned on considerations of comity and federalism peculiar to the fact that state proceedings were pending; it did *not* turn on the fact that in any event a criminal defendant

[18] We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues, or that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U. S. C. § 1983 of federal issues arising in state court proceedings. Cf. *Preiser* v. *Rodriguez,* 411 U. S. 475, 497 (1973). Our assumption is made solely as a means of disposing of appellee's contentions without confronting issues which have not been briefed or argued in this case.

could eventually have obtained federal habeas consideration of his federal claims. The propriety of federal-court interference with an Ohio nuisance proceeding must likewise be controlled by application of those same considerations of comity and federalism.

Informed by the relevant principles of comity and federalism, at least three Courts of Appeals have applied *Younger* when the pending state proceedings were civil in nature. See *Duke* v. *Texas,* 477 F. 2d 244 (CA5 1973); *Lynch* v. *Snepp,* 472 F. 2d 769 (CA4 1973); *Cousins* v. *Wigoda,* 463 F. 2d 603 (CA7 1972). For the purposes of the case before us, however, we need make no general pronouncements upon the applicability of *Younger* to all civil litigation. It suffices to say that for the reasons heretofore set out, we conclude that the District Court should have applied the tests laid down in *Younger* in determining whether to proceed to the merits of appellee's prayer for relief against this Ohio civil nuisance proceeding.

V

Appellee contends that even if *Younger* is applicable to civil proceedings of this sort, it nonetheless does not govern this case because at the time the District Court acted there was no longer a "pending state court proceeding" as that term is used in *Younger*. *Younger* and subsequent cases such as *Steffel* have used the term "pending proceeding" to distinguish state proceedings which have already commenced from those which are merely incipient or threatened. Here, of course, the state proceeding had begun long before appellee sought intervention by the District Court. But appellee's point, we take it, is not that the state proceeding had not begun, but that it had ended by the time its District Court complaint was filed.[19]

[19] It would ordinarily be difficult to consider this problem, that of the duration of *Younger*'s restrictions after entry of a state trial

Appellee apparently relies on the facts that the Allen County Court of Common Pleas had already issued its judgment and permanent injunction when this action was filed, and that no appeal from that judgment has ever been taken to Ohio's appellate courts. As a matter of state procedure, the judgment presumably became final, in the sense of being nonappealable, at some point after the District Court filing, possibly prior to entry of the District Court's own judgment, but surely after the single judge stayed the state court's judgment. We need not, however, engage in such inquiry. For regardless of when the Court of Common Pleas' judgment became final, we believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*.

Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. Nor, in these state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a *nisi*

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court judgment, without also considering the res judicata implications of such a judgment. However, appellants did not plead res judicata in the District Court, and it is therefore not available to them here. See Fed. Rule Civ. Proc. 8 (c); *Sosna* v. *Iowa*, 419 U. S., at 396–397, n. 3.

prius determination that its valid policies are being violated in a fashion which justifies judicial abatement.

Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction.[20] We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing. In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts. We therefore hold that *Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies.[21]

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[20] That a state judicial system may retain undisturbed jurisdiction despite possibly erroneous trial court disposition of constitutional issues was recognized in *Dombrowski* v. *Pfister,* 380 U. S. 479, 484–485 (1965), where we stated: "[T]he mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

[21] By requiring exhaustion of state appellate remedies for the purposes of applying *Younger,* we in no way undermine *Monroe* v. *Pape,* 365 U. S. 167 (1961). There we held that one seeking redress under 42 U. S. C. § 1983 for a deprivation of federal rights need not first initiate state proceedings based on related state causes of action. 365 U. S., at 183. *Monroe* v. *Pape* had nothing to do with the problem presently before us, that of the deference to be accorded

At the time appellee filed its action in the United States District Court, it had available the remedy of appeal to the Ohio appellate courts. Appellee nonetheless contends that exhaustion of state appellate remedies should not be required because an appeal would have been "futile." This claim is based on the decision of the Supreme Court of Ohio in *State ex rel. Keating* v. *A Motion Picture Film Entitled "Vixen,"* 27 Ohio St. 2d 278, 272 N. E. 2d 137 (1971), which had been rendered at the time of the proceedings in the Court of Common Pleas. While *Keating* did uphold the use of a nuisance statute against a film which ran afoul of Ohio's statutory definition of obscenity, it had absolutely nothing to say with respect to appellee's principal contention here, that of whether the First and Fourteenth Amendments prohibit a blanket injunction against a showing of all films, including those which have not been adjudged obscene in adversary proceedings. We therefore have difficulty understanding appellee's belief that an appeal was doomed to failure.

More importantly, we are of the opinion that the considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious. Appellee obviously be-

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state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues.

Our exhaustion requirement is likewise not inconsistent with such cases as *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24 (1934), and *Bacon* v. *Rutland R. Co.,* 232 U. S. 134 (1914), which expressed the doctrine that a federal equity plaintiff challenging state administrative action need not have exhausted his state judicial remedies. Those cases did not deal with situations in which the state judicial process had been initiated.

lieves itself possessed of a viable federal claim, else it would not so assiduously seek to litigate in the District Court. Yet, Art. VI of the United States Constitution declares that "the Judges in every State shall be bound" by the Federal Constitution, laws, and treaties. Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do. The District Court should not have entertained this action, seeking preappeal interference with a state judicial proceeding, unless appellee established that early intervention was justified under one of the exceptions recognized in *Younger*.[22]

VI

Younger, and its civil counterpart which we apply today, do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is "'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" As we have noted, the District Court in this case did not rule on the *Younger* issue, and thus apparently has not considered whether its intervention was justified by one of these narrow exceptions. Even if the District Court's opinion can be interpreted as a *sub silentio* determina-

[22] While appellee had the option to appeal in state courts at the time it filed this action, we do not know for certain whether such remedy remained available at the time the District Court issued its permanent injunction, or whether it remains available now. In any event, appellee may not avoid the standards of *Younger* by simply failing to comply with the procedures of perfecting its appeal within the Ohio judicial system.

tion that the case fits within the exception for statutes which are " 'flagrantly and patently violative of express constitutional prohibitions,' " such a characterization of the statute is not possible after the subsequent decision of the Supreme Court of Ohio in *State ex rel. Ewing* v. *A Motion Picture Film Entitled "Without a Stitch,"* 37 Ohio St. 2d 95, 307 N. E. 2d 911 (1974). That case narrowly construed the Ohio nuisance statute, with a view to avoiding the constitutional difficulties which concerned the District Court.[23]

We therefore think that this case is appropriate for remand so that the District Court may consider whether irreparable injury can be shown in light of *"Without a Stitch,"* and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind. The judgment of the District Court is vacated and the cause is

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[23] In *"Without a Stitch"* it was decided that the closure provisions of Ohio Rev. Code Ann. § 3767.06 (1971) were applicable even if a theater had shown only one film which was adjudged to be obscene. However, the Ohio Supreme Court was concerned with the constitutional implications of prior restraint of films which had not been so adjudged. In narrowing the statute the court noted that § 3767.04 specifies conditions under which a release may be obtained from the closure order: the property owner must appear in court, pay the cost incurred in the action, file a bond in the full value of the property, and demonstrate to the court that he will prevent the nuisance from being re-established. The court then made this critical clarification: "The nuisance is the exhibition of the particular film declared obscene. The release provisions do not, as appellants contend, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical matter, but also would be an unconstitutional prior restraint . . . ." 37 Ohio St. 2d, at 105, 307 N. E. 2d, at 918.

remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I dissent. The treatment of the state *civil* proceeding as one "in aid of and closely related to criminal statutes" is obviously only the first step toward extending to state *civil* proceedings generally the holding of *Younger* v. *Harris,* 401 U. S. 37 (1971), that federal courts should not interfere with pending state *criminal* proceedings except under extraordinary circumstances.[1] Similarly, today's holding that the plaintiff in an action under 42 U. S. C. § 1983 may not maintain it without first exhausting state appellate procedures for review of an adverse state trial court decision is but an obvious first step toward discard of heretofore settled law that such actions may be maintained without first exhausting state judicial remedies.

Younger v. *Harris* was basically an application, in the context of the relation of federal courts to pending state criminal prosecutions, of "the basic doctrine of equity jurisprudence that courts of equity . . . particularly should not act to restrain a criminal prosecution." 401 U. S., at 43. "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." *Stefanelli* v. *Minard,* 342 U. S. 117, 120 (1951). But *Younger* v. *Harris* was

[1] The Court reaches the *Younger* issue although appellants did not plead *Younger* in the District Court. Yet the Court implies that *Younger* is not a jurisdictional matter, since we allowed the parties to waive it in *Sosna* v. *Iowa,* 419 U. S. 393 (1975). *Ante,* at 595 n. 1. In that circumstance, I address the *Younger* issue solely to respond to the Court's treatment of it.

also a decision enforcing "the national policy forbidding federal courts to stay or enjoin pending state court [criminal] proceedings except under special circumstances." 401 U. S., at 41. See also *id.*, at 44. For in decisions long antedating *Younger* v. *Harris,* the Court had invested the basic maxim with particular significance as a restraint upon federal equitable interference with pending state prosecutions. Not a showing of irreparable injury alone but of irreparable injury "both great and immediate" is required to justify federal injunctive relief against a pending state prosecution. *Fenner* v. *Boykin,* 271 U. S. 240, 243 (1926); *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89, 95 (1935). Injury merely "incidental to every criminal proceeding brought lawfully and in good faith" is not irreparable injury that justifies an injunction. *Douglas* v. *City of Jeannette,* 319 U. S. 157, 164 (1943). See also *Dombrowski* v. *Pfister,* 380 U. S. 479, 485 (1965). The line of decisions culminating in *Younger* v. *Harris* reflects this Court's longstanding recognition that equitable interference by federal courts with pending state prosecutions is incompatible in our federal system with the paramount role of the States in the definition of crimes and the enforcement of criminal laws. Federal-court noninterference with state prosecution of crimes protects against "the most sensitive source of friction between States and Nation." *Stefanelli* v. *Minard, supra,* at 120.

The tradition, however, has been quite the opposite as respects federal injunctive interference with pending state civil proceedings. Even though legislation as far back as 1793 has provided in "seemingly uncompromising language," *Mitchum* v. *Foster,* 407 U. S. 225, 233 (1972), that a federal court "may not grant an injunction to stay proceedings in a State court" with specified exceptions, see 28 U. S. C. § 2283, the Court has consistently en-

grafted exceptions upon the prohibition. Many, if not most, of those exceptions have been engrafted under the euphemism "implied." The story appears in *Mitchum* v. *Foster, supra,* at 233–236. Indeed, when Congress became concerned that the Court's 1941 decision in *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, forecast the possibility that the 1793 Act might be enforced according to its literal terms, Congress amended the Act in 1948 "to restore 'the basic law as generally understood and interpreted prior to the Toucey decision.'" *Mitchum* v. *Foster, supra,* at 236.

Thus today's extension of *Younger* v. *Harris* turns the clock back and portends once again the resuscitation of the literal command of the 1793 Anti-Injunction Act—that the state courts should be free from interference by federal injunction even in civil cases. This not only would overrule some 18 decades of this Court's jurisprudence but would heedlessly flout Congress' evident purpose in enacting the 1948 amendment to acquiesce in that jurisprudence.

The extension also threatens serious prejudice to the potential federal-court plaintiff not present when the pending state proceeding is a criminal prosecution. That prosecution does not come into existence until completion of steps designed to safeguard him against spurious prosecution—arrest, charge, information, or indictment. In contrast, the civil proceeding, as in this case, comes into existence merely upon the filing of a complaint, whether or not well founded. To deny by fiat of this Court the potential federal plaintiff a federal forum in that circumstance is obviously to arm his adversary (here the public authorities) with an easily wielded weapon to strip him of a forum and a remedy that federal statutes were enacted to assure him. The Court does not escape this consequence by characterizing the state civil proceeding in-

volved here as "in aid of and closely related to criminal statutes." The nuisance action was brought into being by the mere filing of the complaint in state court, and the untoward consequences for the federal plaintiff were thereby set in train without regard to the connection, if any, of the proceeding to the State's criminal laws.

Even if the extension of *Younger* v. *Harris* to pending state civil proceedings can be appropriate in any case, and I do not think it can be,[2] it is plainly improper in the case of an action by a federal plaintiff, as in this case, grounded upon 42 U. S. C. § 1983.[3] That statute serves a particular congressional objective long recognized and enforced by the Court. Today's extension will defeat that objective. After the War Between the States, "nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers." *Zwickler* v. *Koota,*

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[2] Abstention where authoritative resolution by state courts of ambiguities in a state statute is sufficiently likely to avoid or significantly modify federal questions raised by the statute is another matter. Abstention is justified in such cases primarily by the policy of avoidance of premature constitutional adjudication. The federal plaintiff is therefore not dismissed from federal court as he is in *Younger* cases. On the contrary, he may reserve his federal questions for decision by the federal district court and not submit them to the state courts. *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 (1964). Accordingly, retention by the federal court of jurisdiction of the federal complaint pending state-court decision, not dismissal of the complaint, is the correct practice. *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498, 512–513 (1972).

[3] Title 42 U. S. C. § 1983 provides:

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

389 U. S. 241, 246 (1967). Section 1983 was enacted at that time as § 1 of the Civil Rights Act of 1871, 17 Stat. 13. 389 U. S., at 247. That Act, and the Judiciary Act of 1875, which granted the federal courts general federal-question jurisdiction, completely altered Congress' pre-Civil War policy of relying on state courts to vindicate rights arising under the Constitution and federal laws. 389 U. S., at 245–246. These statutes constituted the lower federal courts " 'the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' " *Steffel* v. *Thompson,* 415 U. S. 452, 464 (1974). The fact, standing alone, that state courts also must protect federal rights can never justify a refusal of federal courts to exercise that jurisdiction. *Zwickler* v. *Koota, supra,* at 248. This is true notwithstanding the possibility of review by this Court of state decisions for, "even when available by appeal rather than only by discretionary writ of certiorari, [that possibility] is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts." *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411, 416 (1964).

Consistently with this congressional objective of the 1871 and 1875 Acts we held in *Monroe* v. *Pape,* 365 U. S. 167, 183 (1961), that a federal plaintiff suing under § 1983 need not exhaust state administrative or judicial remedies before filing his action under § 1983 in federal district court. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Ibid.* The extension today of *Younger* v. *Harris* to require exhaustion in an action under § 1983 drastically undercuts *Monroe* v. *Pape* and its numerous progeny—the mere filing of a complaint against a potential § 1983 litigant forces him to exhaust state remedies.

Mitchum v. *Foster, supra,* holding that actions under § 1983 are excepted from the operation of the federal anti-injunction statute, 28 U. S. C. § 2283, is also undercut by today's extension of *Younger*. *Mitchum* canvassed the history of § 1983 and concluded that it extended "federal power in an attempt to remedy the state courts' failure to secure federal rights." 407 U. S., at 241. *Mitchum* prompted the comment that if *Younger* v. *Harris* were extended to civil cases, "much of the rigidity of section 2283 would be reintroduced, the significance of *Mitchum* for those seeking relief from state civil proceedings would largely be destroyed, and the recognition of section 1983 as an exception to the Anti-Injunction Statute would have been a Pyrrhic victory." [4] Today's decision fulfills that gloomy prophecy. I therefore dissent from the remand and would reach the merits.

MR. JUSTICE DOUGLAS, while joining in the opinion of MR. JUSTICE BRENNAN, wishes to make clear that he adheres to the view he expressed in *Younger* v. *Harris,* 401 U. S. 37, 58–65 (1971) (dissenting opinion), that federal abstention from interference with state criminal prosecutions is inconsistent with demands of our federalism where important and overriding civil rights (such as those involved in the First Amendment) are about to be sacrificed.

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[4] Note, The Supreme Court, 1971 Term, 86 Harv. L. Rev. 50, 217–218 (1972).

Syllabus

REID ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE

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

No. 73–1541. Argued January 20, 1975—Decided March 18, 1975

The Immigration and Naturalization Service, relying on § 241 (a) (2) of the Immigration and Nationality Act, instituted deportation proceedings against petitioners, a husband and wife who had entered this country after falsely representing themselves to be United States citizens, and thereafter had two children who were born in this country. Section 241 (a), *inter alia,* specifies that an alien shall be deported who (1) at the time of entry was within a class of aliens excludable by the law existing at the time of such entry, or (2) entered the United States without inspection. Section 241 (f) states: "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence." Petitioners were found deportable, and on petition for review the Court of Appeals affirmed, rejecting petitioners' contention that they were saved by § 241 (f). *Held:* Petitioners were deportable under § 241 (a) (2) of the Act, which establishes as a separate ground for deportation, quite independently of whether the alien was excludable at the time of his arrival, the failure of an alien to present himself for inspection at the time he made his entry. Aliens like petitioners who accomplish entry into this country by making a willfully false representation of United States citizenship are not only excludable under § 212 (a) (19) but have also so significantly frustrated the process for inspecting incoming aliens that they are also deportable as persons who have "entered the United States without inspection." *INS* v. *Errico,* 385 U. S. 214, distinguished. Pp. 622–631.

492 F. 2d 251, affirmed.

567-852 O - 76 - 45

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 631. DOUGLAS, J., took no part in the consideration or decision of the case.

Benjamin Globman argued the cause for petitioners. With him on the brief was *Harry Cooper.*

Deputy Solicitor General LaFontant argued the cause for respondent. With her on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Harriet S. Shapiro,* and *Sidney M. Glazer.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners Robert and Nadia Reid, husband and wife, are citizens of British Honduras. Robert Reid entered the United States at Chula Vista, California, in November 1968, falsely representing himself to be a citizen of the United States. Nadia Reid, employing the same technique, entered at the Chula Vista port of entry two months later. Petitioners have two children who were born in the United States since their entry.

In November 1971, the Immigration and Naturalization Service (INS) began deportation proceedings against petitioners, which were resolved adversely to them first by a special inquiry officer and then by the Board of Immigration Appeals. On petition for review, the United States Court of Appeals for the Second Circuit by a divided vote affirmed the finding of deportability. 492 F. 2d 251 (1974). We granted certiorari to resolve the conflict between this holding and the contrary conclusion of the Court of Appeals for the Ninth Circuit in *Lee*

**Robert B. Johnstone, Armando Menocal III,* and *Richard A. Gonzales* filed a brief for Daniel Perez Echeverria as *amicus curiae* urging reversal.

Fook Chuey v. *INS,* 439 F. 2d 244 (1970).[1] 419 U. S. 823 (1974).

Because of the complexity of congressional enactments relating to immigration, some understanding of the structure of these laws is required before evaluating the legal contentions of petitioners. The McCarran-Walter Act, enacted by Congress in 1952, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.,* although frequently amended since that date, remains the basic format of the immigration laws. "Although the McCarran-Walter Act has been repeatedly amended, it still is the basic statute dealing with immigration and nationality. The amendments have been fitted into the structure of the parent statute and most of the original enactment remains undisturbed." 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure 1–13 to 1–14 (rev. ed. 1975).

Section 212 of the Act as amended, 8 U. S. C. § 1182, specifies various grounds for *exclusion* of aliens seeking admission to this country. Section 241 of the Act, 8 U. S. C. § 1251, specifies grounds for *deportation* of aliens already in this country. Section 241 (a) specifies 18 different bases for deportation, among which only the first two need directly concern us:

> "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> "(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> "(2) entered the United States without inspection or at any time or place other than as designated by

[1] See also *United States* v. *Osuna-Picos,* 443 F. 2d 907 (CA9 1971); *Gonzalez de Moreno* v. *INS,* 492 F. 2d 532 (CA5 1974); *Gonzalez* v. *INS,* 493 F. 2d 461 (CA5 1974); *Bufalino* v. *INS,* 473 F. 2d 728 (CA3), cert. denied, 412 U. S. 928 (1973).

> the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States . . . ."

The INS seeks to deport petitioners under the provisions of § 241 (a)(2), asserting that they entered the United States without inspection.[2] Petitioners dispute none of the factual predicates upon which the INS bases its claim, but instead argue that their case is saved by the provisions of § 241 (f), which provides in pertinent part as follows:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were *excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation* shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence." 75 Stat. 655, 8 U. S. C. § 1251 (f). (Emphasis supplied.)

Petitioners contend that they are entitled to the benefits of § 241 (f) "by virtue of its explicit language." This contention is plainly wrong, and for more than one reason.

The language of § 241 (f) tracks the provisions of § 212 (a)(19), 8 U. S. C. § 1182 (a)(19), dealing with aliens who are *excludable,* and providing in pertinent part as follows:

> "Except as otherwise provided in this chapter, the

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[2] Entry without inspection is ground for deportation under § 241 (a)(2) even though the alien was not excludable at the time of entry under § 241 (a)(1). 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 4.8b (rev. ed. 1975). It is a basis for deportation wholly independent of any basis for deportation which may exist under § 241 (a)(1).

following classes of aliens shall be ineligible to receive visas and shall be *excluded* from admission into the United States:

. . . . .

"(19) Any *alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact* . . . ." (Emphasis supplied.)

Thus the "explicit language" of § 241 (f), upon which petitioners rely, waives deportation for aliens who are "excludable at the time of entry" by reason of the fraud specified in § 212 (a)(19), and for that reason deportable under the provisions of § 241 (a)(1). If the INS were seeking to deport petitioners on this ground, they would be entitled to have applied to them the provisions of § 241 (f) because of the birth of their children after entry.

But the INS in this case does not rely on § 212 (a)(19), nor indeed on any of the other grounds for *excludability* under § 212, which are in turn made grounds for *deportation* by the language of § 241 (a)(1). It is instead relying on the separate provision of § 241 (a)(2), which does not depend in any way upon the fact that an alien was excludable at the time of his entry on one of the grounds specified in § 212 (a). Section 241 (a)(2) establishes as a separate ground for deportation, quite independently of whether the alien was excludable at the time of his arrival, the failure of an alien to present himself for inspection at the time he made his entry. If this ground is established by the admitted facts, nothing in the waiver provision of § 241 (f), which by its terms grants relief against deportation of aliens "on the ground that they were excludable at the time of entry," has any bearing on the case. Cf. *Costanzo* v. *Tillinghast,* 287 U. S. 341, 343 (1932).

The issue before us, then, turns upon whether petitioners, who accomplished their entry into the United States by falsely asserting that they were citizens of this country, can be held to have "entered the United States without inspection." Obviously not every misrepresentation on the part of an alien making an entry into the United States can be said to amount to an entry without inspection. But the Courts of Appeals have held that an alien who accomplishes entry into this country by making a willfully false representation that he is a United States citizen may be charged with entry without inspection. *Ex parte Saadi,* 26 F. 2d 458 (CA9), cert. denied, 278 U. S. 616 (1928); *United States ex rel. Volpe* v. *Smith,* 62 F. 2d 808 (CA7), aff'd on other grounds, 289 U. S. 422, 424 (1933); *Ben Huie* v. *INS,* 349 F. 2d 1014 (CA9 1965). We agree with these holdings, and conclude that an alien making an entry into this country who falsely represents himself to be a citizen would not only be excludable under § 212 (a) (19) if he were detected at the time of his entry, but has also so significantly frustrated the process for inspecting incoming aliens that he is also deportable as one who has "entered the United States without inspection." In reaching this conclusion we subscribe to the reasoning of Chief Judge Aldrich, writing for the Court of Appeals for the First Circuit in *Goon Mee Heung* v. *INS,* 380 F. 2d 236, 237, cert. denied, 389 U. S. 975 (1967):

> "Whatever the effect other misrepresentations may arguably have on an alien's being legally considered to have been inspected upon entering the country, we do not now consider; we are here concerned solely with an entry under a fraudulent claim of citizenship. Aliens who enter as citizens, rather than as aliens, are treated substantially differently by immigration authorities. The examination to which citizens are

subjected is likely to be considerably more perfunctory than that accorded aliens. Gordon & Rosenfield, Immigration Law and Procedure § 316d (1966). Also, aliens are required to fill out alien registration forms, copies of which are retained by the immigration authorities. 8 C. F. R. §§ 235.4, 264.1; 8 U. S. C. §§ 1201 (b), 1301–1306. Fingerprinting is required for most aliens. 8 U. S. C. §§ 1201 (b), 1301–1302. The net effect, therefore, of a person's entering the country as an admitted alien is that the immigration authorities, in addition to making a closer examination of his right to enter in the first place, require and obtain information and a variety of records that enable them to keep track of the alien after his entry. Since none of these requirements is applicable to citizens, an alien who enters by claiming to be a citizen has effectively put himself in a quite different position from other admitted aliens, one more comparable to that of a person who slips over the border and who has, therefore, clearly not been inspected."

Petitioners rely upon this Court's decision in *INS* v. *Errico,* 385 U. S. 214 (1966). There the Court decided two companion cases involving fraudulent representations by aliens in connection with quota requirements which existed at the time *Errico* was decided, but which were prospectively repealed in 1965. Errico, a native of Italy, falsely represented to the authorities that he was a skilled mechanic with specialized experience in repairing foreign automobiles. On the basis of that representation he was granted first-preference-quota status under the statutory preference scheme then in effect, entered the United States with his wife, and later fathered a child by her.

Scott, a native of Jamaica, contracted a marriage with a United States citizen by proxy solely for the purpose of obtaining nonquota status for her entry into the country. She never lived with her husband and never intended to do so. After entering the United States in 1958, she gave birth to an illegitimate child, who thereby became an American citizen at birth.

When the INS discovered the fraud in each of these cases, it sought to deport both Errico and Scott on the grounds that they were "within one or more of the classes of aliens excludable by the law existing at the time" of their entry, and therefore deportable under § 241 (a)(1). The INS did not rely on the provisions of § 212 (a)(19), making excludable an alien who has procured a visa or other documentation or entry by fraud, nor indeed did it rely on any other of the subsections of § 212 dealing with excludable aliens. Instead it relied on an entirely separate portion of the statute, § 211, 8 U. S. C. § 1181 (a) (1964 ed.), prospectively amended in 1965,[3] but reading, as applicable to Errico and Scott, as follows:

> "No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such immigrant visa of the accompanying parent, (2) is properly chargeable to the quota specified in the immigrant visa, (3) is a nonquota immigrant if specified as

[3] Section 211 of the Act was amended by § 9 of the Act of Oct. 3, 1965, 79 Stat. 917, in connection with revision of the numerical quota system established by the Act. Since § 241 (a)(1) deals with excludability under the immigration law as it existed at the time of entry, the Court in *Errico* looked to § 211 as it existed prior to the amendment. *INS* v. *Errico*, 385 U. S. 214, 215 n. 2 (1966).

such in the immigrant visa, (4) is of the proper status under the quota specified in the immigrant visa, and (5) is otherwise admissible under this chapter."

The INS contended that Errico fell within the proscription of § 211 (a)(4), and that Scott fell within the proscription of § 211 (a)(3), and that therefore § 211 (a) prohibited their admission into the United States as of the time of their entry. It apparently reasoned from these admitted facts that both Errico and Scott were therefore "excludable" at the time of their entry within the meaning of § 241 (a)(1).

Section 211 of the Act of 1952, 66 Stat. 181–182, is entitled Documentary Requirements. Section 212 of the same Act, 66 Stat. 182–188, is entitled General Classes of Aliens Ineligible to Receive Visas and Excluded from Admission. INS could clearly have proceeded against either Scott or Errico under § 212 (a)(19), on the basis of their procuring a visa or other documentation by fraud or misrepresentation. Just as clearly Scott and Errico could have then asserted their claim to the benefit of § 241 (f), waiving deportation based upon fraud for aliens who had given birth to children after their entry and who were otherwise admissible. Instead the INS relied on the provisions of § 211 (a), which deal with the general subject of the necessary documentation for admission of immigrants, rather than with the general subject of excludable aliens. Rather than questioning whether a failure to comply with § 211 (a)(3) or (4) by itself rendered an alien "excludable" as that term is used in § 241 (a)(1), the Court in *Errico* implicitly treated it as doing so and went on to hold that § 241 (f) "saves from deportation an alien who misrepresents his status for the purpose of evading quota restrictions, if he has the necessary familial relationship to a United States citizen or

lawful permanent resident." *INS* v. *Errico,* 385 U. S., at 215.

Errico was decided by a divided Court over a strong dissenting opinion. Even the most expansive view of its holding could not avail these petitioners, since § 241 (f) which it construed applies by its terms only to "the deportation of aliens within the United States on the ground that they were excludable at the time of entry." Here, as we have noted, INS seeks to deport petitioners, not under the provisions of § 241 (a)(1), relating to aliens excludable at the time of entry, but instead under the provisions of § 241 (a)(2), relating to aliens who do not present themselves for inspection. Yet there is no doubt that the broad language used in some portions of the Court's opinion in *Errico* has led one Court of Appeals to apply the provisions of § 241 (f) to a case indistinguishable from petitioners', *Lee Fook Chuey* v. *INS,* 439 F. 2d 244 (CA9 1970), and to decisions of other Courts of Appeals in related areas which may be summarized in the language of Macduff: "Confusion now hath made his masterpiece."

Aliens entering the United States under temporary visitor permits, who acquire one of the specified familial relationships described in § 241 (f) after entry, have argued with varying results that their fraudulent intent upon entry to remain in this country permanently cloaks them with immunity from deportation even though they overstayed their visitor permits.[4] Acceptance of this

[4] For an example of the differing results within one Circuit, see *Muslemi* v. *INS,* 408 F. 2d 1196 (CA9 1969); *Vitales* v. *INS,* 443 F. 2d 343 (CA9 1971), vacated, 405 U. S. 983 (1972); *Cabuco-Flores* v. *INS,* 477 F. 2d 108 (CA9), cert. denied *sub nom. Mangabat* v. *INS,* 414 U. S. 841 (1973). Other Circuits have generally held § 241 (f) not available on similar facts. *De Vargas* v. *INS,* 409 F. 2d 335 (CA5 1968); *Ferrante* v. *INS,* 399 F. 2d 98 (CA6 1968); *Milande* v. *INS,* 484 F. 2d 774 (CA7 1973); *Preux* v. *INS,* 484 F. 2d 396 (CA10 1973).

theory leads to the conclusion that § 241 (f) waives a substantive ground for deportation based on overstay if the alien can affirmatively prove his fraudulent intent at the time of entry, but grants no relief to aliens with exactly the same familial relationship who are unable to satisfactorily establish their dishonesty. See *Cabuco-Flores* v. *INS*, 477 F. 2d 108 (CA9), cert. denied *sub nom. Mangabat* v. *INS*, 414 U. S. 841 (1973); cf. *Jolley* v. *INS*, 441 F. 2d 1245 (CA5 1971). Balking at such an irrational result, one court has gone so far as to declare that § 241 (f) waives deportability under § 241 (a)(1) even though no fraud is involved if the alien is able merely to establish the requisite familial tie. *In re Yuen Lan Hom*, 289 F. Supp. 204 (SDNY 1968).

Nor has there been agreement among those courts which have construed § 241 (f) to waive substantive grounds for deportation under § 212 other than for fraud delineated in § 212 (a)(19) as to which other grounds are waived. While some courts have found that § 241 (f) waives any deportation charge to which fraud is "germane" [5] others have found it waives "quantitative" but not "qualitative" grounds where its requirements are met.[6] Still others have required that "but for" the misrepresentation, the alien meet the substantive requirements of the Act [7] while at least one court has discerned

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[5] See *Muslemi* v. *INS*, *supra*, at 1199.

[6] See, *e. g.*, *Godoy* v. *Rosenberg*, 415 F. 2d 1266 (CA9 1969); *Jolley* v. *INS*, 441 F. 2d 1245 (CA5 1971). It is, of course, difficult to determine which grounds for exclusion fit which characterization. Arguably, for example, the failure to obtain the required certification by the Secretary of Labor dealt with in *Godoy* v. *Rosenberg*, *supra*, could as easily have been characterized as "qualitative." The Ninth Circuit in *Lee Fook Chuey* v. *INS*, 439 F. 2d 244, 246 (1970), found evasion of inspection a "quantitative" ground while the Third Circuit in *Bufalino* v. *INS*, 473 F. 2d, at 731, found it a "qualitative" ground not subject to § 241 (f) waiver.

[7] See, *e. g.*, *Loos* v. *INS*, 407 F. 2d 651 (CA7 1969).

in *Errico* a test requiring that the aliens' fraudulent statement be taken as true, with determination on such hypothetical facts whether the alien would be deportable. *Cabuco-Flores* v. *INS, supra,* at 110.

We do not believe that § 241 (f) as interpreted by *Errico* requires such results. We adhere to the holding of that case, which we take to be that where the INS chooses not to seek deportation under the obviously available provisions of § 212 (a)(19) relating to the fraudulent procurement of visas, documentation, or entry, but instead asserts a failure to comply with those separate requirements of § 211 (a), dealing with compliance with quota requirements, as a ground for deportation under § 241 (a)(1), § 241 (f) waives the fraud on the part of the alien in showing compliance with the provisions of § 211 (a). In view of the language of § 241 (f) and the cognate provisions of § 212 (a)(19), we do not believe *Errico*'s holding may properly be read to extend the waiver provisions of § 241 (f) to any of the grounds of excludability specified in § 212 (a) other than subsection (19). This conclusion, by extending the waiver provision of § 241 (f) not only to deportation based on excludability under § 212 (a)(19), but to a claim of deportability based on fraudulent misrepresentation in order to satisfy the requirements of § 211 (a), gives due weight to the concern expressed in *Errico* that the provisions of § 241 (f) were intended to apply to some misrepresentations that were material to the admissions procedure. It likewise gives weight to our belief that Congress, in enacting § 241 (f), was intent upon granting relief to limited classes of aliens whose fraud was of such a nature that it was more than counterbalanced by after-acquired family ties; [8] it did not intend to arm the dishonest alien

[8] The legislative history of this provision, designed primarily to prevent the deportation of refugees from totalitarian nations for

seeking admission to our country with a sword by which he could avoid the numerous substantive grounds for exclusion unrelated to fraud, which are set forth in § 212 (a) of the Immigration and Nationality Act.

The judgment of the Court of Appeals is

Affirmed.

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

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

In *INS* v. *Errico,* 385 U. S. 214 (1966), respondent evaded quota restrictions by falsely claiming to be a skilled mechanic. Once in this country, he became the parent of a United States citizen. We found Errico's deportation barred by § 241 (f) of the Immigration and Nationality Act, 66 Stat. 163, as added, 75 Stat. 655, 8 U. S. C. § 1251 (f). In the instant case, petitioners evaded quota restrictions by falsely claiming United

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harmless misrepresentations made solely to escape persecution, is fully consistent with our interpretation of the provision. See H. R. Conf. Rep. No. 2096, 82d Cong., 2d Sess., 128 (1952); H. R. Doc. No. 329, 84th Cong., 2d Sess., 5 (1956); H. R. Doc. No. 85, 85th Cong., 1st Sess., 5 (1957); H. R. Rep. No. 1199, 85th Cong., 1st Sess., 10 (1957); 103 Cong. Rec. 15487–15499, 16298–16310 (1957); H. R. Rep. No. 1086, 87th Cong., 1st Sess., 37–38 (1961). The predecessor of current § 241 (f), § 7 of the Immigration Act of 1957, 71 Stat. 640, was consistently described during debate by its supporters as making minor adjustments in the immigration and naturalization system. Congressman Celler, a sponsor of the bill enacting § 7, summarized it during House debate in these words (after summarizing a nonrelated provision of § 7):

"This section also provides for leniency in the consideration of visa applications made by close relatives of United States citizens and aliens lawfully admitted for permanent residence who in the past may have procured documentation for entry by misrepresentation." 103 Cong. Rec. 16301 (1957).

States citizenship. After settling here, they too became parents of United States citizens. Yet the Court today finds that § 241 (f) is no bar to their deportation. Because I find no material difference between the instant case and *Errico,* I dissent.

Section 241 (f) of the Immigration and Nationality Act provides:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

In *Errico, supra,* after a full review of the statute and its legislative history, the Court concluded that § 241 (f) was intended "not to require that aliens who are close relatives of United States citizens have complied with quota restrictions to escape deportation for their fraud . . . ." 385 U. S., at 223. This conclusion was necessary "to give meaning to the statute in the light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens . . . ." *Id.,* at 225.

Thus *Errico* governs the instant case. The Court, however, distinguishes *Errico* on the ground that there deportation proceedings were based on § 211 (a)(4) of the Act, 8 U. S. C. § 1181 (a)(4) (1964 ed.), which dealt with quota requirements, whereas here deportation is based on § 241 (a)(2), which deals with inspection requirements. This distinction is grounded on the argu-

ment that § 241 (f) tracks § 212 (a)(19), 8 U. S. C. § 1182 (a)(19), which deals with excludable aliens, and Errico was such an alien. But petitioners in the instant case were also excludable under § 212 (a)(19), since they sought "to enter the United States, by fraud." Indeed the Court's entire approach was explicitly rejected in *Errico* itself:

> "At the outset it should be noted that even the Government agrees that § 241 (f) cannot be applied with strict literalness. Literally, § 241 (f) applies only when the alien is charged with entering in violation of § 212 (a)(19) of the statute, which excludes from entry '[a]ny alien who . . . has procured a visa or other documentation . . . by fraud, or by willfully misrepresenting a material fact.' Under this interpretation, an alien who entered by fraud could be deported for having entered with a defective visa or for other documentary irregularities even if he would have been admissible if he had not committed the fraud. The Government concedes that such an interpretation would be inconsistent with the manifest purpose of the section, and the administrative authorities have consistently held that § *241 (f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought,* provided that the alien was 'otherwise admissible at the time of entry.' " 385 U. S., at 217 (emphasis added; footnote omitted).

Even if statutory language is unclear any doubt should be resolved in favor of the alien since "deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10 (1948). See also *Barber* v. *Gonzales,* 347 U. S. 637,

642–643 (1954); *Errico, supra,* at 225. Today the Court strains to construe statutory language *against* the alien.

The INS contends that if petitioners were to succeed in this case, "the sky would fall in on the Immigration and Naturalization Service." [1] Apart from the lack of credible support for this dire prediction,[2] if the

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[1] Tr. of Oral Arg. 44.

[2] The INS contends:

"An alien who enters as an immigrant submits himself to the investigations required for the issuance of an immigration visa, and to the supplementary inspection at the port of entry. Records of these investigations are available when a claim of eligibility for waiver under Section 241 (f) is subsequently made. They provide the Immigration Service with a substantial basis for determining later, when the waiver is sought, whether the alien was 'otherwise admissible at the time of entry' and thus entitled to the waiver.

"In contrast, there is no contemporaneous investigation of an alien who enters on a false claim of citizenship; there is unlikely even to be any record of such entry. It would therefore be extremely difficult, if not impossible, to determine whether such an alien was 'otherwise admissible at the time of entry.'" Brief for Respondent 10–11.

This argument, however, overrates the effectiveness of the immigrant visa system. The Fifth and the Ninth Circuits, in decisions conflicting with the opinion below, have found that the visa system provides no basis for the distinction the Government urges:

"Almost invariably, by the time that the relief provision of 241 (f) is invoked, the integrity of the immigrant visa system has been long violated. Section 241 (f) deals with the problem after the breach has occurred. . . .

". . . For example, when the alien misrepresents his identity during the visa issuing process, the information elicited from him is often valueless. When the fraud is discovered, the information derived from the visa process which was tainted by the misrepresentation, may be useless or have little or no bearing upon the ultimate disposition of the case." *Lee Fook Chuey* v. *INS,* 439 F. 2d 244, 250–251 (CA9 1970).

"Lies concerning identity, occupation, and country of origin may well render the initial immigration investigation either as worthless as no investigation at all, or as difficult and fruitless as a later

Immigration and Nationality Act is indeed unworkable, the remedy is for Congress to amend it, not for this Court to distort its language and the cases construing it.

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§ 241 (f) inquiry." *Gonzalez de Moreno* v. *INS,* 492 F. 2d 532, 537 (CA5 1974).

As the Ninth Circuit held, the very essence of *Errico* was that "[w]hen § 241 (f) is invoked, the immigration processing system has already proved ineffective. Congress made the wholly reasonable choice that the interest in family unity outweighs the deterrent effects of a more draconian policy." *Lee Fook Chuey, supra,* at 251.

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WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WIESENFELD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 73–1892. Argued January 20, 1975—Decided March 19, 1975

The gender-based distinction mandated by the provisions of the Social Security Act, 42 U. S. C. § 402 (g), that grant survivors' benefits based on the earnings of a deceased husband and father covered by the Act both to his widow and to the couple's minor children in her care, but that grant benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower, violates the right to equal protection secured by the Due Process Clause of the Fifth Amendment, since it unjustifiably discriminates against female wage earners required to pay social security taxes by affording them less protection for their survivors than is provided for male wage earners. Pp. 642–653.

(a) The distinction is based on an "archaic and overbroad" generalization not tolerated under the Constitution, namely, that male workers' earnings are vital to their families' support, while female workers' earnings do not significantly contribute to families' support. *Frontiero* v. *Richardson*, 411 U. S. 677. Pp. 642–643.

(b) That social security benefits are "noncontractual" and do not compensate for work performed or necessarily correlate with contributions to the program, cannot sanction the solely gender-based differential protection for covered employees. Since the benefits depend significantly upon a covered employee's participation in the work force, and since only covered employees and not others are required to pay taxes toward the system, benefits must be distributed according to classifications that do not differentiate among covered employees solely on the basis of sex. Pp. 646–647.

(c) Since, as is apparent from the statutory scheme itself and from § 402 (g)'s legislative history, § 402 (g)'s purpose in providing benefits to young widows with children was not, as the Government contends, to provide an income to women who, because of economic discrimination, were unable to provide for themselves, but to permit women to elect not to work and to devote themselves to care of children (and thus was not premised upon

any special disadvantage of women), it cannot serve to justify a gender-based distinction diminishing the protection afforded women who do work. Pp. 648–652.

367 F. Supp. 981, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion in which BURGER, C. J., joined, *post,* p. 654. REHNQUIST, J., filed an opinion concurring in the result, *post,* p. 655. DOUGLAS, J., took no part in the consideration or decision of the case.

Keith A. Jones argued the cause for appellant. On the brief were *Solicitor General Bork, Assistant Attorney General Hills,* and *Danny J. Boggs.*

Ruth Bader Ginsburg argued the cause for appellee. With her on the brief was *Melvin L. Wulf.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Social Security Act benefits based on the earnings of a deceased husband and father covered by the Act are payable, with some limitations, both to the widow and to the couple's minor children in her care. § 202 (g) of the Social Security Act, as amended, 42 U. S. C. § 402 (g).[1] Such benefits are payable on the basis of the

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**Nancy Stearns* filed a brief for the Center for Constitutional Rights as *amicus curiae* urging affirmance.

[1] Section 402 (g) is headed "Mother's insurance benefits." It provides in pertinent part:

"(1) The widow and every surviving divorced mother (as defined in section 416 (d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

"(A) is not married,

"(B) is not entitled to a widow's insurance benefit,

"(C) is not entitled to old-age insurance benefits, or is entitled

earnings of a deceased wife and mother covered by the Act, however, only to the minor children and not to the widower. The question in this case is whether this gender-based distinction violates the Due Process Clause of the Fifth Amendment.[2]

A three-judge District Court for the District of New Jersey held that the different treatment of men and women mandated by § 402 (g) unjustifiably discriminated against female wage earners by affording them less protection for their survivors than is provided to male em-

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to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

"(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

"(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit . . .

. . . . . .

shall . . . be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow or surviving divorced mother becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widow's insurance benefit, she remarries, or she dies. . . ."

The terms "fully" and "currently" insured are defined in 42 U. S. C. § 414. See n. 3, *infra*.

[2] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); see also *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. See, *e. g.*, *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975); *Jimenez* v. *Weinberger*, 417 U. S. 628, 637 (1974); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973).

ployees. 367 F. Supp. 981, 991 (1973). We noted probable jurisdiction, 419 U. S. 822 (1974). We affirm.

I

Appellee Stephen C. Wiesenfeld and Paula Polatschek were married on November 15, 1970. Paula, who worked as a teacher for five years before her marriage, continued teaching after her marriage. Each year she worked, maximum social security contributions were deducted from her salary.[3] Paula's earnings were the couple's principal source of support during the marriage, being substantially larger than those of appellee.[4]

On June 5, 1972, Paula died in childbirth. Appellee was left with the sole responsibility for the care of their infant son, Jason Paul. Shortly after his wife's death, Stephen Wiesenfeld applied at the Social Security office in New Brunswick, N. J., for social security survivors' benefits for himself and his son. He did obtain benefits for his son under 42 U. S. C. § 402 (d) (1970 ed. and Supp. III),[5] and received for Jason $206.90 per month

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[3] Thus, Paula Wiesenfeld was "currently insured" when she died, see n. 1, *supra,* because she had "not less than six quarters of coverage during the thirteen-quarter period ending with (1) the quarter in which [she] died." 42 U. S. C. § 414 (b).

[4] In 1970, Paula earned $9,808, and Stephen earned $3,100 as a self-employed consultant; in 1971, Paula earned $10,686 and Stephen $2,188; in 1972, Paula earned $6,836.35 before she died, and Stephen $2,475 for the entire year. Stephen completed his education before the marriage.

[5] Section 402 (d) is headed "Child's insurance benefits" and provides in pertinent part as follows:

"Every child . . . of an individual who dies a fully or currently insured individual, if such child—

"(A) has filed application for child's insurance benefits,

"(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as

until September 1972, and $248.30 per month thereafter. However, appellee was told that he was not eligible for benefits for himself, because § 402 (g) benefits were available only to women.[6] If he had been a woman, he would

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defined in section 423 (d) of this title) which began before he attained the age of 22, and

"(C) was dependent upon such individual—

. . . . .

"(ii) if such individual has died, at the time of such death . . .

. . . . .

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—

"(D) the month in which such child dies or marries,

"(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time student during any part of such month."

Thus, child's insurance benefits are now available without regard to whether the worker upon whose earnings benefits are based is the mother or father. This was not always the case. Originally, a child could receive benefits based on his mother's earnings only if he had not been living with his father and was being supported solely by his mother. Social Security Amendments of Aug. 10, 1939, § 202 (c), 53 Stat. 1364. This provision was amended in 1950 to provide automatic entitlement to otherwise eligible children of women workers who were currently insured, see nn. 1 and 3, *supra*, when they died, but retaining dependency qualifications if the mother's covered employment was not recent. Social Security Amendments of Aug. 28, 1950, § 101 (a), amending § 202 (d), 64 Stat. 483. In 1967, children of women workers were made eligible for children's benefits on exactly the same criteria applied to children of male workers. Social Security Amendments of 1967, Pub. L. 90–248, § 151, 81 Stat. 860.

[6] Appellee said in an affidavit that he was told orally at the Social Security office that he could not file an application for benefits on his own behalf. The appellant Secretary does not dispute that the request for benefits was orally made and orally denied. Tr. of Oral Arg. before District Court, June 20, 1973, p. 45; 367 F. Supp. 981, 985 n. 5.

have received the same amount as his son as long as he was not working, see 42 U. S. C. §§ 402 (d)(2) and (g)(2), and, if working, that amount reduced by $1 for every $2 earned annually above $2,400. 42 U. S. C. §§ 403 (b) and (f).[7]

Appellee filed this suit in February 1973,[8] claiming jurisdiction under 28 U. S. C. § 1331, on behalf of himself and of all widowers similarly situated.[9] He sought a declaration that § 402 (g) is unconstitutional to the extent that men and women are treated differently, an in-

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[7] Stephen Wiesenfeld was employed until October 1972. However, since he earned $2,475 for the entire year 1972, n. 4, *supra,* he apparently would have been eligible for benefits, were he a woman, from June 1972 until he obtained employment again on February 5, 1973, at a salary of $1,500 per month. This lawsuit was filed on February 24, 1973. On September 14, 1973, appellee was dismissed from his position, so that he was unemployed and again eligible for benefits, but for the gender-based distinction, when the lower court opinion issued on December 11, 1973. Appellee, in an affidavit filed in September 1973, ascribed his employment difficulties in large part to the difficulties of childcare. In particular, he noted that he had "encountered severe difficulty in obtaining the services of a suitable housekeeper, to whom I could conscientiously entrust Jason's care. I have employed four housekeepers in the past year . . . ."

[8] Appellee did not seek administrative review of the denial under 42 U. S. C. § 405 (b). However, appellant stipulated that any administrative appeal would have been futile, since § 402 (g) on its face precludes granting benefits to men. Tr. of Oral Arg. before District Court, June 20, 1973, pp. 16–17. Nor does appellant now claim that § 405 (h), which provides that "[n]o findings of fact or decision of the Secretary shall be reviewed . . . except as herein provided" (see § 405 (g)), is a bar to this action. See *Public Utilities Comm'n of California* v. *United States,* 355 U. S. 534, 539–540 (1958); *Richardson* v. *Morris,* 409 U. S. 464 (1973) (*per curiam*); *Griffin* v. *Richardson,* 346 F. Supp. 1226 (Md.), aff'd, 409 U. S. 1069 (1972).

[9] The three-judge court declined to permit the action to proceed as a class action. 367 F. Supp., at 986–987. No appeal has been taken from this ruling.

junction restraining appellant from denying benefits under § 402 (g) solely on the basis of sex, and payment of past benefits commencing with June 1972, the month of the original application. Cross motions for summary judgment were filed. After the three-judge court determined that it had jurisdiction,[10] it granted summary judgment in favor of appellee, and issued an order giving appellee the relief he sought.

II

The gender-based distinction made by § 402 (g) is indistinguishable from that invalidated in *Frontiero* v.

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[10] The court recognized that the jurisdictional amount of $10,000 under 28 U. S. C. § 1331 is established as long as it does not "appear to a legal certainty" that the matter in controversy does not total $10,000, *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289 (1938), and therefore that where an injunction commanding future payments is sought, there is no need to await accrual of $10,000 in back benefits to bring suit. However, it was troubled by the fact that appellee was employed on the day suit was filed, see n. 7, *supra*, and thus would not have been entitled to benefits on that day. It held that there was nonetheless jurisdiction because of the futility of dismissing the suit when the plaintiff could refile immediately and establish jurisdiction, since he was unemployed by the time of decision. We believe that there was jurisdiction in any event on the day the suit was filed. Benefits under § 402 (g) could be available to appellee, if he prevailed, until his infant child became 18, see §§ 402 (d), (g), and (s)(1). At the then-prevailing benefit rates, appellee would reach $10,000 in benefits if he collected full benefits for a little more than three years, see *supra*, at 640–641. Social security benefits are to some degree in the nature of insurance, providing present security and peace of mind from fear of future lack of earnings. Also, unlike disability benefits, see 42 U. S. C. § 423, these survivors' benefits do not depend upon ability to earn, but only upon actual earnings. Thus, they give a potential recipient a choice between staying home to care for the child and working. This opportunity for choice, and the potential right to as much as $53,640 worth of benefits ($2,980 per year times 18 years), certainly has a present value of $10,000, whether or not the claimant was eligible for benefits on the day he filed suit.

Richardson, 411 U. S. 677 (1973). *Frontiero* involved statutes which provided the wife of a male serviceman with dependents' benefits but not the husband of a servicewoman unless she proved that she supplied more than one-half of her husband's support. The Court held that the statutory scheme violated the right to equal protection secured by the Fifth Amendment. *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975), explained: "In . . . *Frontiero* the challenged [classification] based on sex [was] premised on overbroad generalizations that could not be tolerated under the Constitution. . . . [T]he assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not." *Id.,* at 507. A virtually identical "archaic and overbroad" generalization, *id.,* at 508, "not . . . tolerated under the Constitution" underlies the distinction drawn by § 402 (g), namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support.[11]

Section 402 (g) was added to the Social Security Act in 1939 as one of a large number of amendments designed to "afford more adequate protection to the family as a unit." H. R. Rep. No. 728, 76th Cong., 1st Sess., 7 (1939). Monthly benefits were provided to wives, children, widows, orphans, and surviving dependent parents of covered workers. *Ibid.* However, children of covered female workers were eligible for survivors' benefits only in limited circumstances, see n. 5, *supra,* and no benefits

[11] See the observations in *Frontiero,* 411 U. S., at 689 n. 23, that in view of the large percentage of married women working (41.5% in 1971), the presumption of complete dependency of wives upon husbands has little relationship to present reality. In the same vein, *Taylor* v. *Louisiana,* 419 U. S. 522 (1975), observed that current statistics belie "the presumed role in the home" of contemporary women. *Id.,* at 535 n. 17.

whatever were made available to husbands or widowers on the basis of their wives' covered employment.[12]

Underlying the 1939 scheme was the principle that "[u]nder a social-insurance plan the primary purpose is to pay benefits in accordance with the *probable needs* of the beneficiaries rather than to make payments to the estate of a deceased person regardless of whether or not he leaves dependents." H. R. Rep. No. 728, *supra,* at 7. (Emphasis supplied.) It was felt that "[t]he payment of these survivorship benefits and supplements for the wife of an annuitant are . . . in keeping with the principle of social insurance . . . ." *Ibid.* Thus, the framers of the Act legislated on the "then generally accepted presumption that a man is responsible for the support of his wife and children." D. Hoskins & L. Bixby, Women and Social Security: Law and Policy in Five Countries, Social Security Administration Research Report No. 42, p. 77 (1973).[13]

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[12] Changes have been made in these provisions. For example, benefits are now available to husbands and aged widowers of covered workers if they can show that more than one-half of their support has been provided by their wives. 42 U. S. C. §§ 402 (c), (f). See also n. 5, *supra.* See generally Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L. J. 181 (1973).

[13] See, *e. g.,* H. R. Rep. No. 728, 76th Cong., 1st Sess., 36 (1939): "[A] child is not usually financially dependent upon his mother"; 84 Cong. Rec. 6896 (1939) (remarks of Rep. Cooper): "[W]e now have under the provisions of this bill a program on a family basis, and we will take care of these people who will need this assistance because of the loss of the *father* or the *husband* and the loss of the pay and wages that *he* has been bringing into the family." (Emphasis supplied.) See also Report of the Committee on Social Insurance and Taxes, The President's Commission on the Status of Women 29 (1963): "It was decided at that time that if the determination of dependency were based on generally valid presumptions, there would be no need in most situations for detailed investigations of family financial relationships. Since the husband traditionally was the wage earner in the family and the wife was the homemaker,

Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. See *Kahn* v. *Shevin,* 416 U. S. 351, 354 n. 7 (1974). But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Section 402 (g) clearly operates, as did the statutes invalidated by our judgment in *Frontiero,* to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious. First, it was open to the servicewoman under the statutes invalidated in *Frontiero* to prove that her husband was in fact dependent upon her. Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support, or that, had his wife lived, she would have remained at work while he took over care of the child. Second, in this case social security taxes were deducted from Paula's salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in *Frontiero,* the Constitution also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men.

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benefits were provided for wives, widows, and children on the basis of presumed dependency on the husband . . . ."

III

Appellant seeks to avoid this conclusion with two related arguments. First, he claims that because social security benefits are not compensation for work done, Congress is not obliged to provide a covered female employee with the same benefits as it provides to a male. Second, he contends that § 402 (g) was "reasonably designed to offset the adverse economic situation of women by providing a widow with financial assistance to supplement or substitute for her own efforts in the marketplace," Brief for Appellant 14, and therefore does not contravene the equal protection guarantee.

A

Appellant relies for the first proposition primarily on *Flemming* v. *Nestor,* 363 U. S. 603 (1960). We held in *Flemming* that the interest of a covered employee in future social security benefits is "noncontractual," because "each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation." *Id.,* at 609–610. Appellant apparently contends that since benefits derived from the social security program do not correlate necessarily with contributions made to the program, a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment.

We do not see how the fact that social security benefits are "noncontractual" can sanction differential protection for covered employees which is solely gender based. From the outset, social security old age, survivors', and disability (OASDI) benefits have been "afforded as a matter of right, related to past participation in the pro-

ductive processes of the country." Final Report of the Advisory Council on Social Security 17 (1938). It is true that social security benefits are not necessarily related directly to tax contributions, since the OASDI system is structured to provide benefits in part according to presumed need.[14] For this reason, *Flemming* held that the position of a covered employee "cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments." 363 U. S., at 610. But the fact remains that the statutory right to benefits *is* directly related to years worked and amount earned by a covered employee,[15] and not to the need of the beneficiaries directly. Since OASDI benefits do depend significantly upon the participation in the work force of a covered employee, and since only covered employees and not others are required to pay taxes toward the system, benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex.

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[14] See *supra,* at 644. There has been a continuing tension in the OASDI system between two goals: individual equity, which accords benefits commensurate with the contributions made to the system, and social adequacy, which assures to all contributors and their families a tolerable standard of living. See J. Pechman, H. Aaron & M. Taussig, Social Security: Perspectives for Reform 33–34 (1968); Report of the Social Security Board, H. R. Doc. No. 110, 76th Cong., 1st Sess., 5 (1939). Rather than abandoning either goal, Congress has tried to meet both, by assuring that the protection afforded each contributor is at least that which his contributions could purchase on the private market. See H. R. Rep. No. 728, 76th Cong., 1st Sess., 13–14 (1939); H. R. Rep. No. 1300, 81st Cong., 1st Sess., 2 (1949).

[15] See 42 U. S. C. §§ 414, 415 for the correlation between years worked, amount earned, and the "primary insurance amount," which is the amount received by fully insured employees upon reaching retirement age. Benefits under § 402 (g) are 75% of the primary insurance amount of the covered employee.

B

Appellant seeks to characterize the classification here as one reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families. The Court held in *Kahn* v. *Shevin,* 416 U. S., at 355, that a statute "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" can survive an equal protection attack. See also *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975). But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.[16] Here, it is apparent both from the statutory scheme itself and from the legislative history of § 402 (g) that Congress' purpose in providing benefits to young widows with children was not to provide an income to women who were, because of economic discrimination, unable to provide for themselves. Rather, § 402 (g), linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of children. Since this purpose in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work.

That the purpose behind § 402 (g) is to provide chil-

[16] This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. See *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Jimenez* v. *Weinberger,* 417 U. S., at 634; *U. S. Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 536–537 (1973).

dren deprived of one parent with the opportunity for the personal attention of the other could not be more clear in the legislative history. The Advisory Council on Social Security, which developed the 1939 amendments, said explicitly that "[s]uch payments [under § 402 (g)] are intended as supplements to the orphans' benefits *with the purpose of enabling the widow to remain at home and care for the children.*" Final Report of the Advisory Council on Social Security 31 (1938). (Emphasis supplied.) In 1971, a new Advisory Council, considering amendments to eliminate the various gender-based distinctions in the OASDI structure, reiterated this understanding: "Present law provides benefits for the mother of young . . . children . . . if she chooses to stay home and care for the children instead of working. In the Council's judgment, it is desirable to allow a woman who is left with the care of the children the *choice* of whether to stay at home to care for the children or to work." 1971 Advisory Council on Social Security, Reports on the Old-Age, Survivors, and Disability Insurance and Medicare Programs 30 (hereinafter 1971 Reports). (Emphasis supplied.)

Indeed, consideration was given in 1939 to extending benefits to all widows regardless of whether or not there were minor children. The proposal was rejected, apparently because it was felt that young widows without children can be expected to work, while middle-aged widows "are likely to have more savings than younger widows and many of them have children who are grown and able to help them." Report of the Social Security Board, H. R. Doc. No. 110, 76th Cong., 1st Sess., 7–8 (1939). See also Final Report of the Advisory Council on Social Security 31 (1938); Hearings on the Social Security Act Amendments of 1939 before the House Committee on Ways and Means, 76th Cong., 1st Sess., 61, 1217, 2169–2170; H. R. Rep. No. 728, 76th Cong., 1st Sess., 36–

37 (1939). Thus, Congress decided *not* to provide benefits to all widows even though it was recognized that some of them would have serious problems in the job market. Instead, it provided benefits only to those women who had responsibility for minor children, because it believed that they should not be required to work.

The whole structure of survivors' benefits conforms to this articulated purpose. Widows without minor children obtain no benefits on the basis of their husband's earnings until they reach age 60 or, in certain instances of disability, age 50. 42 U. S. C. §§ 402 (e)(1) and (5). Further, benefits under § 402 (g) cease when all children of a beneficiary are no longer eligible for children's benefits.[17] If Congress were concerned with providing women with benefits because of economic discrimination, it would be entirely irrational to except those women who had spent many years at home rearing children, since those women are most likely to be without the skills required to succeed in the job market. See Walker, Sex Discrimination in Government Benefit Programs, 23 Hastings L. J. 277, 278–279 (1971); Hearings, *supra,* at 61 (remarks of Dr. Altemeyer, Chairman, Social Security Board); Report of the Committee on Social Insurance and Taxes, The President's Commission on the Status of Women 31–32 (1963). Similarly, the Act now provides benefits to a surviving

[17] In certain cases, mother's benefits under § 402 (g) cease although some children are still eligible for children's benefits under § 402 (d). In particular, children continue to be eligible for benefits while full-time students until age 22 and, in some instances, for a few months thereafter. §§ 402 (d)(1)(F) and (d)(7). Yet, benefits to the mother under § 402 (g) cease if all children have reached 18 and are not disabled. § 402 (s)(1). This distinction also sustains our conclusion that § 402 (g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since mother's benefits are linked to children's benefits only so long as it is realistic to think that the children might need their parent at home.

divorced wife who is the parent of a covered employee's child, regardless of how long she was married to the deceased or of whether she or the child was dependent upon the employee for support. §§ 402 (g), 416 (d)(3). Yet, a divorced wife who is not the mother of a child entitled to children's benefits is eligible for benefits only if she meets other eligibility requirements *and* was married to the covered employee for 20 years. §§ 402 (b) and (e), 416 (d).[18] Once again, this distinction among women is explicable only because Congress was not concerned in § 402 (g) with the employment problems of women generally but with the principle that children of covered employees are entitled to the personal attention of the surviving parent if that parent chooses not to work.

Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402 (g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent. Even in the typical family hypothesized by the Act, in which the husband is supporting the family and the mother is caring for the children, this result makes no sense. The fact

[18] Originally, no divorced wives were entitled to benefits on the basis of their former husbands' earnings. The provision for surviving divorced wives who are the mothers of children entitled to survivors' benefits was added in 1950. Social Security Amendments of 1950, § 101 (a), 64 Stat. 483. It was not until 1965 that benefits were provided for aged divorced wives and widows, premised upon a 20-year marriage. Social Security Amendments of 1965, Pub. L. 89–97, § 308, 79 Stat. 375. Both these groups of women were required to prove dependency upon the former husband. The proof-of-dependency requirements were eliminated in 1972. Social Security Amendments of 1972, Pub. L. 92–603, § 114, 86 Stat. 1348. This separate development of benefits for divorced women with children and those without reinforces the conclusion that the presence of children is the raison d'être of § 402 (g).

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that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972). Further, to the extent that women who work when they have sole responsibility for children encounter special problems, it would seem that men with sole responsibility for children will encounter the same child-care related problems.[19] Stephen Wiesenfeld, for example, found that providing adequate care for his infant son impeded his ability to work, see n. 7, *supra.*

Finally, to the extent that Congress legislated on the presumption that women as a group would choose to forgo work to care for children while men would not,[20]

[19] The Commission on Railroad Retirement, commenting upon a similar provision of the railroad retirement system, significantly stated: "Statistically speaking, there are, of course, significant differences by sex in the roles played in our society. For example, far more women than men are primarily involved in raising minor children. But if the society's aim is to further a socially desirable purpose, e. g., better care for growing children, it should tailor any subsidy directly to the end desired, not indirectly and unequally by helping widows with dependent children and ignoring widowers in the same plight. In this example, it is the economic and *functional* capability of the surviving breadwinner to care for children which counts; the sex of the surviving parent is incidental." Report of the Commission on Railroad Retirement, Railroad Retirement System—Its Coming Crisis, H. R. Doc. No. 92–350, p. 378 (1972). (Emphasis supplied.)

[20] Precisely this view was expressed by the 1971 Advisory Council on Social Security, whose recommendations upon which gender-based

the statutory structure, independent of the gender-based classification, would deny or reduce benefits to those men who conform to the presumed norm and are not hampered by their child-care responsibilities. Benefits under § 402 (g) decrease with increased earnings, see, *supra,* at 641. According to appellant, "the bulk of male workers would receive no benefits in any event," Brief for Appellant 17 n. 11, because they earn too much. Thus, the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids.

Since the gender-based classification of § 402 (g) cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero.* Like the statutes there, "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause." *Reed* v. *Reed,* 404 U. S. 71, 77 (1971).

Affirmed.

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

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distinctions in the OASDI system to retain and which to discard were followed in the 1972 Social Security Amendments: "The Council believes that it is unnecessary to offer the same choice [whether to work or care for surviving children] to a man. Even though many more married women work today than in the past, so that they are both workers and homemakers, very few men adopt such a dual role; the customary and predominant role of the father is not that of a homemaker but rather that of the family breadwinner. A man generally continues to work to support himself and his children after the death or disability of his wife. The Council therefore does not recommend that benefits be provided for a young father who has children in his care." 1971 Reports 30.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

I concur in the judgment and generally in the opinion of the Court. But I would identify the impermissible discrimination effected by § 402 (g) somewhat more narrowly than the Court does. Social Security is designed, certainly in this context, for the protection of the *family*. Although it lacks the contractual attributes of insurance or an annuity, *Flemming* v. *Nestor*, 363 U. S. 603 (1960), it is a contributory system and millions of wage earners depend on it to provide basic protection for their families in the event of death or disability.

Many women are the principal wage earners for their families, and they participate in the Social Security system on exactly the same basis as men. When the mother is a principal wage earner, the family may suffer as great an economic deprivation upon her death as would occur upon the death of a father wage earner. It is immaterial whether the surviving parent elects to assume primary child care responsibility rather than work, or whether other arrangements are made for child care. The statutory scheme provides benefits both to a surviving mother who remains at home and to one who works at low wages. A surviving father may have the same need for benefits as a surviving mother.* The statutory scheme therefore impermissibly discriminates against a female wage earner because it provides her family less protection than it

*I attach less significance to the view emphasized by the Court that a purpose of the statute is to enable the surviving parent to remain at home to care for a child. In light of the long experience to the contrary, one may doubt that fathers generally will forgo work and remain at home to care for children to the same extent that mothers may make this choice. Under the current statutory program, however, the payment of benefits is not conditioned on the surviving parent's decision to remain at home.

provides that of a male wage earner, even though the family needs may be identical. I find no legitimate governmental interest that supports this gender classification.

MR. JUSTICE REHNQUIST, concurring in the result.

Part III–B of the Court's opinion contains a thorough examination of the legislative history and statutory context which define the role and purpose of § 402 (g). I believe the Court's examination convincingly demonstrates that the only purpose of § 402 (g) is to make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent, should that parent desire to remain in the home with the child. Moreover, the Court's opinion establishes that the Government's proffered legislative purpose is so totally at odds with the context and history of § 402 (g) that it cannot serve as a basis for judging whether the statutory distinction between men and women rationally serves a valid legislative objective.

This being the case, I see no necessity for reaching the issue of whether the statute's purported discrimination against female workers violates the Fifth Amendment as applied in *Frontiero* v. *Richardson,* 411 U. S. 677 (1973). I would simply conclude, as does the Court in Part III–B of its opinion, that the restriction of § 402 (g) benefits to surviving mothers does not rationally serve any valid legislative purpose, including that for which § 402 (g) was obviously designed. This is so because it is irrational to distinguish between mothers and fathers when the sole question is whether a child of a deceased contributing worker should have the opportunity to receive the full-time attention of the only parent remaining to it. To my mind, that should be the end of the matter. I therefore concur in the result.

AUSTIN ET AL. *v.* NEW HAMPSHIRE ET AL.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

No. 73–2060. Argued January 15, 1975—Decided March 19, 1975

The New Hampshire Commuters Income Tax imposes a tax on nonresidents' New Hampshire-derived income above $2,000 at a 4% rate, except that if the nonresident's State of residence would impose a lesser tax had the income been earned in that State, the New Hampshire tax is reduced to that amount. The Commuters Income Tax contains provisions that in practical effect exempt from tax income earned by New Hampshire residents outside the State, and New Hampshire imposes no tax on its residents' domestic earned income. *Held:* Under the rule requiring substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers, the New Hampshire Commuters Income Tax violates the Privileges and Immunities Clause, since the tax falls exclusively on nonresidents' incomes and is not offset even approximately by other taxes imposed upon residents alone. Pp. 665–668.

(a) The State's contention that the tax's ultimate burden is not in effect more onerous on nonresidents because their total tax liability is unchanged once the tax credit received from their State of residence is taken into account, cannot be squared with the underlying policy of comity that the Privileges and Immunities Clause requires. Pp. 665–666.

(b) The possibility that in this case Maine, the appellant taxpayers' State of residence, could shield its residents from the New Hampshire tax by amending its credit provisions does not cure, but in fact compounds, the constitutional defect of the discrimination in the New Hampshire tax, since New Hampshire in effect invites appellants to induce their representatives to retaliate against such discrimination. The constitutionality of one State's statutes affecting nonresidents cannot depend upon the present configuration of another State's statutes. Pp. 666–668.

114 N. H. 137, 316 A. 2d 165, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 668. DOUGLAS, J., took no part in the consideration or decision of the case.

Charles W. Smith argued the cause and filed a brief for appellants.

Charles G. Cleaveland, Assistant Attorney General of New Hampshire, argued the cause for appellees *pro hac vice.* With him on the brief were *Warren B. Rudman,* Attorney General, and *Donald W. Stever, Jr.,* Assistant Attorney General.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellants are residents of Maine who were employed in New Hampshire during the 1970 tax year and as such were subject to the New Hampshire Commuters Income Tax. On behalf of themselves and others similarly situated, they petitioned the New Hampshire Superior Court for a declaration that the tax violates the Privileges and Immunities and Equal Protection Clauses of the Constitutions of New Hampshire and of the United States. The cause was transferred directly to the New Hampshire Supreme Court, which upheld the tax. 114 N. H. 137, 316 A. 2d 165 (1974). We noted probable jurisdiction of the federal constitutional claims, 419 U. S. 822 (1974), and on the basis of the Privileges and Immunities Clause of Art. IV, we now reverse.

I

The New Hampshire Commuters Income Tax imposes a tax on nonresidents' New Hampshire-derived income in

**Jon A. Lund,* Attorney General, and *Jerome S. Matus* and *Donald J. Gasink,* Assistant Attorneys General, of Maine, *Kimberly B. Cheney,* Attorney General, *Benson D. Scotch,* Deputy Attorney General, and *Charles D. Hassel,* Assistant Attorney General, of Vermont, filed a brief for the States of Maine and Vermont as *amici curiae* urging reversal.

William F. Hyland, Attorney General, *pro se, Stephen Skillman,* Assistant Attorney General, and *Herbert K. Glickman,* Deputy Attorney General, filed a brief for the Attorney General of New Jersey as *amicus curiae* urging affirmance.

excess of $2,000.[1] The tax rate is 4% except that if the nonresident taxpayer's State of residence would impose a lesser tax had the income been earned in that State, the New Hampshire tax is reduced to the amount of the tax that the State of residence would impose. Employers are required to withhold 4% of the nonresident's income, however, even if his home State would tax him at less than the full 4%. Any excess tax withheld is refunded to the nonresident upon his filing a New Hampshire tax return after the close of the tax year showing that he is entitled to be taxed at a rate less than 4%.

The Commuters Income Tax initially imposes a tax of 4% as well on the income earned by New Hampshire residents outside the State. It then exempts such income from the tax, however: (1) if it is taxed by the State from which it is derived; (2) if it is exempted from taxation by the State from which it is derived; or (3) if the State from which it is derived does not tax such income.[2]

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[1] N. H. Rev. Stat. Ann. § 77–B:2 II (1971) provides:

"A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income . . . less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state."

[2] N. H. Rev. Stat. Ann. § 77–B:2 I (1971) provides:

"A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire . . . ; provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income

The effect of these imposition and exemption features is that no resident of New Hampshire is taxed on his out-of-state income. Nor is the domestic earned income of New Hampshire residents taxed. In effect, then, the State taxes only the incomes of nonresidents working in New Hampshire; [3] it is on the basis of this disparate treatment of residents and nonresidents that appellants challenge New Hampshire's right to tax their income from employment in that State.[4]

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tax on such income, it shall be exempt from taxation under this paragraph."

[3] New Hampshire residents pay a 4.5% tax on interest (other than interest on notes and bonds of the State and on bank deposits) and dividends (other than cash dividends on stock in national banks and New Hampshire banks and thrift institutions) in excess of $600. N. H. Rev. Stat. Ann. §§ 77:1–5 (1971). Residents also pay a $10 annual "resident tax" for the use of their town or city of residence. N. H. Rev. Stat. Ann. §§ 72:1, 5–a (Supp. 1973). Other state taxes, such as those on business profits, real estate transfers, and property, are paid by residents and nonresidents alike.

State income tax revenues from the tax on residents' unearned income in fiscal year 1970 were $3,462,000. In fiscal year 1971, the first in which the State taxed the earned income of nonresidents, total income tax revenues rose to $5,238,000. U. S. Dept. of Commerce, Bureau of the Census, State Tax Collections in 1970 (Series GF70 No. 1) and in 1971 (Series GF71 No. 1), p. 26.

[4] Appellees challenge appellants' standing to maintain this action on the theory that their economic position was unchanged despite the imposition of the Commuters Income Tax because they received an offsetting credit under the tax laws of Maine, Me. Rev. Stat. Ann., Tit. 36, § 5127 (Supp. 1973), against income taxes owing to that State; the appellants' total tax liability, that is, was unaffected. We think the question is covered, however, by the holding of *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959). In addition, appellants are affected by the requirements that they file a New Hampshire tax return and that their employers withhold 4% of their earnings; since the appellees do not suggest that appellants are subject to the tax at the 4% rate, at the very least the withholding requirement deprives them of the use value of the excess

II

The Privileges and Immunities Clause of Art. IV, § 2, cl. 1, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Clause thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment. The origins of the Clause do reveal, however, the concerns of central import to the Framers. During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of Confederation was intended to arrest this centrifugal tendency with some particularity. It provided:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."

The discriminations at which this Clause was aimed were by no means eradicated during the short life of the Con-

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withheld over their ultimate tax liability, if any. These effects may not be substantial, but they establish appellants' status as parties "adversely affected" by the State's tax laws, giving them "a direct stake in the outcome" of this litigation. *Sierra Club* v. *Morton,* 405 U. S. 727, 740 (1972).

federation,[5] and the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent,[6] unless it was to strengthen the force of the Clause in fashioning a single nation.[7] Thus, in the first, and long the leading, explication of the Clause, Mr. Justice Washington, sitting as Circuit Justice, deemed the fundamental privileges and immunities protected by the Clause to be essentially coextensive with those calculated to achieve the purpose of forming a more perfect Union, including "an exemption from higher taxes or impositions than are paid by the other citizens of the state." *Corfield* v. *Coryell,* 6 F. Cas. 546, 552 (No. 3,230) (CCED Pa. 1825).

In resolving constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Ken-*

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[5] James Madison, in a commentary on the plan of union proposed by William Paterson of New Jersey, wrote: "Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens [of other States] are entitled to equality of privileges by the Articles of Confederation." 1 M. Farrand, Records of the Federal Convention 317 (1911).

[6] Charles Pinckney, who drafted the shorter version now found in Art. IV, § 2, cl. 1, see 37 Annals of Cong. 1129 (1821), assured the Convention that "[t]he 4th article, respecting the extending the rights of the Citizens of each State, throughout the United States [etc.] is formed exactly upon the principles of the 4th article of the present Confederation . . . ." 3 M. Farrand, *supra,* at 112. For an explanation of the deletion of certain phrases found in Art. IV of the Confederation in light of the Fugitive Slave and Commerce Clauses of the Constitution, see *Lemmon* v. *People,* 20 N. Y. 562, 627 (1860) (opinion of Wright, J.).

[7] *Id.,* at 607 (Denio, J.); see *Paul* v. *Virginia,* 8 Wall. 168, 180 (1869).

tucky, 309 U. S. 83, 88 (1940). See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures. When a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion. See *id.*, at 359.

This consideration applies equally to the protection of individual liberties, see *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), and to the maintenance of our constitutional federalism. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 164 (1954). The Privileges and Immunities Clause, by making noncitizenship or nonresidence [8] an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents are not represented in the taxing State's legislative halls, cf. *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 532–533 (1959) (BRENNAN, J., concurring), judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution."

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[8] For purposes of analyzing a taxing scheme under the Privileges and Immunities Clause the terms "citizen" and "resident" are essentially interchangeable. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 79 (1920) ("a general taxing scheme . . . if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States"); *Smith* v. *Loughman*, 245 N. Y. 486, 492, 157 N. E. 753, 755, cert. denied, 275 U. S. 560 (1927); see *Toomer* v. *Witsell*, 334 U. S. 385, 397 (1948).

Travis v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 82 (1920). Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions.

The first such case was *Ward* v. *Maryland*, 12 Wall. 418 (1871), challenging a statute under which nonresidents were required to pay $300 per year for a license to trade in goods not manufactured in Maryland, while resident traders paid a fee varying from $12 to $150, depending upon the value of their inventory. The State attempted to justify this disparity as a response to the practice of "runners" from industrial States selling by sample in Maryland, free from local taxation and other overhead expenses incurred by resident merchants. It portrayed the fee as a "tax upon a particular business or trade, carried on in a particular mode," rather than a discrimination against traders from other States. Although the tax may not have been "palpably arbitrary," see *Allied Stores of Ohio, Inc.* v. *Bowers, supra,* at 530, the discrimination could not be denied and the Court held that it violated the guarantee of the Privileges and Immunities Clause against "being subjected to any higher tax or excise than that exacted by law of . . . permanent residents." [9]

In *Travellers' Insurance Co.* v. *Connecticut*, 185 U. S. 364 (1902), the Court considered a tax laid on the value of stock in local insurance corporations. The shares of

[9] Accord, *Toomer* v. *Witsell, supra,* at 396, where the Court held invalid another disparate licensing-fee system, citing *Ward* v. *Maryland* for the proposition that "it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of *substantial equality with the citizens of that State.*" (Emphasis added.)

nonresident stockholders were assessed at their market value, while those owned by residents were assessed at market value less the proportionate value of all real estate held by the corporation and on which it had already paid a local property tax. In analyzing the apparent discrimination thus worked against nonresidents, the Court took account of the overall distribution of the tax burden between resident and nonresident stockholders. Finding that nonresidents paid no local property taxes, while residents paid those taxes at an average rate approximating or exceeding the rate imposed by the State on nonresidents' stock, the Court upheld the scheme. While more precise equality between the two classes could have been obtained, it was "enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents." Their contribution to state and local property tax revenues, that is, was no more than the ratable share of their property within the State.

The principles of *Ward* and *Travellers'* were applied to taxes on nonresidents' local incomes in *Shaffer* v. *Carter,* 252 U. S. 37 (1920), and *Travis* v. *Yale & Towne Mfg. Co., supra. Shaffer* upheld the Oklahoma tax on income derived from local property and business by a nonresident where the State also taxed the income—from wherever derived—of its own citizens. Putting aside "theoretical distinctions" and looking to "the practical effect and operation" of the scheme, the nonresident was not treated more onerously than the resident in any particular, and in fact was called upon to make no more than his ratable contribution to the support of the state government. The New York tax on residents' and nonresidents' income at issue in *Travis,* by contrast, could not be sustained when its actual effect was considered. The tax there granted personal exemptions to each resi-

dent taxpayer for himself and each dependent, but it made no similar provision for nonresidents. The disparity could not be "deemed to be counterbalanced" by an exemption for nonresidents' interest and dividend income because it was not likely "to benefit non-residents to a degree corresponding to the discrimination against them." Looking to "the concrete, the particular incidence" of the tax, therefore, the Court said of the many New Jersey and Connecticut residents who worked in New York:

> "They pursue their several occupations side by side with residents of the State of New York—in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. . . . This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . but a general rule, operating to the disadvantage of all non-residents . . . and favoring all residents . . . ." 252 U. S., at 80–81 (citations omitted).

III

Against this background establishing a rule of substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers, the New Hampshire Commuters Income Tax cannot be sustained. The overwhelming fact, as the State concedes, is that the tax falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone.[10] Rather, the argument advanced in fa-

[10] The $10 annual resident tax and the tax on certain unearned income in excess of $600 would rarely equal, much less exceed, the 4% tax on nonresidents' incomes over $2,000. Appellant Logan, for example, with $33,000 of New Hampshire-derived income, paid $252 in taxes to that State; a resident with the same earned income

vor of the tax is that the ultimate burden it imposes is "not more onerous in effect," *Shaffer* v. *Carter, supra,* on nonresidents because their total state tax liability is unchanged once the tax credit they receive from their State of residence is taken into account. See n. 4, *supra.* While this argument has an initial appeal, it cannot be squared with the underlying policy of comity to which the Privileges and Immunities Clause commits us.

According to the State's theory of the case, the only practical effect of the tax is to divert to New Hampshire tax revenues that would otherwise be paid to Maine, an effect entirely within Maine's power to terminate by repeal of its credit provision for income taxes paid to another State. The Maine Legislature could do this, presumably, by amending the provision so as to deny a credit for taxes paid to New Hampshire while retaining it for the other 48 States. Putting aside the acceptability of such a scheme, and the relevance of any increase in appellants' home state taxes that the diversionary effect is said to have,[11] we do not think the possibility that Maine could

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would have paid only the $10 resident tax. Against this disparity and the disparities among nonresidents' tax rates depending on their State of residence, we find no support in the record for the assertion of the court below that the Commuters Income Tax creates no more than a "practical equality" between residents and nonresidents when the taxes paid only by residents are taken into account. "[S]omething more is required than bald assertion"—by the state court or by counsel here—to establish the validity of a taxing statute that on its face discriminates against nonresidents. *Mullaney* v. *Anderson,* 342 U. S. 415, 418 (1952).

[11] The States of Maine and Vermont, *amici curiae,* point out that at least $400,000 was diverted from Maine to New Hampshire by reason of the challenged tax and Maine's tax credit in 1971, and that the average Maine taxpayer, appellants included, thereby bore an additional burden of 40 cents in Maine taxes. While the inference is strong, we deem the present record insufficient to demonstrate that Maine taxes were actually higher than they otherwise would have been but for this revenue loss.

shield its residents from New Hampshire's tax cures the constitutional defect of the discrimination in that tax. In fact, it compounds it. For New Hampshire in effect invites appellants to induce their representatives, if they can, to retaliate against it.

A similar, though much less disruptive, invitation was extended by New York in support of the discriminatory personal exemption at issue in *Travis*. The statute granted the nonresident a credit for taxes paid to his State of residence on New York-derived income only if that State granted a substantially similar credit to New York residents subject to its income tax. New York contended that it thus "looked forward to the speedy adoption of an income tax by the adjoining States," which would eliminate the discrimination "by providing similar exemptions similarly conditioned." To this the Court responded in terms fully applicable to the present case. Referring to the anticipated legislative response of the neighboring States, it stated:

> "This, however, is wholly speculative; New York has no authority to legislate for the adjoining States; and we must pass upon its statute with respect to its effect and operation in the existing situation. . . . A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution." 252 U. S., at 82.[12]

[12] Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treatment of nonresidents by States that coordinate their tax laws.

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Nor, we may add, can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State.

Since we dispose of this case under Art. IV, § 2, of the Constitution, we have no occasion to address the equal protection arguments directed at the disparate treatment of residents and nonresidents and at that feature of the statute that causes the rate of taxation imposed upon nonresidents to vary among them depending upon the rate established by their State of residence.

Reversed.

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

MR. JUSTICE BLACKMUN, dissenting.

For me, this is a noncase. I would dismiss the appeal for want of a substantial federal question. We have far more urgent demands upon our limited time than this kind of litigation.

Because the New Hampshire income tax statutes operate in such a way that no New Hampshire resident is ultimately subjected to the State's income tax, the case at first glance appears to have some attraction. That attraction, however, is superficial and, upon careful analysis, promptly fades and disappears entirely. The reason these appellants, who are residents of Maine, not of New Hampshire, pay a New Hampshire tax is because the Maine Legislature—the appellants' own duly elected representatives—has given New Hampshire the option to divert this increment of tax (on a Maine resident's income earned in New Hampshire) from Maine to New Hampshire, and New Hampshire willingly has picked up that option. All that New Hampshire has done is what Maine specifically permits and, indeed, invites it to do. If Maine should become disenchanted with its bestowed

bounty, its legislature may change the Maine statute. The crux is the statute of Maine, not the statute of New Hampshire. The appellants, therefore, are really complaining about their own statute. It is ironic that the State of Maine, which allows the credit, has made an appearance in this case as an *amicus* urging, in effect, the denial of the credit by an adjudication of unconstitutionality of New Hampshire's statute. It seems to me that Maine should be here seeking to uphold its own legislatively devised plan or turn its attention to its own legislature.

All this is reminiscent of the federal estate tax credit for state death taxes paid, originally granted by § 301 (b) of the Revenue Act of 1924, 43 Stat. 304, and by § 301 (b) of the Revenue Act of 1926, 44 Stat. 70, and now constituting § 2011 of the Internal Revenue Code of 1954, 26 U.S.C. § 2011. States, including New Hampshire and those adjacent to it, through specific legislation, have taken advantage of the credit allowed. Me. Rev. Stat. Ann., Tit. 36, §§ 3741–3745 (1965 and Supp. 1973); Mass. Gen. Laws, c. 65A, §§ 1–7 (1969 and Supp. 1975); N. H. Rev. Stat. Ann. §§ 87:1–13 (1971); Vt. Stat. Ann., Tit. 32, §§ 7001–7005 (1970). The credit provision has been upheld against constitutional attack. *Florida* v. *Mellon,* 273 U. S. 12, 17 (1927); *Rouse* v. *United States,* 65 Ct. Cl. 749, cert. denied, 278 U. S. 638 (1928).

One wonders whether this is just a lawyers' lawsuit. Certainly, the appellants, upon prevailing today, have no direct or apparent financial gain. Relief for them from the New Hampshire income tax results only in a corresponding, *pro tanto,* increase in their Maine income tax. Dollarwise, they emerge at exactly the same point. The single difference is that their State, Maine, enjoys the tax on the New Hampshire-earned income, rather than New Hampshire. Where, then, is the injury? If there is an element of injury, it is Maine-imposed.

We waste our time, therefore, by theorizing and agonizing about the Privileges and Immunities Clause and equal protection in this case. But if that exercise in futility is nevertheless indicated, I see little merit in the appellants' quest for relief. It is settled that absolute equality is not a requisite under the Privileges and Immunities Clause. *Toomer* v. *Witsell,* 334 U. S. 385, 396 (1948); *id.,* at 408 (Frankfurter, J., concurring). And I fail to perceive unconstitutional unequal protection on New Hampshire's part. If inequality exists, it is due to differences in the respective income tax rates of the States that border upon New Hampshire.

I say again that this is a noncase, made seemingly attractive by high-sounding suggestions of inequality and unfairness. The State of Maine has the cure within its grasp, and if the cure is of importance to it and to its citizens, such as appellants, it and they should be about adjusting Maine's house rather than coming here complaining of a collateral effect of its own statute.

Syllabus

UNITED STATES *v.* FEOLA

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

No. 73–1123. Argued November 19, 1974—Decided March 19, 1975

Respondent and others were convicted in a jury trial of violating 18 U. S. C. § 111 for having assaulted federal officers (here undercover narcotics agents) in the performance of their official duties, and of conspiring to commit that offense, in violation of the general conspiracy statute, 18 U. S. C. § 371. The trial court had instructed the jurors that, in order to find any of the defendants guilty on either the conspiracy count or the substantive count, they were not required to conclude that the defendants were aware that their quarry were federal officers. The Court of Appeals approved the instructions on the substantive charges but, in reliance on *United States* v. *Crimmins,* 123 F. 2d 271, and its progeny, reversed the conspiracy convictions on the ground that the trial court had erred in not charging that knowledge of the victim's official identity must be proved in order to convict on the § 371 charge. *Held:*

1. Section 111, which was enacted both to protect federal officers and federal functions and to provide a federal forum in which to try alleged offenders, requires no more than proof of an intent to assault, not of an intent to assault a federal officer; and it was not necessary under the substantive statute to prove that respondent and his confederates knew that their victims were federal officers. Pp. 676–686.

2. Where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiring to commit the offense. Thus, in this case where proof of knowledge that the intended victims were federal officers was not necessary to convict under § 111, such knowledge did not have to be proved to convict under § 371. Pp. 686–696.

(a) There is nothing on the face of § 371 that would appear to require a greater degree of knowledge of the official status of the victim than is required in the case of the substantive statute, and at least two decisions repudiate respondent's contentions to the

contrary, *In re Coy,* 127 U. S. 731; *United States* v. *Freed,* 401 U. S. 601. Pp. 687–688.

(b) The principle of the *Crimmins* case, *supra,* that to permit conspiratorial liability where the conspirators were ignorant of the federal implications of their acts would be to enlarge their agreement beyond its terms as they understood them, has no bearing on a case like the instant one where the substantive offense, assault, is not of the type outlawed without regard to the intent of the actor to accomplish the result that is made criminal. Nor can it be said that the acts contemplated by the conspirators are legally different from those actually performed solely because of the official identity of the victim. Pp. 688–693.

(c) Imposition of a strict "anti-federal" scienter requirement has no relationship to the purposes of the law of conspiracy, which are to protect society from the dangers of concerted criminal activity and to identify an agreement to engage in crime as sufficiently threatening to the social order to warrant its being the subject of criminal sanctions regardless of whether the crime agreed upon is actually committed. Pp. 693–694.

486 F. 2d 1339, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 696.

Allan Abbot Tuttle argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Jerome M. Feit.*

George J. Bellantoni argued the cause and filed a brief for respondent.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether knowledge that the intended victim is a federal officer is a requisite for the crime of conspiracy, under 18 U. S. C. § 371, to com-

mit an offense violative of 18 U. S. C. § 111,[1] that is, an assault upon a federal officer while engaged in the performance of his official duties.

Respondent Feola and three others (Alsondo, Rosa, and Farr) were indicted for violations of §§ 371 and 111. A jury found all four defendants guilty of both charges.[2] Feola received a sentence of four years for the conspiracy and one of three years, plus a $3,000 fine, for the assault. The three-year sentence, however, was suspended and he was given three years' probation "to commence at the expiration of confinement" for the conspiracy. The respective appeals of Feola, Alsondo, and Rosa were considered by the United States Court of Appeals for the Second Circuit in a single opinion. After an initial ruling partially to the contrary, that court affirmed the judgment of conviction on the substantive charges, but reversed the conspiracy convictions. *United States* v. *Alsondo,* 486 F. 2d 1339, 1346 (1973).[3] Because of a

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[1] "§ 111. Assaulting, resisting, or impeding certain officers or employees.

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Among the persons "designated in section 1114" of 18 U. S. C. is "any officer or employee . . . of the Bureau of Narcotics and Dangerous Drugs."

[2] Codefendant Alsondo was also convicted of carrying a firearm unlawfully during the commission of the other felonies, in violation of 18 U. S. C. § 924 (c) (2).

[3] The appeal of the fourth defendant, Farr, was processed separately by the Court of Appeals. A different panel, upon the authority of *Alsondo,* similarly affirmed the judgment of conviction

conflict among the federal Circuits on the scienter issue with respect to a conspiracy charge,[4] we granted the Government's petition for a writ of certiorari in Feola's case.[5] 416 U. S. 935 (1974).

I

The facts reveal a classic narcotics "rip-off." The details are not particularly important for our present purposes. We need note only that the evidence shows that Feola and his confederates arranged for a sale of heroin to buyers who turned out to be undercover agents for the Bureau of Narcotics and Dangerous Drugs. The group planned to palm off on the purchasers, for a substantial sum, a form of sugar in place of heroin and, should that ruse fail, simply to surprise their unwitting buyers and relieve them of the cash they had brought along for payment. The plan failed when one agent, his suspicions being aroused,[6] drew his revolver in time to counter an assault upon another agent from the rear.

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on the substantive charge but reversed the conspiracy conviction. *United States* v. *Farr*, 487 F. 2d 1023 (CA2 1973), cert. pending, No. 73–953. The District Court imposed concurrent sentences in Farr's case, and the United States has not sought review here.

[4] See, *e. g.*, *United States* v. *Iannelli*, 477 F. 2d 999, 1002 (CA3 1973), cert. granted on another issue, 417 U. S. 907 (1974); *United States* v. *Thompson*, 476 F. 2d 1196, 1198–1200 (CA7), cert. denied, 414 U. S. 918 (1973); *United States* v. *Polesti*, 489 F. 2d 822, 824 (CA7 1973), cert. pending, No. 73–5489; *United States* v. *Roselli*, 432 F. 2d 879, 891–892 (CA9 1970), cert. denied, 401 U. S. 924 (1971); *United States* v. *Fernandez*, 497 F. 2d 730, 738–739 (CA9 1974), cert. pending, No. 73–6868.

[5] The sentence imposed on codefendants Alsondo and Rosa possessed elements of concurrency and the United States did not petition for a writ of certiorari in their cases.

[6] The agent opened a closet door in the Manhattan apartment where the sale was to have taken place and observed a man on the floor, bound and gagged. App. 11–12.

Instead of enjoying the rich benefits of a successful swindle, Feola and his associates found themselves charged, to their undoubted surprise, with conspiring to assault, and with assaulting, federal officers.

At the trial, the District Court, without objection from the defense, charged the jurors that, in order to find any of the defendants guilty on either the conspiracy count or the substantive one, they were not required to conclude that the defendants were aware that their quarry were federal officers.[7]

The Court of Appeals reversed the conspiracy convictions on a ground not advanced by any of the defendants. Although it approved the trial court's instructions to the jury on the substantive charge of assaulting a federal officer,[8] it nonetheless concluded that the failure to charge that knowledge of the victim's official identity must be proved in order to convict on the conspiracy charge amounted to plain error. 486 F. 2d, at 1344. The court perceived itself bound by a line of cases, commencing with Judge Learned Hand's opinion in *United States* v. *Crimmins,* 123 F. 2d 271 (CA2 1941), all hold-

[7] The court charged:

"In this connection, it is not necessary for the government to prove that the defendants or any of them knew that the persons they were going to assault or impede or resist were federal agents. It's enough, as far as this particular element of the case is concerned, for the government to prove that the defendants agreed and conspired to commit an assault." Tr. 513.

"I believe I have previously mentioned to you that the statute does not require that the defendant know either the identity of the person assaulted or imped[ed] or intimidated or that the person assaulted is a federal officer." *Id.,* at 525.

[8] The Second Circuit consistently has so held. See, *e. g., United States* v. *Lombardozzi,* 335 F. 2d 414, 416, cert. denied, 379 U. S. 914 (1964); *United States* v. *Montanaro,* 362 F. 2d 527, 528, cert. denied, 385 U. S. 920 (1966); *United States* v. *Ulan,* 421 F. 2d 787, 788 (1970).

ing that scienter of a factual element that confers federal jurisdiction, while unnecessary for conviction of the substantive offense, is required in order to sustain a conviction for conspiracy to commit the substantive offense. Although the court noted that the *Crimmins* rationale "has been criticized," 486 F. 2d, at 1343, and, indeed, offered no argument in support of it, it accepted "the controlling precedents somewhat reluctantly." *Id.*, at 1344.

II

The Government's plea is for symmetry. It urges that since criminal liability for the offense described in 18 U. S. C. § 111 does not depend on whether the assailant harbored the specific intent to assault a federal officer, no greater scienter requirement can be engrafted upon the conspiracy offense, which is merely an agreement to commit the act proscribed by § 111. Consideration of the Government's contention requires us preliminarily to pass upon its premise, the proposition that responsibility for assault upon a federal officer does not depend upon whether the assailant was aware of the official identity of his victim at the time he acted.

That the "federal officer" requirement is anything other than jurisdictional [9] is not seriously urged upon us; in-

[9] We are content to state the issue this way despite its potential to mislead. Labeling a requirement "jurisdictional" does not necessarily mean, of course, that the requirement is not an element of the offense Congress intended to describe and to punish. Indeed, a requirement is sufficient to confer jurisdiction on the federal courts for what otherwise are state crimes precisely because it implicates factors that are an appropriate subject for federal concern. With respect to the present case, for example, a mere general policy of deterring assaults would probably prove to be an undesirable or insufficient basis for federal jurisdiction; but where Congress seeks to protect the integrity of federal functions and the safety of federal officers, the interest is sufficient to warrant federal involvement. The significance of labeling a statutory requirement as "jurisdic-

deed, both Feola [10] and the Court of Appeals, 486 F. 2d, at 1342, concede that scienter is not a necessary element of the substantive offense under § 111. Although some early cases were to the contrary,[11] the concession recognizes what is now the practical unanimity of the Courts of Appeals.[12] Nevertheless, we are not always guided by concessions of the parties, and the very considerations of symmetry urged by the Government suggest that we first turn our attention to the substantive offense.

The Court has considered § 111 before. In *Ladner* v. *United States,* 358 U. S. 169 (1958), the issue was whether a single shotgun blast which wounded two federal agents effected multiple assaults, within the meaning of 18 U. S. C. § 254 (1940 ed.), one of the statutory predecessors to the present § 111.[13] The Government urged that

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tional" is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute. The question, then, is not whether the requirement is jurisdictional, but whether it is jurisdictional only.

[10] Brief for Respondent 6; Tr. of Oral Arg. 19.

[11] *E. g., Sparks* v. *United States,* 90 F. 2d 61, 63 (CA6 1937); *Hall* v. *United States,* 235 F. 2d 248, 249 (CA5 1956).

[12] *E. g., United States* v. *Perkins,* 488 F. 2d 652, 654 (CA1 1973), cert. denied, 417 U. S. 913 (1974); *United States* v. *Ulan,* 421 F. 2d, at 788 (CA2); *United States* v. *Goodwin,* 440 F. 2d 1152, 1156 (CA3 1971); *United States* v. *Wallace,* 368 F. 2d 537 (CA4 1966), cert. denied, 386 U. S. 976 (1967); *Bennett* v. *United States,* 285 F. 2d 567, 570–571 (CA5 1960), cert. denied, 366 U. S. 911 (1961); *United States* v. *Kiraly,* 445 F. 2d 291, 292 (CA6), cert. denied, 404 U. S. 915 (1971); *United States* v. *Ganter,* 436 F. 2d 364, 367 (CA7 1970); *United States* v. *Kartman,* 417 F. 2d 893, 894 (CA9 1969). See *United States* v. *Leach,* 429 F. 2d 956, 959–960 (CA8 1970), cert. denied, 402 U. S. 986 (1971).

[13] Section 111 assumed its present form in 1948, 62 Stat. 688, when it replaced both § 118 and § 254 of 18 U. S. C. (1940 ed.). The Reviser's Note states that this was done "with changes in

§ 254 had been intended not only to deter interference with federal law enforcement activities but, as well, to forestall injury to individual officers, as "wards" of the United States. Given the latter formulation of legislative intent, argued the Government, a single blast wounding two officers would constitute two offenses. The Court disagreed because it found an equally plausible reading of the legislative intent to be that "the congressional aim was to prevent hindrance to the execution of official duty . . . and was not to protect federal officers except as incident to that aim," 358 U. S., at 175–176. Under that view of legislative purpose, to have punishment depend upon the number of officers impeded would be incongruous. With no clear choice between these alternative formulations of congressional intent, in light of the statutory language and sparse legislative history, the Court applied a policy of lenity and, for purposes of the case, adopted the less harsh reading. *Id.*, at 177–178. It therefore held that the single discharge of a shotgun constituted only a single violation of § 254.

In the present case, we see again the possible consequences of an interpretation of § 111 that focuses on only one of the statute's apparent aims. If the primary purpose is to protect federal law enforcement personnel, that purpose could well be frustrated by the imposition of a strict scienter requirement. On the other hand, if § 111 is seen primarily as an anti-obstruction statute, it is likely that Congress intended criminal liability to be imposed only when a person acted with the specific intent to impede enforcement activities. Otherwise, it has been said: "Were knowledge not required in obstruction of justice offenses described by these terms, wholly innocent (or

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phraseology and substance necessary to effect the consolidation." H. R. Rep. No. 304, 80th Cong., 1st Sess., A12 (1947).

even socially desirable) behavior could be transformed into a felony by the wholly fortuitous circumstance of the concealed identity of the person resisted." [14] Although we adhere to the conclusion in *Ladner* that either view of legislative intent is "plausible," we think it plain that Congress intended to protect *both* federal officers and federal functions, and that, indeed, furtherance of the one policy advances the other. The rejection of a strict scienter requirement is consistent with both purposes.

Section 111 has its origin in § 2 of the Act of May 18, 1934, c. 299, 48 Stat. 781. Section 1 of that Act, in which the present 18 U. S. C. § 1114 has its roots, made it a federal crime to kill certain federal law enforcement personnel while engaged in, or on account of, the performance of official duties,[15] and § 2 forbade forcible resistance or interference with, or assault upon, any officer designated in § 1 while so engaged. The history of the 1934 Act, though scanty, offers insight into its multiple pur-

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[14] *United States* v. *Fernandez,* 497 F. 2d, at 744 (Hufstedler, J., concurring).

[15] Section 1 provided:

"That whoever shall kill, as defined in sections 273 and 274 of the Criminal Code, any United States marshal or deputy United States marshal, special agent of the Division of Investigation of the Department of Justice, post-office inspector, Secret Service operative, any officer or enlisted man of the Coast Guard, any employee of any United States penal or correctional institution, any officer of the customs or of the internal revenue, any immigrant inspector or any immigration patrol inspector, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under section 275 of the Criminal Code." C. 299, 48 Stat. 780.

A glance at the present § 1114 reveals how the list of protected federal officers has been greatly expanded. Plainly, some of those now named, *viz.*, "employee of the Postal Service" and "employee of the National Park Service," are not necessarily engaged in the execution of federal law.

poses. The pertinent committee reports consist, almost in their entirety, of a letter dated January 3, 1934, from Attorney General Cummings urging the passage of the legislation.[16] In that letter the Attorney General states

[16] S. Rep. No. 535, 73d Cong., 2d Sess. (1934); H. R. Rep. No. 1455, 73d Cong., 2d Sess. (1934); H. R. Conf. Rep. No. 1593, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 8126–8127 (1934).

The Attorney General's letter was addressed to Senator Ashurst, Chairman of the Senate Committee on the Judiciary, and read in full as follows:

"My Dear Senator: I wish again to renew the recommendation of this Department that legislation be enacted making it a Federal offense forcibly to resist, impede, or interfere with, or to assault or kill, any official or employee of the United States while engaged in, or on account of, the performance of his official duties. Congress has already made it a Federal offense to assault, resist, etc., officers or employees of the Bureau of Animal Industry of the Department of Agriculture while engaged in or on account of the execution of their duties (sec. 62, C. C.; sec. 118, title 18, U. S. C.); to assault, resist, etc., officers and others of the Customs and Internal Revenue, while engaged in the execution of their duties (sec. 65, C. C.; sec. 121, title 18, U. S. C.); to assault, resist, beat, wound, etc., any officer of the United States, or other person duly authorized, while serving or attempting to serve the process of any court of the United States (sec. 140, C. C.; sec. 245, title 18, U. S. C.); and to assault, resist, etc., immigration officials or employees while engaged in the performance of their duties (sec. 16, Immigration Act of Feb. 5, 1917, c. 29, 39 Stat. 885; sec. 152, title 8, U. S. C.). Three of the statutes just cited impose an increased penalty when a deadly or dangerous weapon is used in resisting the officer or employee.

"The need for general legislation of the same character, for the protection of Federal officers and employees other than those specifically embraced in the statutes above cited, becomes increasingly apparent every day. The Federal Government should not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel; and Congress has recognized this fact at least to the extent indicated by the special acts above cited. This Department has found need for similar legislation for the adequate protection of the special agents of its division of investigation, sev-

that this was needed "for the protection of Federal officers and employees." Compelled reliance upon state courts, "however respectable and well disposed, for the protection of [federal] investigative and law-enforcement personnel" was inadequate, and there was need for resort to a federal forum.

Although the letter refers only to the need to protect federal personnel, Congress clearly was concerned with the safety of federal officers insofar as it was tied to the efficacy of law enforcement activities. This concern is implicit in the decision to list those officers protected rather than merely to forbid assault on any federal employee. Indeed, the statute as originally formulated would have prohibited attack on "any civil official, inspec-

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eral of whom have been assaulted in the course of a year, while in the performance of their official duties.

"In these cases resort must usually be had to the local police court, which affords but little relief to us, under the circumstances, in our effort to further the legitimate purposes of the Federal Government. It would seem to be preferable, however, instead of further extending the piecemeal legislation now on the statute books, to enact a broad general statute to embrace all proper cases, both within and outside the scope of existing legislation. Other cases in point are assaults on letter carriers, to cover which the Post Office Department has for several years past sought legislation; and the serious wounding, a couple of years ago, of the warden of the Federal Penitentiary at Leavenworth by escaped convicts outside the Federal jurisdiction. In the latter case it was possible to punish the escaped convicts under Federal law for their escape; but they could not be punished under any Federal law for the shooting of the warden.

"I have the honor, therefore, to enclose herewith a copy of S. 3184, which was introduced at the request of this Department in the Seventy-second Congress and to urge its reintroduction in the present Congress; and to express the hope that it may receive the prompt and serious consideration of your committee.

"Respectfully,

"Homer Cummings,
"*Attorney General.*"

tor, agent, or other officer or employee of the United States." See H. R. Rep. No. 1455, 73d Cong., 2d Sess., 1 (1934). The House rejected this and insisted on the version that was ultimately enacted. Although the reason for the insistence is unexplained, it is fair to assume that the House was of the view that the bill as originally drafted strayed too far from the purpose of insuring the integrity of law enforcement pursuits.[17]

In resolving the question whether Congress intended to condition responsibility for violation of § 111 on the actor's awareness of the identity of his victim, we give weight to both purposes of the statute, but here again, as in *Ladner,* we need not make a choice between them. Rather, regardless of which purpose we would emphasize, we must take note of the means Congress chose for its achievement.

Attorney General Cummings, in his letter, emphasized the importance of providing a federal forum in which attacks upon named federal officers could be prosecuted. This, standing alone, would not indicate a congressional conclusion to dispense with a requirement of specific intent to assault a federal officer, for the locus of the

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[17] This conclusion is supported by the wording of § 2 of the 1934 Act (and of the present § 111), for that section outlawed more than assaults. It made it a criminal offense "forcibly [to] resist, oppose, impede, intimidate, or interfere with" the named officials while in the performance of their duty. Statutory language of this type had appeared as early as 1866, in § 6 of the Act of July 18 of that year, 14 Stat. 179, embracing a comprehensive scheme for the prevention of smuggling. The bulk of that statute, to be sure, was concerned with essentially regulatory matters; § 6, however, proscribed a broad range of actions—beyond simple forcible resistance—that would frustrate effective enforcement of the body of the statute. In employing a similar formulation in 1934, Congress could be presumed to be going beyond mere protection of the safety of federal officers without regard to the integrity of their official functions.

forum does not of itself define the reach of the substantive offense. But the view that § 111 requires knowledge of the victim's office rests on the proposition that the reference to the federal forum was merely a shorthand expression of the need for a statute to fill a gap in the substantive law of the States. See *United States* v. *Fernandez,* 497 F. 2d 730, 745 (CA9 1974) (concurring opinion), cert. pending, No. 73–6868. In that view, § 111 is seen merely as a federal aggravated assault statute, necessary solely because some state laws mandate increased punishment only for assaults on state peace officers; assaults on federal personnel would be punishable, under state law, only for simple assault. As a federal aggravated assault statute, § 111 would be read as requiring the same degree of knowledge as its state-law counterparts. See *Morissette* v. *United States,* 342 U. S. 246, 263 (1952). The argument fails, however, because it is fairly certain that Congress was not enacting § 111 as a federal counterpart to state proscriptions of aggravated assault.

The Attorney General's call for a federal forum in which to prosecute an attacker of a federal officer was directed at both sections of the proposed bill that became the 1934 Act. The letter concerned not only the section prohibiting assaults but also the section prohibiting killings. The latter, § 1, was not needed to fill a gap in existing substantive state law. The States proscribed murder, and, until recently, with the enactment of certain statutes in response to the successful attack on capital punishment, murder of a peace officer has not been deemed an aggravated form of murder, for all States usually have punished murderers with the most severe sanction the law allows. Clearly, then, Congress understood that it was not only filling one gap in state substantive law but in large part was duplicating state proscriptions in order to insure a federal forum for the trial of

offenses involving federal officers. Fulfillment of the congressional goal to protect federal officers required then, as it does now, the highest possible degree of certainty that those who killed or assaulted federal officers were brought to justice. In the congressional mind, with the reliance upon the Attorney General's letter, certainty required that these cases be tried in the federal courts, for no matter how "respectable and well disposed," it would not be unreasonable to suppose that state officials would not always or necessarily share congressional feelings of urgency as to the necessity of prompt and vigorous prosecutions of those who violate the safety of the federal officer. From the days of prohibition to the days of the modern civil rights movement, the statutes federal agents have sworn to uphold and enforce have not always been popular in every corner of the Nation. Congress may well have concluded that § 111 was necessary in order to insure uniformly vigorous protection of federal personnel, including those engaged in locally unpopular activity.

We conclude, from all this, that in order to effectuate the congressional purpose of according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts, § 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer. All the statute requires is an intent to assault, not an intent to assault a federal officer. A contrary conclusion would give insufficient protection to the agent enforcing an unpopular law, and none to the agent acting under cover.[18]

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[18] Some indication that Congress did not intend to exclude undercover agents from the protection of the statute comes from the inclusion of the term "Secret Service operative" in the list of protected officials in the 1934 Act. In the 1948 revision, that term was re-

This interpretation poses no risk of unfairness to defendants. It is no snare for the unsuspecting. Although the perpetrator of a narcotics "rip-off," such as the one involved here, may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful. The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him. The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.

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placed by "any officer or employee of the secret service or of the Bureau of Narcotics." 62 Stat. 756. That Bureau, in 1948 part of the Treasury, has since been abolished and its functions transferred to the Bureau of Narcotics and Dangerous Drugs, the predecessor agency to the present Drug Enforcement Administration. See Reorganization Plan No. 2 of 1973, 38 Fed. Reg. 15932.

Our Brother STEWART in dissent asserts, *post,* at 705–706, that since only state prohibitions of simple assault deter attack on the undercover agent, it is "nonsense" to hold that Congress concluded that a strict scienter requirement would have given insufficient protection to undercover agents. This argument conveniently ignores § 1 of the 1934 Act, the homicide prohibition. Certainly prior to 1934 all States outlawed murder, and if the congressional judgment that there was need to prosecute in federal courts assaults upon federal officers regardless of the reach of state law was "nonsense," enactment of the homicide prohibition—completely duplicating the coverage of state statutes—was legislative fatuity. It is more plausible, we think, to conclude that Congress chose not to entrust to the States sole responsibility for the interdiction of attacks, fatal or not, upon federal law enforcement officials—a matter essential to the morale of all federal law enforcement personnel and central to the efficacy of federal law enforcement activities. The dissent would have us conclude that Congress silently chose to treat assaults and homicides differently; but we have before us one bill with a single legislative history, and we decline to bifurcate our interpretation.

We are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration under § 111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea.* For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.[19]

We hold, therefore, that in order to incur criminal liability under § 111 an actor must entertain merely the criminal intent to do the acts therein specified. We now consider whether the rule should be different where persons conspire to commit those acts.

III

Our decisions establish that in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself. *Ingram* v. *United States,* 360 U. S. 672, 678 (1959). See *Pettibone* v. *United States,* 148 U. S. 197 (1893). Respondent Feola urges upon us the proposition that the Government must show a degree of criminal intent in the conspiracy count greater than is necessary to convict for the substantive offense; he urges that even though it is not necessary to show that he was

[19] See *United States* v. *Perkins,* 488 F. 2d, at 654–655; *United States* v. *Ulan,* 421 F. 2d, at 789–790; *United States* v. *Goodwin,* 440 F. 2d, at 1156; *United States* v. *Young,* 464 F. 2d 160, 163 (CA5 1972).

aware of the official identity of his assaulted victims in order to find him guilty of assaulting federal officers, in violation of 18 U. S. C. § 111, the Government nonetheless must show that he was aware that his intended victims were undercover agents, if it is successfully to prosecute him for conspiring to assault federal agents. And the Court of Appeals held that the trial court's failure to charge the jury to this effect constituted plain error.

The general conspiracy statute, 18 U. S. C. § 371,[20] offers no textual support for the proposition that to be guilty of conspiracy a defendant in effect must have known that his conduct violated federal law. The statute makes it unlawful simply to "conspire . . . to commit any offense against the United States." A natural reading of these words would be that since one can violate a criminal statute simply by engaging in the forbidden conduct, a conspiracy to commit that offense is nothing more than an agreement to engage in the prohibited conduct. Then where, as here, the substantive statute does not require that an assailant know the official status of his victim, there is nothing on the face of the conspiracy statute that would seem to require that those agreeing to the assault have a greater degree of knowledge.

We have been unable to find any decision of this Court that lends support to the respondent. On the contrary, at least two of our cases implicitly repudiate his position. The appellants in *In re Coy,* 127 U. S. 731 (1888), were

[20] Title 18 U. S. C. § 371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

convicted of conspiring to induce state election officials to neglect their duty to safeguard ballots and election results. The offense occurred with respect to an election at which Indiana voters, in accordance with state law, voted for both local officials and members of Congress. Much like Feola here, those appellants asserted that they could not be punished for conspiring to violate federal law because they had intended only to affect the outcome of state races. In short, it was urged that the conspiracy statute embodied a requirement of specific intent to violate federal law. *Id.*, at 753. The Court rejected this contention and held that the statute required only that the conspirators agree to participate in the prohibited conduct. See *Anderson* v. *United States,* 417 U. S. 211, 226 (1974).

Similarly, in *United States* v. *Freed,* 401 U. S. 601 (1971), we reversed the dismissal of an indictment charging defendants with possession of, and with conspiracy to possess, hand grenades that had not been registered, as required by 26 U. S. C. § 5861 (d). The trial court dismissed the indictment for failure to allege that the defendants knew that the hand grenades in fact were unregistered. We held that actual knowledge that the grenades were unregistered was not an element of the substantive offense created by Congress and therefore upheld the indictment both as to the substantive offense and as to the charge of conspiracy. Again, we declined to require a greater degree of intent for conspiratorial responsibility than for responsibility for the underlying substantive offense.

With no support on the face of the general conspiracy statute or in this Court's decisions, respondent relies solely on the line of cases commencing with *United States* v. *Crimmins,* 123 F. 2d 271 (CA2 1941), for the principle that the Government must prove

"antifederal" intent in order to establish liability under § 371. In *Crimmins,* the defendant had been found guilty of conspiring to receive stolen bonds that had been transported in interstate commerce. Upon review, the Court of Appeals pointed out that the evidence failed to establish that Crimmins actually knew the stolen bonds had moved into the State. Accepting for the sake of argument the assumption that such knowledge was not necessary to sustain a conviction on the substantive offense, Judge Learned Hand nevertheless concluded that to permit conspiratorial liability where the conspirators were ignorant of the federal implications of their acts would be to enlarge their agreement beyond its terms as they understood them. He capsulized the distinction in what has become well known as his "traffic light" analogy:

> "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." *Id.,* at 273.

Judge Hand's attractive, but perhaps seductive, analogy has received a mixed reception in the Courts of Appeals. The Second Circuit, of course, has followed it; [21] others have rejected it.[22] It appears that most have avoided it by the simple expedient of inferring the requisite knowledge from the scope of the conspiratorial

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[21] See, *e. g., United States* v. *Vilhotti,* 452 F. 2d 1186, 1190 (1971), cert. denied, 406 U. S. 947 (1972), and *sub nom. Maloney* v. *United States,* 405 U. S. 1041 (1972); *United States* v. *Sherman,* 171 F. 2d 619, 623–624 (1948), cert. denied *sub nom. Grimaldi* v. *United States* and *Whelan* v. *United States,* 337 U. S. 931 (1949).

[22] See, *e. g., United States* v. *Polesti,* 489 F. 2d, at 824; *United States* v. *Roselli,* 432 F. 2d, at 891–892.

venture.[23] We conclude that the analogy, though effective prose, is, as applied to the facts before us, bad law.[24]

The question posed by the traffic light analogy is not before us, just as it was not before the Second Circuit in *Crimmins*. Criminal liability, of course, may be imposed on one who runs a traffic light regardless of whether he harbored the "evil intent" of disobeying the light's command; whether he drove so recklessly as to be unable to perceive the light; whether, thinking he was observing all traffic rules, he simply failed to notice the light; or whether, having been reared elsewhere, he thought that the light was only an ornament. Traffic violations generally fall into that category of offenses that dispense with a *mens rea* requirement. See *United States* v. *Dotterweich*, 320 U. S. 277 (1943). These laws embody the social judgment that it is fair to punish one who intentionally engages in conduct that creates a risk to others, even though no risk is intended or the actor,

[23] See, *e. g.*, *United States* v. *Garafola*, 471 F. 2d 291 (CA6 1972); *United States* v. *Iacovetti*, 466 F. 2d 1147, 1154 (CA5 1972), cert. denied, 410 U. S. 908 (1973); *United States* v. *Cimini*, 427 F. 2d 129, 130 (CA6 1970); *Nassif* v. *United States*, 370 F. 2d 147, 152–153 (CA8 1966).

What little commentary the *Crimmins* rule has attracted has been uniformly critical. See Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 937–940 (1959); Model Penal Code § 5.03 (Tent. Draft No. 10, 1960); 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 388–389 (1970); Final Report of the National Commission on Reform of Federal Criminal Laws §§ 203, 204, and 1004 (1971).

[24] The Government rather effectively exposes the fallacy of the *Crimmins* traffic light analogy by recasting it in terms of a jurisdictional element. The suggested example is a traffic light on an Indian reservation. Surely, one may conspire with others to disobey the light but be ignorant of the fact that it is on the reservation. As applied to a jurisdictional element of this kind the formulation makes little sense.

through no fault of his own, is completely unaware of the existence of any risk. The traffic light analogy poses the question whether it is fair to punish parties to an agreement to engage intentionally in apparently innocent conduct where the unintended result of engaging in that conduct is the violation of a criminal statute.

But this case does not call upon us to answer this question, and we decline to do so, just as we have once before. *United States* v. *Freed,* 401 U. S., at 609 n. 14. We note in passing, however, that the analogy comes close to stating what has been known as the "*Powell* doctrine," originating in *People* v. *Powell,* 63 N. Y. 88 (1875), to the effect that a conspiracy, to be criminal, must be animated by a corrupt motive or a motive to do wrong. Under this principle, such a motive could be easily demonstrated if the underlying offense involved an act clearly wrongful in itself; but it had to be independently demonstrated if the acts agreed to were wrongful solely because of statutory proscription. See Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 936–937 (1959). Interestingly, Judge Hand himself was one of the more severe critics of the *Powell* doctrine.[25]

That Judge Hand should reject the *Powell* doctrine and then create the *Crimmins* doctrine seems curious enough. Fatal to the latter, however, is the fact that it was announced in a case to which it could not have been meant to apply. In *Crimmins,* the substantive offense, namely, the receipt of stolen securities that had been

[25] "Starting with People v. Powell . . . the anomalous doctrine has indeed gained some footing in the circuit courts of appeals that for conspiracy there must be a 'corrupt motive. . . .' Yet it is hard to see any reason for this, or why more proof should be necessary than that the parties had in contemplation all the elements of the crime they are charged with conspiracy to commit." *United States* v. *Mack,* 112 F. 2d 290, 292 (CA2 1940).

in interstate commerce, proscribed clearly wrongful conduct. Such conduct could not be engaged in without an intent to accomplish the forbidden result. So, too, it is with assault, the conduct forbidden by the substantive statute, § 111, presently before us. One may run a traffic light "of whose existence one is ignorant," but assaulting another "of whose existence one is ignorant," probably would require unearthly intervention. Thus, the traffic light analogy, even if it were a correct statement of the law, is inapt, for the conduct proscribed by the substantive offense, here assault, is not of the type outlawed without regard to the intent of the actor to accomplish the result that is made criminal. If the analogy has any vitality at all, it is to conduct of the latter variety; that, however, is a question we save for another day. We hold here only that where a substantive offense embodies only a requirement of *mens rea* as to each of its elements, the general federal conspiracy statute requires no more.

The *Crimmins* rule rests upon another foundation: that it is improper to find conspiratorial liability where the parties to the illicit agreement were not aware of the fact giving rise to federal jurisdiction, because the essence of conspiracy is agreement and persons cannot be punished for acts beyond the scope of their agreement. 123 F. 2d, at 273. This "reason" states little more than a conclusion, for it is clear that one may be guilty as a conspirator for acts the precise details of which one does not know at the time of the agreement. See *Blumenthal* v. *United States,* 332 U. S. 539, 557 (1947). The question is not merely whether the official status of an assaulted victim was known to the parties at the time of their agreement, but whether the acts contemplated by the conspirators are to be deemed legally different from those actually performed solely because of the official identity of the

victim. Put another way, does the identity of the proposed victim alter the legal character of the acts agreed to, or is it no more germane to the nature of those acts than the color of the victim's hair?

Our analysis of the substantive offense in Part II, *supra,* is sufficient to convince us that for the purpose of individual guilt or innocence, awareness of the official identity of the assault victim is irrelevant. We would expect the same to obtain with respect to the conspiracy offense unless one of the policies behind the imposition of conspiratorial liability is not served where the parties to the agreement are unaware that the intended target is a federal law enforcement official.

It is well settled that the law of conspiracy serves ends different from, and complementary to, those served by criminal prohibitions of the substantive offense. Because of this, consecutive sentences may be imposed for the conspiracy and for the underlying crime. *Callanan* v. *United States,* 364 U. S. 587 (1961); *Pinkerton* v. *United States,* 328 U. S. 640 (1946). Our decisions have identified two independent values served by the law of conspiracy. The first is protection of society from the dangers of concerted criminal activity, *Callanan* v. *United States,* 364 U. S., at 593; *Dennis* v. *United States,* 341 U. S. 494, 573–574 (1951) (Jackson, J., concurring). That individuals know that their planned joint venture violates federal as well as state law seems totally irrelevant to that purpose of conspiracy law which seeks to protect society from the dangers of concerted criminal activity. Given the level of criminal intent necessary to sustain conviction for the substantive offense, the act of agreement to commit the crime is no less opprobrious and no less dangerous because of the absence of knowledge of a fact unnecessary to the formation of criminal intent. Indeed, unless imposition of an "antifederal"

knowledge requirement serves social purposes external to the law of conspiracy of which we are unaware, its imposition here would serve only to make it more difficult to obtain convictions on charges of conspiracy, a policy with no apparent purpose.

The second aspect is that conspiracy is an inchoate crime. This is to say, that, although the law generally makes criminal only antisocial conduct, at some point in the continuum between preparation and consummation, the likelihood of a commission of an act is sufficiently great and the criminal intent sufficiently well formed to justify the intervention of the criminal law. See Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev., at 923–925. The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed. *United States* v. *Bayer,* 331 U. S. 532, 542 (1947). Criminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventive action.

Again, we do not see how imposition of a strict "anti-federal" scienter requirement would relate to this purpose of conspiracy law. Given the level of intent needed to carry out the substantive offense, we fail to see how the agreement is any less blameworthy or constitutes less of a danger to society solely because the participants are unaware which body of law they intend to violate. Therefore, we again conclude that imposition of a requirement of knowledge of those facts that serve only to establish federal jurisdiction would render it more difficult to serve the policy behind the law of conspiracy without serving any other apparent social policy.

We hold, then, that assault of a federal officer pursuant to an agreement to assault is not, even in the words of

Judge Hand, "beyond the reasonable intendment of the common understanding," *United States* v. *Crimmins,* 123 F. 2d, at 273. The agreement is not thereby enlarged, for knowledge of the official identity of the victim is irrelevant to the essential nature of the agreement, entrance into which is made criminal by the law of conspiracy.

Again we point out, however, that the state of knowledge of the parties to an agreement is not always irrelevant in a proceeding charging a violation of conspiracy law. First, the knowledge of the parties is relevant to the same issues and to the same extent as it may be for conviction of the substantive offense. Second, whether conspirators knew the official identity of their quarry may be important, in some cases, in establishing the existence of federal jurisdiction. The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is, when a federal officer is attacked. Where, however, there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or by some unique characteristic, as the putative buyers in the present case, and that specifically identified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victim's actual identity and even though they would not have agreed to the assault had they known that identity. Where the object of the intended attack is not identified with sufficient specificity so as to give rise to the con-

clusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to assault poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.

To summarize, with the exception of the infrequent situation in which reference to the knowledge of the parties to an illegal agreement is necessary to establish the existence of federal jurisdiction, we hold that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense.

The judgment of the Court of Appeals with respect to the respondent's conspiracy conviction is reversed.

It is so ordered.

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

Does an assault on a federal officer violate 18 U. S. C. § 111 [1] even when the assailant is unaware, and has no reason to know, that the victim is other than a private citizen or, indeed, a confederate in crime? This important question, never decided by the Court, is squarely presented in a petition for certiorari that has been pending here for many months: No. 73–6868, *Fernandez* v.

[1] "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

United States.[2] But this question was not contained in the petition for certiorari in the present case, and has not been addressed in either the briefs or oral arguments. The parties have merely assumed the answer to the question, and directed their attention to the separate question whether scienter is an element of *conspiring* to violate § 111. Nevertheless the Court sets out *sua sponte* to decide the basic question presented in *Fernandez* without the benefit of either briefing or oral argument by counsel.

This conspicuous disregard of the most basic principle of our adversary system of justice seems to me indefensible. Clearly, the petition for certiorari in *Fernandez* should have been granted, and that case decided after briefing and oral argument on its merits, before the subsidiary issue in the present case was considered. It is not too late to correct the serious judicial mistake the Court has made. We should grant certiorari in *Fernandez* now, and set the present case for rehearing after the argument in *Fernandez* has been had. But the Court rejects that course, and I perforce address the fundamental *Fernandez* question.

The Court recognizes that "[t]he question . . . is not whether the ['federal officer'] requirement is jurisdictional, but whether it is jurisdictional only." *Ante*, at 677 n. 9. Put otherwise, the question is whether Congress intended to write an aggravated assault statute, analogous to the many state statutes which protect the persons and functions of state officers against assault, or whether Congress intended merely to federalize every assault which happens to have a federal officer as its victim. The Court chooses the latter interpretation, reading

[2] The petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit, affirming a substantive conviction under 18 U. S. C. § 111. *United States* v. *Fernandez*, 497 F. 2d 730.

the federal-officer requirement to be jurisdictional only. This conclusion is inconsistent with the pertinent legislative history, the verbal structure of § 111, accepted canons of statutory construction, and the dictates of common sense.

Many States provide an aggravated penalty for assaults upon state law enforcement officers; typically the victim-status element transforms the assault from a misdemeanor to a felony.[3] These statutes have a twofold purpose: to reflect the societal gravity associated with assaulting a public officer and, by providing an enhanced deterrent against such assault, to accord to public officers and their functions a protection greater than that which the law of assault otherwise provides to private citizens and their private activities.[4] Consonant with these purposes, the accused's knowledge that his victim had an official status or function is invariably recognized by the States as an essential element of the aggravated offense.[5] Where an assailant had no such knowledge, he could not of course be deterred by the statutory threat of enhanced punishment, and it makes no sense to regard the unknowing assault as being any more reprehensible, in a moral

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[3] See, *e. g.*, Cal. Penal Code §§ 241, 243, 245 (b) (Supp. 1975); D. C. Code Ann. § 22–505 (1973); Ill. Rev. Stat., c. 38, § 12–2 (a) (6) (1973); Mich. Comp. Laws § 750.479 (1970); Mo. Rev. Stat. § 557.215 (1969); N. J. Stat. Ann. § 2A:99–1 (1969); R. I. Gen. Laws Ann. § 11–5–5 (Supp. 1974); Tex. Penal Code §§ 22.02 (a)(2) & (b) (1974); Wis. Stat. Ann. § 940.205 (Supp. 1974–1975); Model Penal Code § 242.1 (Proposed Official Draft 1962).

[4] See, *e. g.*, *People* v. *Baca*, 247 Cal. App. 2d 487, 55 Cal. Rptr. 681; *Celmer* v. *Quarberg*, 56 Wis. 2d 581, 203 N. W. 2d 45.

[5] See, *e. g.*, *People* v. *Glover*, 257 Cal. App 2d 502, 65 Cal. Rptr. 219; *People* v. *Litch*, 4 Ill. App. 3d 788, 281 N. E. 2d 745; *State* v. *Lewis*, 184 Neb. 111, 165 N. W. 2d 569; *Ford* v. *State*, 158 Tex. Cr. 26, 252 S. W. 2d 948; *Celmer* v. *Quarberg*, *supra*; Model Penal Code § 242.1 (Proposed Official Draft 1962).

or retributive sense, than if the victim had been, as the assailant supposed, a private citizen.

The state statutes protect only state officers. I would read § 111 as filling the gap and supplying analogous protection for federal officers and their functions. An aggravated penalty should apply only where an assailant knew, or had reason to know, that his victim had some official status or function. It is immaterial whether the assailant knew the victim was employed by the federal, as opposed to a state or local, government. That *is* a matter of "jurisdiction only," for it does not affect the moral gravity of the act. If the victim was a federal officer, § 111 applies; if he was a state or local officer, an analogous state statute or local ordinance will generally apply. But where the assailant reasonably thought his victim a common citizen or, indeed, a confederate in crime, aggravation is simply out of place, and the case should be tried in the appropriate forum under the general law of assault, as are unknowing assaults on state officers.

The history of § 111 permits no doubt that this is an aggravated assault statute, requiring proof of scienter. The provision derives from a 1934 statute, 18 U. S. C. § 254 (1940 ed.), set out in the margin.[6] The Attorney General proposed the statute in a letter to the Chairman of the Senate Committee on the Judiciary; the Attorney General's reasons are the only ones on record for the pro-

[6] "Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in section 253 of this title while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both." Act of May 18, 1934, c. 299, § 2, 48 Stat. 781.

vision.[7] The federal officers covered were listed in a companion provision, simultaneously enacted, proscribing the killing of federal officers.[8] The present § 111 emerged

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[7] The letter is reprinted by the Court, *ante*, at 680–681, n. 16.

[8] Act of May 18, 1934, c. 299, § 1, 48 Stat. 780, as amended, 18 U. S. C. § 1114. The original provision read:

"Whoever shall kill, as defined in sections 452 and 453 of this title, any United States marshal or deputy United States marshal or person employed to assist a United States marshal or deputy United States marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, post-office inspector, Secret Service operative, any officer or enlisted man of the Coast Guard, any employee of any United States penal or correctional institution, any officer, employee, agent, or other person in the service of the customs or of the internal revenue, any immigrant inspector or any immigration patrol inspector, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Division of Grazing of the Department of the Interior, or any officer or employee of the Indian field service of the United States, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under section 454 of this title." 18 U. S. C. § 253 (1940 ed.).

The list of officers has expanded. It now includes, in 18 U. S. C. § 1114:

"any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the secret service or of the Bureau of Narcotics and Dangerous Drugs, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any

from the 1948 recodification of Title 18,[9] "with changes in phraseology and substance necessary to effect the consolidation" of the former § 254 with a minor 1909 statute proscribing assaults on officers of the "Bureau of Animal Industry of the Department of Agriculture." [10] As the Court has recognized, the purport of the present § 111 must be derived from its major source, the 1934 enactment. See *Ladner* v. *United States,* 358 U. S. 169, 176 n. 4.

Rummaging through the spare legislative history of the 1934 law, the Court manages to persuade itself that

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officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty, in the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions."

[9] Act of June 25, 1948, 62 Stat. 688.

[10] See the Reviser's Note, H. R. Rep. No. 304, 80th Cong., 1st Sess., A12 (1947). The minor provision consolidated with § 254 was 18 U. S. C. § 118 (1940 ed.), derived from the Act of Mar. 4, 1909, § 62, 35 Stat. 1100.

Congress intended to reach unknowing assaults on federal officers. *Ante,* at 679–684. But if that was the congressional intention, which I seriously doubt, it found no expression in the legislative product. *The fact is that the 1934 statute expressly required scienter for an assault conviction.* An assault on a federal officer was proscribed only if perpetrated *"on account of* the performance of his official duties." See n. 6, *supra.* That is, it was necessary not only that the assailant have notice that his victim possessed official status or duties but also that the assailant's *motive* be retaliation against the exercise of those duties.

It was not until the *1948 recodification* that the proscription was expanded to cover assaults on federal officers "while engaged in," as well as "on account of," the performance of official duties. This was, as the Reviser observed, a technical alteration; it produced no instructive legislative history. See n. 10, *supra.* As presently written, the statute does clearly reach knowing assaults regardless of motive. But to suggest that it also reaches wholly unknowing assaults is to convert the 1948 alteration into one of major substantive importance, which it concededly was not.

The Court has also managed to convince itself that § 254 was not an aggravated assault statute. The surest evidence that § 254 *was* an aggravated assault statute may be found in its penalty provision.[11] A single unarmed assault was made, and remains, punishable by a sentence of three years' imprisonment and a $5,000 fine. One need not make an exhaustive survey of state law to appreciate that this is a harsher penalty than is typically imposed for an unarmed assault on a private citizen. In

[11] The Reviser's Note, *supra,* n. 10, observed that the new § 111 adopted the penalty provision of § 254 "as the latest expression of Congressional intent."

1934, federal law already defined and proscribed all varieties of assault occurring within the admiralty, maritime, and territorial jurisdiction of the United States: The penalty structure extended in graded steps, turning on the intent and methods of the assailant, from three months' to 20 years' imprisonment.[12] If Congress had intended the victim-status element in § 254 to be "jurisdictional only"—to provide merely another jurisdictional basis for trying assaults in the federal courts—there would have been no need to append a new and unique penalty provision to § 254. Instead, Congress could simply have made cross-reference to the pre-existing penalty structure for assaults within federal jurisdiction. This is not idle speculation. It was precisely the solution adopted, *in the same 1934 Act,* for the new offense of killing a federal officer: Congress provided that that new offense be *defined and punished* according to the pre-existing, graded, penalty structure for homicides within the maritime, admiralty, and territorial jurisdiction of the United States.[13]

This deliberated difference in definition and penalty treatment between the homicide and the assault statutes has an obvious significance. Congress gave to the new assault statute a unique and substantively novel definition and penalty. Unless we wish to assume that Congress was scatterbrained, we must conclude that it regarded the victim-status element as of substantive—and not merely jurisdictional—importance. That ele-

[12] 18 U. S. C. § 455 (1926 ed.), derived from the Act of Mar. 4, 1909, § 276, 35 Stat. 1143.

[13] See n. 8, *supra.* The definitions of, and penalties for, homicides within federal jurisdiction were set forth in 18 U. S. C. §§ 452–454 (1926 ed.), derived from the Act of Mar. 4, 1909, § 273, 35 Stat. 1143. This was the same Act which established the definitions of, and graded penalties for, assaults within federal jurisdiction. See n. 11, *supra.*

ment was seen as an *aggravating* circumstance, just as is true in the state statutes, and not merely as a factor giving federal prosecutors and judges jurisdiction to deal with the offense.

The Court reasons otherwise. Positing that the victim-status element in the homicide statute is jurisdictional only, the Court concludes that the same must be true of the assault statute. *Ante,* at 683–684. Even assuming the premise, the conclusion does not follow. Quite apart from the radically different ways in which the two statutes provide for offense-definition and penalties, it requires little imagination to appreciate how Congress could regard the victim-status element as "jurisdictional only" in the homicide case but substantively significant in the assault case. The Court itself supplies a possible reason:

> "[The homicide statute] was not needed to fill a gap in existing substantive state law. The States proscribed murder, and, until recently, with the enactment of certain statutes in response to the successful attack on capital punishment, murder of a peace officer has not been deemed an aggravated form of murder, for all States usually have punished murderers with the most severe sanction the law allows." *Ante,* at 683.

In other words, the Court suggests that the widely perceived distinction, in morality and social policy, between assaults, depending upon the assailant's knowledge of the identity of the victim, found little or no echo in the law of homicide. From this, the natural conclusion—fortified by the penalty provisions—would be that Congress discriminated between the two statutes, recognizing the substantive distinction in the one and not in the other. For reasons I cannot fathom, the Court instead assumes that Congress was unable to discriminate in this

fashion—that what had been self-evident to state legislatures was beyond the capacity of the National Legislature to comprehend. The Court says it cannot believe "Congress silently chose to treat assaults and homicides differently . . . . [W]e have before us one bill with a single legislative history, and we decline to bifurcate our interpretation." *Ante,* at 685 n. 18. But it was *Congress itself* that "bifurcated" the 1934 statute—by treating homicides and assaults differently as regards penalty and offense definition, and by proscribing only those assaults that were *"on account of* the performance of official duties." What the Court "declines" to do is to read the statute that Congress wrote.

While the legislative history of the 1934 law is "scant," *Ladner* v. *United States,* 358 U. S., at 174, it is sufficient to locate a congressional purpose consistent only with implication of a scienter requirement. As the Court said in *Ladner:* "[T]he congressional aim was to prevent hindrance to the execution of official duty, and thus to assure the carrying out of federal purposes and interests, and was not to protect federal officers except as incident to that aim." *Id.,* at 175–176. This purpose is, of course, exactly analogous to the purposes supporting the state statutes which provide enhanced punishment for assault on state officers. A statute proscribing interference with official duty does not "prevent hindrance" with that duty where the assailant thinks his victim is a mere private citizen, or indeed, a confederate in his criminal activity.

To avoid this self-evident proposition, the Court effectively overrules *Ladner* and concludes that the assault statute aims as much at protecting individual officers as it does at protecting the functions they execute. *Ante,* at 677–682. If the *Ladner* Court had shared this opinion, it would not have held, as it did, that a single shotgun

blast wounding two federal agents was to be considered a single assault. But in any event, even today's revisionist treatment of *Ladner* does not succeed in getting the Court where it wants to go. So far as the scienter requirement is concerned, it makes no difference whether the statute aims to protect individuals, or functions, or both. The Court appears to think that extending § 111 to unknowing assaults will deter such assaults—will "give . . . protection . . . to the agent acting under cover." *Ante,* at 684. This, of course, is nonsense. The federal statute "protects" an officer from assault only when the assailant knows that the victim is an officer. Absent such knowledge, the only "protection" is that provided by the *general* law of assault, for that is the only law which the potential assailant reasonably, if erroneously, believes applicable in the circumstances.

The Court also suggests that implication of a scienter requirement "would give insufficient protection to the agent enforcing an unpopular law." This is to repeat the same error. Whatever the "popularity" of the laws he is executing, and whatever the construction placed on § 111, a federal officer is "protected" from assault by that statute only where the assailant has some indication from the circumstances that his victim is other than a private citizen. Assuming, *arguendo,* that Congress thought that local prosecutors and judges were insufficiently enthusiastic about trying cases involving assaults on federal officers, it remains the fact that a federal statute proscribing *knowing* assaults meets this concern in every case where local attitudes might conceivably embolden the populace to interfere with federal officers enforcing an "unpopular" law.

The fact is that there is absolutely no indication that before 1934 local prosecutors and judges were lax in trying cases involving assaults on federal officers, that Con-

gress thought so, or—and this is the major point—that Congress was so obsessed by the esoteric "problem" of unknowing assaults on officers who, if known, would be unpopular, as to enact a statute severely aggravated in penalty but blind to the commonsense distinction between knowing and unknowing assaults. The list of covered officers was long and varied in 1934; it has since become even more so.[14] I can perceive no design to single out officers charged with the execution of "unpopular" laws or given to using undercover techniques. The Attorney General's letter [15] in support of the 1934 enactment disavowed any criticism of the integrity or good faith of local law enforcement authorities. He was at pains to stress that the "Federal Government should not be compelled to rely upon the courts of the States, *however respectable and well disposed* . . . ." His particular concern was that "[i]n these cases resort must usually be had to the local police court, which affords but little relief to us, under the circumstances, in our effort to further the legitimate purposes of the Federal Government." This is most reasonably read as a reference to the fact that, absent some statute aggravating the offense, assault was and is merely a misdemeanor—a "police court" offense—in many States. To deal with this problem, the Attorney General sought enactment of a federal aggravated assault statute, Congress obliged, and this Court should give the statute its natural interpretation.

Turning from the history of the statute to its structure, the propriety of implying a scienter requirement becomes manifest. The statute proscribes not only assault but also a whole series of related acts. It applies to any person who "forcibly assaults, *resists, opposes, impedes, intimidates,* or *interferes* with [a federal officer] . . .

[14] See n. 8, *supra.*

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

while engaged in or on account of the performance of his official duties." (Emphasis added.) It can hardly be denied that the emphasized words imply a scienter requirement. Generally speaking, these acts are legal and moral wrongs only if the actor knows that his "victim" enjoys a moral or legal privilege to detain him or order him about. These are terms of art, arising out of the common and statutory law proscribing obstruction of justice.[16] Indeed, in urging enactment of § 254, the Attorney General referred to obstruction statutes, having either express or implied scienter requirements, as an instructive analogue.[17] Whether it be express or implied, scienter has always been regarded in this country as an essential element of obstruction of justice. *Pettibone* v. *United States,* 148 U. S. 197, 204–207. The sole innovation in § 111 is its protection of executive officers and functions, rather than judicial officers and functions. Obviously this distinction should have no effect on the scienter requirement.

If the words grouped in the statute with "assaults" require scienter, it follows that scienter is also required for an assault conviction. One need hardly rely on such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach this obvious conclusion. The Court suggests that assault may be treated differently, "with no risk of unfairness," because an assailant—unlike one who merely "opposes" or "resists"—"knows from the very outset that his planned course of conduct is wrongful" even

[16] Comparable language is used in the other federal obstruction-of-justice statutes, *e. g.,* 18 U. S. C. §§ 1501–1505, 1507, 1509, 1752, 2231.

[17] Title 18 U. S. C. § 245 (1926 ed.), mentioned in the Attorney General's letter, *supra,* n. 7, had an express scienter requirement. Title 18 U. S. C. § 121 (1926 ed.), also mentioned, had long been judicially construed to require scienter. *E. g., Gay* v. *United States,* 12 F. 2d 433, 434–435.

though he "may be surprised to find that his intended victim is a federal officer in civilian apparel." *Ante,* at 685. This argument will not do, either as a matter of statutory construction or as a matter of elementary justice.

The Court is saying that because all assaults are wrong, it is "fair" to regard them all as *equally* wrong. This is a strange theory of justice. As the States recognize, an unknowing assault on an officer is less reprehensible than a knowing assault; to provide that the former may be punished as harshly as the latter is to create a very real "risk of unfairness." It is not unprecedented for Congress to enact stringent legislation, but today it is the Court that rewrites a statute so as to create an inequity which Congress itself had no intention of inflicting.

To treat assaults differently from the other acts associated with it in the statute is a pure exercise in judicial legislation. In *Ladner* v. *United States,* 358 U. S., at 176, the Court noted that the "Government frankly conceded on the oral argument that assault can be treated no differently from the other outlawed activities." The Court characterized this concession as "necessary in view of the lack of any indication that assault was to be treated differently, and in light of 18 U. S. C. § 111, the present recodification of § 254, which lumps assault in with the rest of the offensive actions," *id.,* at 176 n. 4. This analysis was not mere dictum but strictly necessary to the result reached in *Ladner.* No contrary analysis can be squared with the statutory history.[18]

[18] As noted earlier, the 1934 version of the statute, proscribed assault on a federal officer only when perpetrated *"on account of* the performance of his official duties." (Emphasis added.) See n. 6, *supra.* By contrast, the other acts in 18 U. S. C. § 254 (1940 ed.), were proscribed so long as the officer was "engaged in the performance of his official duties." The mental element for assault was *more,* not less, stringent than for the other acts. In the 1948 re-

The implication of scienter here is as necessary and proper as it was in *Morissette* v. *United States,* 342 U. S. 246. The Court there read a scienter requirement into a federal larceny statute over the Government's objection that the need for scienter should not be implied for a federal offense when the statute that created the offense was silent on the subject. The Court said:

> "Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act. . . .
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> ". . . [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Id.,* at 262–263.

The same principle applies here. The terms and purposes of § 111 flow from well-defined and familiar law proscribing obstructions of justice, and the provision com-

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codification, this asymmetry was eliminated, to allow consolidation of the 1934 statute with a minor provision enacted in 1909. Now each of the acts is proscribed if committed upon an officer engaged in performance of his duties or if committed "on account" of his performance of duty. It would be utterly farfetched to suggest that this technical alteration, aiming toward symmetry, was intended to create a *difference* concerning the scienter requirement as between assaults and the other acts listed with it in § 111.

plements a pattern of state aggravated assault statutes which are uniform and unambiguous in requiring scienter.

We see today the unfortunate consequences of deciding an important question without the benefit of the adversary process.[19] In this rush to judgment, settled prece-

[19] The Court seems to be emboldened by the rough consensus among the Courts of Appeals that the victim-status elements in § 111 is jurisdictional only. *Ante,* at 677 n. 12. But this consensus is both very recent and very shaky. The federal courts continue to complain that the "substantial number of prosecutions under this statute" has resulted in "disagreement in the cases" regarding the scienter question. *United States* v. *Perkins,* 488 F. 2d 652, 654; see also *United States* v. *Chunn,* 347 F. 2d 717, 721. The fact is that until 1964, the federal courts were virtually unanimous *the other way*—that is, in holding or assuming that proof of scienter was required for the offense of obstructing or assaulting a federal officer. *E. g., Hall* v. *United States,* 235 F. 2d 248; *Carter* v. *United States,* 231 F. 2d 232, cert. denied, 351 U. S. 984; *Owens* v. *United States,* 201 F. 2d 749; *Hargett* v. *United States,* 183 F. 2d 859; *Sparks* v. *United States,* 90 F. 2d 61; *United States* v. *Bell,* 219 F. Supp. 260; *United States* v. *Page,* 277 F. 459; *United States* v. *Taylor,* 57 F. 391; *United States* v. *Miller,* 17 F. R. D. 486. The turning point was *United States* v. *Lombardozzi,* 335 F. 2d 414, cert. denied, 379 U. S. 914, which eliminated the scienter requirement on the historically erroneous ground that Congress had enacted the provision merely to transfer to the federal courts a class of assault cases out from under the untrustworthy state courts and prosecutors' offices. *Lombardozzi* was promptly followed, with little or no fresh analysis, in nearly every Circuit. Just as promptly, however, second thoughts have emerged. The Ninth Circuit has recently acknowledged that *Lombardozzi* was unsoundly premised. *United States* v. *Fernandez,* 497 F. 2d, at 736–739. In her concurring opinion in *Fernandez,* Judge Hufstedler strongly argued the desirability of re-examining the entire question, *id.,* at 740–747. A number of Courts of Appeals have felt constrained to limit *Lombardozzi* by making distinctions between the scienter requirement for assault and for the other acts proscribed by § 111, distinctions directly at odds with the history of the provisions and with *Ladner* v. *United States,* 358 U. S. 169, 176. See, *e. g., United States* v. *Perkins, supra,* at 654–655; *United States* v. *Ulan,* 421 F. 2d

dents, such as *Ladner* v. *United States, supra,* and *Pettibone* v. *United States, supra,* are subverted. Legislative history is ignored or imaginatively reconstructed. Statutory terms are broken from their context and given unnatural readings. On top of it all, the Court disregards two firmly established canons of statutory construction—"two wise principles this Court has long followed":

> "First, as we have recently reaffirmed, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' *Rewis* v. *United States,* 401 U. S. 808, 812 (1971). See also *Ladner* v. *United States,* 358 U. S. 169, 177 (1958); *Bell* v. *United States,* 349 U. S. 81 (1955); *United States* v. *Five Gambling Devices,* 346 U. S. 441 (1953) (plurality opinion for affirmance). . . .
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> ". . . [S]econd . . . : unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States* v. *Bass,* 404 U. S. 336, 347.

If the Congress desires to sweep all assaults upon federal employees into the federal courts, a suitable statute could be easily enacted. I should hope that in so doing

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787, 789–790; *United States* v. *Goodwin,* 440 F. 2d 1152, 1156; *United States* v. *Young,* 464 F. 2d 160, 163. Having acted hastily, the Courts of Appeals are only now appreciating the need for reconsideration. Acting with even greater haste, the Court today bids fair to insure that the issue will be forever sealed.

the Congress, like every State which has dealt with the matter, would make a distinction in penalty between an assailant who knows the official identity of the victim and one who does not. That result would have a double advantage over the result reached by the Court today. It would be a fair law, and it would be the product of the lawmaking branch of our Government.

For the reasons stated, I believe that before there can be a violation of 18 U. S. C. § 111, an assailant must know or have reason to know that the person he assaults is an officer. It follows *a fortiori* that there can be no criminal conspiracy to violate the statute in the absence of at least equivalent knowledge. Accordingly, I respectfully dissent from the opinion and judgment of the Court.

OREGON *v.* HASS

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 73–1452. Argued January 21, 1975—Decided March 19, 1975

When a suspect in police custody has been given and accepts the full warnings prescribed by *Miranda* v. *Arizona,* 384 U. S. 436, and later states that he would like to telephone a lawyer, but is told he cannot do so until reaching the station, and he then provides inculpatory information, such information is admissible in evidence at the suspect's trial solely for impeachment purposes after he has taken the stand and testified to the contrary knowing such information had been ruled inadmissible for the prosecution's case in chief. *Harris* v. *New York,* 401 U. S. 222. Pp. 720–724.

267 Ore. 489, 517 P. 2d 671, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 724. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 726. DOUGLAS, J., took no part in the consideration or decision of the case.

Thomas H. Denney, Assistant Attorney General of Oregon, argued the cause for petitioner. With him on the briefs were *Lee Johnson,* Attorney General, and *W. Michael Gillette,* Assistant Attorney General.

Sam A. McKeen argued the cause for respondent. With him on the brief was *Enver Bozgoz.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a variation of the fact situation encountered by the Court in *Harris* v. *New York,* 401 U. S. 222 (1971): When a suspect, who is in the custody of a state police officer, has been given full *Miranda* warnings [1]

[1] *Miranda* v. *Arizona,* 384 U. S. 436, 467–473 (1966).

and accepts them, and then later states that he would like to telephone a lawyer but is told that this cannot be done until the officer and the suspect reach the station, and the suspect then provides inculpatory information, is that information admissible in evidence solely for impeachment purposes after the suspect has taken the stand and testified contrarily to the inculpatory information, or is it inadmissible under the Fifth and Fourteenth Amendments?

I

The facts are not in dispute. In August 1972, bicycles were taken from two residential garages in the Moyina Heights area of Klamath Falls, Ore. Respondent Hass, in due course, was indicted for burglary in the first degree, in violation of Ore. Rev. Stat. § 164.225, with respect to the bicycle taken from the garage attached to one of the residences, a house occupied by a family named Lehman. He was not charged with the other burglary.

On the day of the thefts, Officer Osterholme of the Oregon State Police traced an automobile license number to the place where Hass lived. The officer met Hass there and placed him under arrest. App. 15. At Hass' trial Osterholme testified *in camera* that, after giving Hass the warnings prescribed by *Miranda* v. *Arizona,* 384 U. S. 436, 467–473 (1966), he asked Hass about the theft of the bicycle taken from the Lehman residence. Hass admitted that he had taken two bicycles but stated that he was not sure, at first, which one Osterholme was talking about. App. 10. He further said that he had returned one of them and that the other was where he had left it. *Id.,* at 12. Osterholme and Hass then departed in a patrol car for the site. *Id.,* at 12–13. On the way Hass opined that he "was in a lot of trouble," *id.,* at 13, 26, and would like to telephone his attorney. *Id.,* at 13. Osterholme replied that he could telephone the lawyer

"as soon as we got to the office." *Ibid.* Thereafter, respondent pointed out a place in the brush where the bicycle was found.

The court ruled that statements made by Hass after he said he wanted to see an attorney, and his identification of the bicycle's location, were not admissible. The prosecution then elicited from Osterholme, in its case in chief before the jury, that Hass had admitted to the witness that he had taken two bicycles that day because he needed money, that he had given one back, and that the other had been recovered. *Id.*, at 31–32.

Later in the trial Hass took the stand. He testified that he and two friends, Walker and Lee, were "just riding around" in his Volkswagen truck, *id.*, at 42; that the other two got out and respondent drove slowly down the street; that Lee suddenly reappeared, tossed a bicycle into the truck, and "ducked down" on the floor of the vehicle, *id.*, at 44; that respondent did not know that Lee "stole it at first," *id.*, at 45; that it was his own intention to get rid of the bike; that they were overtaken by a jeep occupied by Mr. Lehman and his son; that the son pointed out Lee as "that's the guy," *id.*, at 46; that Lee then returned the bike to the Lehmans; that respondent drove on and came upon Walker "sitting down there and he had this other bicycle by him," and threw it into the truck, *id.*, at 48; that he, respondent, went "out by Washburn Way and I threw it as far as I could," [2] *ibid.*; that later he told police he had stolen two bicycles, *id.*, at 49; that he had had no idea what Lee and Walker were going to do, *id.*, at 61; and that he did not see any of the

[2] Hass' testimony would appear to be an admission of guilt of the Oregon crime of "theft by receiving," Ore. Rev. Stat. § 164.095, that is, the receipt or disposal of property of another, knowing that the property was stolen. Hass, however, was not charged with that offense.

bikes being taken and did not know "where those residences were located," *id.*, at 63.

The prosecution then recalled Officer Osterholme in rebuttal. He testified that Hass had pointed out the two houses from which the bicycles were taken. *Id.*, at 65. On cross-examination, the officer testified that, prior to so doing, Hass had told Osterholme "that he knew where the bicycles came from, however, he didn't know the exact street address." *Id.*, at 66. Osterholme also stated that Lee was along at the time but that Lee "had some difficulty" in identifying the residences "until Mr. Hass actually pointed them" and then "he recognized it." *Id.*, at 78.

The trial court, at the request of the defense, then advised the jury that the portion of Officer Osterholme's testimony describing the statement made by Hass to him "may not be used by you as proof of the Defendant's guilt . . . but you may consider that testimony only as it bears on the [credibility] of the Defendant as a witness when he testified on the witness stand." *Id.*, at 79.

Respondent again took the stand and said that Osterholme's testimony that he took him out to the residences and that respondent pointed out the houses was "wrong." *Id.*, at 81.

The jury returned a verdict of guilty. Hass received a sentence of two years' probation and a $250 fine. The Oregon Court of Appeals, feeling itself bound by the earlier Oregon decision in *State* v. *Brewton*, 247 Ore. 241, 422 P. 2d 581, cert. denied, 387 U. S. 943 (1967), a pre-*Harris* case, reversed on the ground that Hass' statements were improperly used to impeach his testimony. 13 Ore. App. 368, 374, 510 P. 2d 852, 855 (1973). On petition for review, the Supreme Court of Oregon, by a 4-to-3 vote, affirmed. 267 Ore. 489, 517 P. 2d 671 (1973). The court reasoned that in a situation of proper *Miranda* warn-

ings, as here, the police have nothing to lose, and perhaps could gain something, for impeachment purposes, by continuing their interrogation after the warnings; thus, there is no deterrence. In contrast, the court said, where warnings are yet to be given, there is an element of deterrence, for the police "will not take the chance of losing incriminating evidence for their case in chief by not giving adequate warnings." *Id.*, at 492, 517 P. 2d, at 673. The three dissenters perceived no difference between the two situations. *Id.*, at 493–495, 517 P. 2d, at 674. Because the result was in conflict with that reached by the North Carolina court in *State* v. *Bryant*, 280 N. C. 551, 554–556, 187 S. E. 2d 111, 113–114 (1972),[3] and because it bore upon the reach of our decision in *Harris* v. *New York*, 401 U. S. 222 (1971), we granted certiorari. 419 U. S. 823 (1974). We reverse.

II

The respondent raises some preliminary arguments. We mention them in passing:

[3] See also *United States ex rel. Wright* v. *LaVallee*, 471 F. 2d 123, 125 (CA2 1972), cert. denied, 414 U. S. 867 (1973); *United States ex rel. Padgett* v. *Russell*, 332 F. Supp. 41 (ED Pa. 1971); *State* v. *Johnson*, 109 Ariz. 70, 505 P. 2d 241 (1973); *Rooks* v. *State*, 250 Ark. 561, 466 S. W. 2d 478 (1971); *People* v. *Nudd*, 12 Cal. 3d 204, 524 P. 2d 844 (1974), cert. pending, No. 74–5472; *Jorgenson* v. *People*, 174 Colo. 144, 482 P. 2d 962 (1971); *Williams* v. *State*, 301 A. 2d 88 (Del. 1973); *State* v. *Retherford*, 270 So. 2d 363 (Fla. 1972), cert. denied, 412 U. S. 953 (1973); *Campbell* v. *State*, 231 Ga. 69, 200 S. E. 2d 690 (1973); *People* v. *Moore*, 54 Ill. 2d 33, 294 N. E. 2d 297, cert. denied, 412 U. S. 943 (1973); *Davis* v. *State*, 257 Ind. 46, 271 N. E. 2d 893 (1971); *Sabatini* v. *State*, 14 Md. App. 431, 287 A. 2d 511 (1972); *Commonwealth* v. *Harris*, — Mass. —, 303 N. E. 2d 115 (1973); *State* v. *Kish*, 28 Utah 2d 430, 503 P. 2d 1208 (1972); *Riddell* v. *Rhay*, 79 Wash. 2d 248, 484 P. 2d 907, cert. denied, 404 U. S. 974 (1971); *Ameen* v. *State*, 51 Wis. 2d 175, 186 N. W. 2d 206 (1971). Cf. *Commonwealth* v. *Horner*, 453 Pa. 435, 441, 309 A. 2d 552, 555 (1973).

1. Hass suggests that "when state law is more restrictive against the prosecution than federal law," this Court has no power "to compel a state to conform to federal law." Brief for Respondent 1. This, apparently, is proffered as a reference to our expressions that a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. See, *e. g., Cooper* v. *California,* 386 U. S. 58, 62 (1967); *Sibron* v. *New York,* 392 U. S. 40, 60–61 (1968). See also *State* v. *Kaluna,* 55 Haw. 361, 368–369, 520 P. 2d 51, 58–59 (1974). But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.[4] See *Smayda* v. *United States,* 352 F. 2d 251, 253 (CA9 1965), cert. denied, 382 U. S. 981 (1966); *Aftanase* v. *Economy Baler Co.,* 343 F. 2d 187, 193 (CA8 1965).

Although Oregon has a constitutional provision against compulsory self-incrimination in any criminal prosecution, Ore. Const., Art. 1, § 12, the present case was decided by the Oregon courts on Fifth and Fourteenth Amendment grounds. The decision did not rest on the Oregon Constitution or state law; neither was cited. The fact that the Oregon courts found it necessary to at-

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[4] The respondent would take comfort in the following pronouncement of the Supreme Court of Oregon in *State* v. *Florance,* 270 Ore. 169, 182, 527 P. 2d 1202, 1208 (1974), a search and seizure case:

"If we choose we can continue to apply this interpretation. We can do so by interpreting Article 1, § 9, of the Oregon constitutional prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the federal constitution. Or we can interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court" (footnote omitted).

The second sentence of this quoted excerpt is, of course, good law. The last sentence, unsupported by any cited authority, is not the law and surely must be an inadvertent error; in any event, we reject it.

tempt to distinguish *Harris* v. *New York, supra,* reveals the federal basis.

2. Hass suggests that a decision by a State's highest court in favor of a criminal defendant is not reviewable here. This, we assume, is a standing argument advanced on the theory that the State is not aggrieved by the Oregon judgment. Surely, a holding that, for constitutional reasons, the prosecution may not utilize otherwise relevant evidence makes the State an aggrieved party for purposes of review. This should be self-evident, but cases such as *California* v. *Green,* 399 U. S. 149 (1970), manifest its validity.

3. *State* v. *Brewton,* 247 Ore. 241, 422 P. 2d 581 (1967), by which the Oregon Court of Appeals in the present case felt itself bound, merits comment. There the Oregon court, again by a 4-to-3 vote, held that statements, elicited from a murder defendant, that were inadmissible in the State's case in chief because they had not been preceded by adequate warnings, could not be used to impeach the defendant's own testimony even though the statements had been voluntarily made.

In the present case the Supreme Court of Oregon stated that it took review "for the purpose of deciding whether we wished to overrule *Brewton,*" 267 Ore., at 492, 517 P. 2d, at 673. It found it "not necessary to make that determination" because, in the majority view, *Brewton* and *Harris* were distinguishable. *Ibid.* As set forth below, we are unable so to distinguish the two cases. Furthermore, *Brewton* is pre-*Harris.*

III

This takes us to the real issue, namely, that of the bearing of *Harris* v. *New York* upon this case.

In *Harris,* the defendant was charged by the State in a two-count indictment with twice selling heroin to an

undercover police officer. The prosecution introduced evidence of the two sales. Harris took the stand in his own defense. He denied the first sale and described the second as one of baking powder utilized as part of a scheme to defraud the purchaser. On cross-examination, Harris was asked whether he had made specified statements to the police immediately following his arrest; the statements partially contradicted Harris' testimony. In response, Harris testified that he could not remember the questions or answers recited by the prosecutor. The trial court instructed the jury that the statements attributed to Harris could be used only in passing on his credibility and not as evidence of guilt. The jury returned a verdict of guilty on the second count of the indictment.

The prosecution had not sought to use the statements in its case in chief, for it conceded that they were inadmissible under *Miranda* because Harris had not been advised of his right to appointed counsel. THE CHIEF JUSTICE, speaking for the Court, observed, 401 U. S., at 224: "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." Relying on *Walder* v. *United States,* 347 U. S. 62 (1954), a Fourth Amendment case, we ruled that there was no "difference in principle" between *Walder* and *Harris;* that the "impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility"; that the "benefits of this process should not be lost"; that, "[a]ssuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief," 401 U. S., at 225, and that the "shield provided by *Miranda* cannot be perverted into a license to use perjury

by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.*, at 226. It was held, accordingly, that Harris' credibility was appropriately impeached by the use of his earlier conflicting statements.

We see no valid distinction to be made in the application of the principles of *Harris* to that case and to Hass' case. Hass' statements were made after the defendant knew Osterholme's opposing testimony had been ruled inadmissible for the prosecution's case in chief.

As in *Harris,* it does not follow from *Miranda* that evidence inadmissible against Hass in the prosecution's case in chief is barred for all purposes, always provided that "the trustworthiness of the evidence satisfies legal standards." 401 U. S., at 224. Again, the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility; again, "the benefits of this process should not be lost," *id.*, at 225; and, again, making the deterrent-effect assumption, there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief. If all this sufficed for the result in *Harris,* it supports and demands a like result in Hass' case. Here, too, the shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances.

We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution. There is no evidence or suggestion that Hass' statements to Officer Osterholme on the way to Moyina Heights were involuntary or coerced. He properly sensed, to be sure, that he was in "trouble"; but the pressure on him was

no greater than that on any person in like custody or under inquiry by any investigating officer.

The only possible factual distinction between *Harris* and this case lies in the fact that the *Miranda* warnings given Hass were proper, whereas those given Harris were defective. The deterrence of the exclusionary rule, of course, lies in the necessity to give the warnings. That these warnings, in a given case, may prove to be incomplete, and therefore defective, as in *Harris,* does not mean that they have not served as a deterrent to the officer who is not then aware of their defect; and to the officer who is aware of the defect the full deterrence remains. The effect of inadmissibility in the *Harris* case and in this case is the same: inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth.

One might concede that when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in *Harris,* and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness.

We therefore hold that the Oregon appellate courts were in error when they ruled that Officer Osterholme's testimony on rebuttal was inadmissible on Fifth and

Fourteenth Amendment grounds for purposes of Hass' impeachment. The judgment of the Supreme Court of Oregon is reversed.

It is so ordered.

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

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

In *Harris* v. *New York,* 401 U. S. 222 (1971), petitioner was not informed of his right to appointed counsel and thus his subsequent statements to police were inadmissible under *Miranda* v. *Arizona,* 384 U. S. 436 (1966). The Court nonetheless permitted the use of those statements to impeach petitioner's trial testimony. The Court today extends *Harris* to a case where the accused was told of his rights and asked for a lawyer, yet police questioning continued in violation of *Miranda.* The statements that resulted are again held admissible for impeachment purposes.

I adhere to my dissent in *Harris* in which I stated that *Miranda* "completely disposes of any distinction between statements used on direct as opposed to cross-examination. 'An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn.' " *Harris, supra,* at 231. I adhere as well to the view that the judiciary must "avoid even the slightest appearance of sanctioning illegal government conduct." *United States* v. *Calandra,* 414 U. S. 338, 360 (1974) (BRENNAN, J., dissenting). "[I]t is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that '[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard

of the charter of its own existence.'" *Harris, supra,* at 232 (BRENNAN, J., dissenting).

The Court's decision today goes beyond *Harris* in undermining *Miranda.* Even after *Harris,* police had some incentive for following *Miranda* by warning an accused of his right to remain silent and his right to counsel. If the warnings were given, the accused might still make a statement which could be used in the prosecution's case in chief. Under today's holding, however, once the warnings are given, police have almost no incentive for following *Miranda*'s requirement that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda, supra,* at 474. If the requirement is followed there will almost surely be no statement since the attorney will advise the accused to remain silent.[1] If, however, the requirement is disobeyed, the police may obtain a statement which can be used for impeachment if the accused has the temerity to testify in his own defense.[2] Thus, after today's decision, if an individual states that he wants an attorney, police interrogation will doubtless be vigorously pressed to obtain statements before the attorney arrives. I am unwilling to join this fundamental erosion of Fifth and Sixth Amendment rights and

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[1] See, *e. g., Watts* v. *Indiana,* 338 U. S. 49, 59 (1949) (Jackson, J., concurring in result) ("any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances"). See also Comment, 80 Yale L. J. 1198, 1220 (1971) ("[the police] realize that as soon as a lawyer arrives there is little chance that any further questioning will be permitted").

[2] As I pointed out in *Harris* v. *New York,* 401 U. S. 222 (1971), "the accused is denied an 'unfettered' choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him." *Id.,* at 230 (BRENNAN, J., dissenting).

therefore dissent. I would affirm or, at least, remand for further proceedings for the reasons given in MR. JUSTICE MARSHALL'S dissenting opinion.

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

While I agree with my Brother BRENNAN that on the merits the judgment of the Oregon Supreme Court was correct, I think it appropriate to add a word about this Court's increasingly common practice of reviewing state-court decisions upholding constitutional claims in criminal cases. See *Michigan* v. *Mosley,* 51 Mich. App. 105, 214 N. W. 2d 564 (1974), cert. granted, 419 U. S. 1119 (1975); *Michigan* v. *Payne,* 412 U. S. 47 (1973); *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972); *California* v. *Byers,* 402 U. S. 424 (1971); *California* v. *Green,* 399 U. S. 149 (1970).

In my view, we have too often rushed to correct state courts in their view of federal constitutional questions without sufficiently considering the risk that we will be drawn into rendering a purely advisory opinion. Plainly, if the Oregon Supreme Court had expressly decided that Hass' statement was inadmissible as a matter of state as well as federal law, this Court could not upset that judgment. See *Jankovich* v. *Indiana Toll Road Comm'n,* 379 U. S. 487 (1965); *Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940); *Fox Film Corp.* v. *Muller,* 296 U. S. 207 (1935). The sound policy behind this rule was well articulated by Mr. Justice Jackson in *Herb* v. *Pitcairn,* 324 U. S. 117 (1945):

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement.

> It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.*, at 125–126 (citations omitted).

Where we have been unable to say with certainty that the judgment rested solely on federal law grounds, we have refused to rule on the federal issue in the case; the proper course is then either to dismiss the writ as improvidently granted or to remand the case to the state court to clarify the basis of its decision. *California* v. *Krivda,* 409 U. S. 33 (1972); *Mental Hygiene Dept.* v. *Kirchner,* 380 U. S. 194 (1965). Of course, it may often be unclear whether a state court has relied in part on state law in reaching its decision. As the Court said in *Herb* v. *Pitcairn, supra,* however, where the answer does not appear "of record" and is not "clear and decisive,"

> "it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended. If this imposes an unwelcome burden it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference as well as to protect our own from unwitting renunciation." 324 U. S., at 128.

From a perusal of the Oregon Supreme Court's opinion it is evident that these exacting standards were not met in this case. The Constitution of Oregon contains an

independent prohibition against compulsory self-incrimination, and there is a distinct possibility that the state court intended to express its view of state as well as federal constitutional law. The majority flatly states that the case was decided below solely on federal constitutional grounds, but I am not so certain. Although the state court did not expressly cite state law in support of its judgment, its opinion suggests that it may well have considered the matter one of state as well as federal law. The court stated that it had initially viewed the issue of the case as whether it should overrule one of its prior precedents in light of this Court's opinion in *Harris* v. *New York,* 401 U. S. 222 (1971). It concluded that it was not required to consider whether to overrule the earlier state case, however, since upon examination it determined that *Harris* did not reach this fact situation. In view of the court's suggestion that the federal constitutional rule in *Harris* would be regarded as merely a persuasive authority even if it were deemed to be squarely in conflict with the state rule, it seems quite possible that the state court intended its decision to rest at least in part on independent state grounds. In any event, I agree with Mr. Justice Jackson that state courts should be "asked rather than told what they have intended."

In addition to the importance of avoiding jurisdictional difficulties, it seems much the better policy to permit the state court the freedom to strike its own balance between individual rights and police practices, at least where the state court's ruling violates no constitutional prohibitions. It is peculiarly within the competence of the highest court of a State to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum.

The Oregon court's decision in this case was not premised on a reluctant adherence to what it deemed federal

law to require, but was based on its independent conclusion that admitting evidence such as that held admissible today will encourage police misconduct in violation of the right against compulsory self-incrimination. This is precisely the setting in which it seems most likely that the state court would apply the State's self-incrimination clause to lessen what it perceives as an intolerable risk of abuse. Accordingly, in my view the Court should not review a state-court decision reversing a conviction unless it is quite clear that the state court has resolved all applicable state-law questions adversely to the defendant and that it feels compelled by its view of the federal constitutional issue to reverse the conviction at hand.

Even if the majority is correct that the Oregon Supreme Court did not intend to express a view of state as well as federal law, this Court should, at the very least, remand the case for such further proceedings as the state court deems appropriate. I can see absolutely no reason for departing from the usual course of remanding the case to permit the state court to consider any other claims, including the possible applicability of state law to the issue treated here. See *Michigan* v. *Payne,* 412 U. S., at 57; *California* v. *Byers,* 402 U. S., at 434; *California* v. *Green,* 399 U. S., at 168–170; C. Wright, Federal Courts 488 (2d ed. 1970); cf. *Georgia Railway & Electric Co.* v. *Decatur,* 297 U. S. 620, 623 (1936). Surely the majority does not mean to suggest that the Oregon Supreme Court is foreclosed from considering the respondent's state-law claims or even ruling *sua sponte* that the statement in question is not admissible as a matter of state law. If so, then I should think this unprecedented assumption of authority will be as much a surprise to the Supreme Court of Oregon as it is to me.

I dissent.

LASCARIS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF ONONDAGA COUNTY *v.* SHIRLEY ET AL.

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

No. 73–1016. Argued December 18, 1974—Decided March 19, 1975*

Amendment, subsequent to this Court's noting probable jurisdiction of appeal from judgment of three-judge District Court, of § 402 (a) of Social Security Act resolves question below of conflict between § 402 (a) and provision of New York Social Services Law requiring the recipient, as a condition of eligibility for benefits under the Aid to Families with Dependent Children program, to cooperate to compel the absent parent to contribute to child's support.

365 F. Supp. 818, affirmed.

Alan W. Rubenstein argued the cause for appellants in both cases. With him on the briefs for appellant in No. 73–1095 were *Louis J. Lefkowitz,* Attorney General of New York, and *Ruth Kessler Toch,* Solicitor General. *Philip C. Pinsky* and *John B. LaParo* filed a brief for appellant in No. 73–1016.

Douglas A. Eldridge argued the cause *pro hac vice* for appellees in both cases. With him on the brief for appellee Stuck was *Isadore Greenberg.*†

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*Together with No. 73–1095, *Lavine, Commissioner, Department of Social Services of New York* v. *Shirley et al.,* also on appeal to the same court.

†*Ronald A. Zumbrun* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal in both cases. *Evelle J. Younger,* Attorney General, *Elizabeth Palmer,* Assistant Attorney General, and *John J. Klee, Jr.,* Deputy Attorney General, filed a brief for the State of California as *amicus curiae* urging reversal in No. 73–1095.

PER CURIAM.

After our previous remand, 409 U. S. 1052 (1972), the three-judge District Court held that amended New York Social Services Law § 101–a "engraft[ed] . . . a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits." 365 F. Supp. 818, 821 (1973). That condition, the court held, rendered the amended section invalid because in conflict with the Social Security Act, § 402 (a), 42 U. S. C. § 602 (a), insofar as it required recipient cooperation in a paternity or support action against an absent parent as a condition of eligibility for benefits under the program for Aid to Families with Dependent Children. On June 17, 1974, we noted probable jurisdiction of the appeals of the State and County Commissioners of Social Service, 417 U. S. 943. Since that time, however, on January 4, 1975, Pub. L. 93–647, 88 Stat. 2359, amended § 402 (a) of the Social Security Act expressly to resolve the conflict as to eligibility found by the three-judge District Court to exist between the federal and state laws. Amended § 402 (a), like New York's amended § 101–a, requires the recipient to cooperate to compel the absent parent to contribute to the support of the child.

Section 402 (a), as amended, in pertinent part provides:*

*Pub. L. 93–647 provides that § 402 (a), as amended, shall become effective on July 1, 1975. However, President Ford announced when he signed the law that he would propose changes to several sections, including the child-support provisions, during the early months of the 94th Congress, stating:

"The second element of this bill involves the collection of child support payments from absent parents. I strongly agree with the objectives of this legislation.

"In pursuit of this objective, however, certain provisions of this legislation go too far by injecting the Federal Government into

"A State plan for aid and services to needy families with children must

. . . . . .

"(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

. . . . . .

"(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406 (b)(2) (without regard to subparagraphs (A) through (E) of such section) . . . ."

We affirm the judgment of the three-judge court. *Townsend* v. *Swank,* 404 U. S. 282 (1971); *Carleson* v. *Remillard,* 406 U. S. 598 (1972). In light of the resolu-

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domestic relations. Specifically, provisions for use of the Federal courts, the tax collection procedures of the Internal Revenue Service, and excessive audit requirements are an undesirable and unnecessary intrusion of the Federal Government into domestic relations. They are also an undesirable addition to the workload of the Federal courts, the IRS and the Department of Health, Education, and Welfare Audit Agency. Further, the establishment of a parent locator service in the Department of Health, Education, and Welfare with access to all Federal records raises serious privacy and administrative issues. I believe that these defects should be corrected in the next Congress, and I will propose legislation to do so." 11 Weekly Compilation of Presidential Documents, No. 2, Jan. 13, 1975, p. 20.

tion of the conflict by Pub. L. 93–647, we have no occasion to prepare an extended opinion.

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST dissent.

COX, FORMER ASSISTANT DIRECTOR FOR TREATMENT, VIRGINIA DIVISION OF CORRECTIONS, ET AL. *v.* COOK

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

No. 74–751. Decided March 24, 1975

In state prisoner's action against prison officials seeking damages and expunction of records for alleged due process violations in summarily placing him in solitary confinement, relief cannot be based on the rules requiring notice and a hearing in connection with serious prison discipline determinations announced in the nonretroactive decision, *Wolff* v. *McDonnell,* 418 U. S. 539, or in *Landman* v. *Royster,* 333 F. Supp. 621, where the discipline determinations in question all occurred before the dates of those decisions.

Certiorari granted; reversed.

PER CURIAM.

This petition by officials of the Virginia prison system for a writ of certiorari arises out of a suit brought against them by an inmate of the Virginia State Penitentiary in which he alleged that on three occasions, between October 1968 and March 1970, he was placed in solitary confinement for misconduct without being given notice of the misconduct charged or an opportunity to meet the charge at a hearing,[1] in violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment; and in which he requested monetary damages and expunction of all records of the discipline.

[1] The suit was also based on a claim that an unidentified guard inflicted a beating on respondent. The Court of Appeals for the Fourth Circuit has sustained the District Court's holding that none of the petitioners was responsible for the beating, and respondent has not filed a cross-petition for a writ of certicrari.

A jury at a partial trial [2] found that respondent had in fact been placed in solitary confinement for misconduct without notice or a hearing. It also found that he had suffered mental but no physical damage. However, it made no finding with respect to the responsibility of any of the petitioners for his confinement. After offering respondent an additional opportunity to adduce further proof on this issue before a second jury, the trial judge ruled that respondent could recover nothing as the proof was insufficient to establish that petitioners had knowledge of or were responsible for respondent's confinement.

Respondent appealed and, without briefs or oral argument, the United States Court of Appeals for the Fourth Circuit, holding that the proof below *would* support a finding that petitioners were ultimately responsible for respondent's solitary confinement, reversed and remanded for further proceedings.

On petition for rehearing petitioners contended that the constitutional rule requiring notice and some kind of a hearing in connection with serious prison discipline determinations was created in *Wolff* v. *McDonnell,* 418 U. S. 539, in 1974, and was expressly made inapplicable to disciplinary action taken before the date of that decision. *Id.,* at 573–574. Thus even if respondent had proved that petitioners were responsible for his solitary confinement he could not, as a matter of law, obtain relief. The Court of Appeals denied the rehearing petition, saying that, in the district in which respondent was incarcerated, a federal decision predating *Wolff* v. *McDonnell, supra,* namely *Landman* v. *Royster,* 333 F.

[2] The trial judge was uncertain whether respondent was entitled to a jury trial. Counsel and the court agreed to obtain a jury's findings of fact on certain issues in the form of a special verdict, and to postpone decision whether a jury trial was warranted.

Supp. 621 (ED Va. 1971), required notice and a hearing in connection with serious prison discipline determinations. Petitioners contend here that *Landman* v. *Royster, supra,* was itself decided after the discipline determinations involved in this case and thus supplies no more basis for liability in this case than does *Wolff* v. *McDonnell.* We agree.

In *Wolff* v. *McDonnell, supra,* we held that a state prisoner was entitled under the Due Process Clause of the Fourteenth Amendment to notice and some kind of a hearing in connection with discipline determinations involving serious misconduct. However, we expressly rejected the holding of the Court of Appeals in that case that

> "the due process requirements in prison disciplinary proceedings were to apply retroactively so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged," 418 U. S., at 573;

and we expressly held our decision not to be retroactive. The holding was made in the context of a request for expunction of the records of prison discipline determinations. The same result obtains, *a fortiori,* to monetary claims against prison officials acting in good-faith reliance on a pre-existing procedure. See *Pierson* v. *Ray,* 386 U. S. 547 (1967). It is true that the United States District Court for the Eastern District of Virginia in *Landman* v. *Royster, supra,* anticipated in part the holding of this Court in *Wolff* v. *McDonnell, supra.* Even if this might bear on the retroactivity issue with respect to discipline determinations made in the Eastern District of Virginia after the decision in *Landman* v. *Royster, supra,* and before the decision in *Wolff* v. *McDonnell, supra,* the discipline determinations in this case all occurred before the decision in *Landman* v. *Royster,*

supra. Therefore, neither the rule announced in that case nor the one announced in *Wolff* v. *McDonnell, supra,* supports respondent's damage or expunction claims here.[3] Accordingly, the writ of certiorari is granted and the judgment of the Court of Appeals for the Fourth Circuit is

Reversed.

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

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[3] We do not regard the uncertain dicta in *Landman* v. *Peyton,* 370 F. 2d 135 (CA4 1966), which did predate the discipline determinations involved here, as laying down a rule binding on petitioners prior to the later decision in *Landman* v. *Royster,* 333 F. Supp. 621 (ED Va. 1971). These dicta were not mentioned or relied on by the Court of Appeals or respondent.

SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* COUNCILMAN

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

No. 73–662. Argued December 10, 1974—Decided March 25, 1975

After court-martial charges were preferred against respondent Army captain for the sale, transfer, and possession of marihuana, he brought suit in Federal District Court to enjoin petitioner military authorities from proceeding with the court-martial. The District Court granted a permanent injunction, and the Court of Appeals affirmed, on the ground that the offenses charged were not "service connected" and hence were not within court-martial jurisdiction. Petitioners contend in this Court (1) that any federal-question jurisdiction that the District Court might have had under 28 U. S. C. § 1331 had been removed by Art. 76 of the Uniform Code of Military Justice (UCMJ), which provides that court-martial proceedings "are final and conclusive" and that "all action taken pursuant to those proceedings [is] binding upon all . . . courts . . . of the United States," and (2) that the District Court improperly intervened in a pending court-martial proceeding. *Held:*

1. Article 76 does not stand as a jurisdictional bar to respondent's suit, and the District Court had subject-matter jurisdiction under 28 U. S. C. § 1331, assuming the requisite jurisdictional amount. Pp. 744–753.

(a) The general rule that "the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise," *Smith* v. *Whitney*, 116 U. S. 167, 177, is subject to its own qualification that the court-martial's acts be "within the scope of its jurisdiction and duty," and hence collateral relief from the consequences of a court-martial judgment is not barred if the judgment was void. Pp. 746–748.

(b) The finality clause of Art. 76 does no more than describe the terminal point for proceedings within the court-martial system, *Gusik* v. *Schilder*, 340 U. S. 128, and the legislative history of the article does not support a conclusion that it was intended to confine collateral attack on court-martial proceedings in Art. III courts exclusively to habeas corpus. Pp. 748–753.

2. When a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise. There is nothing in the circumstances of this case to outweigh the strong considerations favoring exhaustion of remedies within the military court system or to warrant intruding on the integrity of military court processes, which were enacted by Congress in the UCMJ in an attempt to balance the unique necessities of the military system against the equally significant interest of ensuring fairness to servicemen charged with military offenses. Pp. 753–760.

481 F. 2d 613, reversed.

POWELL, J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined, and in Part II of which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BURGER, C. J., filed a statement concurring in the judgment, *post*, p. 761. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 762.

Solicitor General Bork argued the cause for petitioners. With him on the brief were *Assistant Attorney General Petersen, Danny J. Boggs,* and *Jerome M. Feit.*

Nicholas D. Garrett and *Orin Christopher Meyers* argued the cause and filed a brief for respondent.*

MR. JUSTICE POWELL delivered the opinion of the Court.

On March 27, 1972, court-martial charges were preferred against respondent Bruce R. Councilman, an Army captain on active duty at Fort Sill, Okla. The charges alleged that Captain Councilman had wrongfully sold, transferred, and possessed marihuana. On July 6, 1972, the District Court for the Western District of Oklahoma permanently enjoined petitioners, the Secretaries of Defense and of the Army and the Commanding

**David F. Addlestone, Donald S. Burris, Marvin M. Karpatkin,* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

General and Staff Judge Advocate of Fort Sill, from proceeding with Captain Councilman's impending court-martial. On appeal, the Court of Appeals for the Tenth Circuit affirmed, holding that the offenses with which Captain Councilman had been charged were not "service connected" and therefore not within the military court-martial jurisdiction. 481 F. 2d 613 (1973).

The judgments of the District Court and the Court of Appeals were predicated on certain assumptions, not hitherto examined by this Court,[1] concerning the proper relationship between the military justice system established by Congress and the powers and responsibilities of Art. III courts. In the view we take of the matter, the case presents no occasion for resolution of the merits of Councilman's "service-connection" claim. Although the District Court may have had subject-matter jurisdiction, we think that the balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings. We see nothing in the circumstances of this case that alters this general equitable balance. Accordingly, we reverse.

I

The parties in the District Court stipulated the relevant facts.[2] They need only be summarized here. The Army's Criminal Investigation Detachment at Fort Sill received information from a confidential informant that Councilman was using marihuana at his off-post apartment. The detachment arranged to have Councilman invited to an off-post party, where he was introduced to Specialist Four Glenn D. Skaggs, an enlisted man working as a detachment undercover agent. Skaggs, who

[1] See *Secretary of the Navy* v. *Avrech*, 418 U. S. 676 (1974).

[2] Pet. for Cert., App. E, pp. 23–25.

used the name Danny Drees in his undercover activities, was identified as an enlisted clerk-typist at the Fort Sill Army Training Center. Shortly after their initial meeting, Councilman allegedly transferred to Skaggs small quantities of marihuana, once by sale and once by gift. On both occasions, Councilman and Skaggs were off post and not in uniform. Councilman was off duty and, to all appearances, Skaggs was off duty as well. Thereafter, based on Skaggs' investigations, Councilman was apprehended by civilian authorities, who searched his apartment and discovered additional quantities of marihuana. Councilman later was remanded to military authorities. He was charged with having violated Art. 134 of the Uniform Code of Military Justice [3] by wrongfully selling, transferring, and possessing marihuana. Following an investigatory hearing,[4] the charges were referred to a general court-martial for trial.

At a preliminary hearing held on June 27, 1972, Councilman, represented by counsel, moved to dismiss the charges, contending that the court-martial lacked jurisdiction under this Court's decision in *O'Callahan* v. *Parker,* 395 U. S. 258 (1969), because the alleged offenses were not "service connected." After an evidentiary hearing, the presiding military judge denied the motion and scheduled the court-martial to begin on July 11. On July 5, Councilman brought this action in the District Court, moving for a temporary restraining order and a preliminary injunction to prevent his impending court-martial. Councilman claimed that since

[3] 10 U. S. C. § 934. The article prohibits, *inter alia,* "all disorders and neglects to the prejudice of good order and discipline in the armed forces." This provision was upheld last Term as against vagueness and First Amendment overbreadth challenges. *Parker* v. *Levy,* 417 U. S. 733 (1974); *Secretary of the Navy* v. *Avrech, supra.* No similar challenge is repeated here.

[4] See UCMJ Art. 32, 10 U. S. C. § 832.

the court-martial lacked jurisdiction over the alleged offenses, he "[would] suffer great and irreparable damage in that he [might] be deprived of his liberty without due process of law, if the Court-Martial Proceedings are permitted on July 11 . . . ." On the following day, after a hearing on the service-connection issue, the District Court permanently enjoined the military authorities from proceeding with the court-martial.[5]

The Court of Appeals affirmed, holding that the alleged offenses did not meet the tests for service connection set forth in *O'Callahan* v. *Parker, supra,* and elaborated in *Relford* v. *U. S. Disciplinary Commandant,* 401 U. S. 355 (1971). The court found that only one of the factors enumerated in those decisions pointed to service connection in this case: the "factor relat[ing] to the rank of the persons involved in the incident or the fact that both were servicemen." 481 F. 2d, at 614. The court concluded that this factor, standing alone, was insuffi-

[5] The District Court subsequently denied the military authorities' petition for reconsideration, in which petitioners argued that because Councilman had not filed a complaint to institute the action as required by Fed. Rule Civ. Proc. 3, the court lacked jurisdiction to act. The District Court concluded that the papers filed by Councilman—motions for a temporary restraining order and a preliminary injunction, and supporting affidavit and briefs—although not formally denominated a complaint, were adequate to apprise petitioners of the nature of the claim and the relief sought and to invoke the jurisdiction of the court. The court stated that, as authorized by Fed. Rule Civ. Proc. 8 (f), it deemed the papers sufficient to comply with Rule 3, and entered an order *nunc pro tunc,* under Fed. Rule Civ. Proc. 15 (b), conforming the pleadings to the rules. Petitioners have raised no objection to this disposition of the matter. We think that so long as the court's subject-matter jurisdiction actually existed and adequately appeared to exist from the papers filed, see n. 9, *infra,* any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment. See 2 J. Moore, Federal Practice ¶ 3.04, pp. 718–720, ¶ 3.06 [1], pp. 731–732 (2d ed. 1974).

cient to sustain court-martial jurisdiction and that Councilman's possession and distribution of marihuana "affect[ed] military discipline no more than commission of any crime by any serviceman." *Id.,* at 615.

On behalf of the military authorities, the Solicitor General filed a petition for a writ of certiorari addressed to the "service-connected" offense issue,[6] and noting the existence of conflicts on this issue between the decision below and decisions of the Court of Military Appeals.[7] We granted the petition, 414 U. S. 1111 (1973),[8] and although normally we do not consider questions raised neither below nor in the petition, see *United States* v. *Richardson,* 418 U. S. 166, 206 (1974) (STEWART, J., dissenting), the jurisdictional and equity issues necessarily implicit in this case seemed sufficiently important to raise them *sua sponte.* See, *e. g., Younger* v. *Harris,* 401 U. S. 37, 40 (1971); *Duignan* v. *United States,* 274 U. S. 195, 200 (1927), and cases there cited. We therefore requested supplemental briefs "on the issues of (1) the jurisdiction of the District Court, (2) exhaustion of

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[6] Pet. for Cert. 2.

[7] *E. g., United States* v. *Castro,* 18 U. S. C. M. A. 598, 40 C. M. R. 310 (1969); *United States* v. *Adams,* 19 U. S. C. M. A. 75, 41 C. M. R. 75 (1969) (off-post possession of marihuana or illegal narcotics held service connected); *United States* v. *Rose,* 19 U. S. C. M. A. 3, 41 C. M. R. 3 (1969) (unlawful sale of barbiturates off post by one serviceman to another held service connected). See *Cole* v. *Laird,* 468 F. 2d 829 (CA5 1972) (holding use of marihuana by a serviceman off post and off duty not service connected); *Moylan* v. *Laird,* 305 F. Supp. 551 (RI 1969); *Lyle* v. *Kincaid,* 344 F. Supp. 223 (MD Fla. 1972); *Schroth* v. *Warner,* 353 F. Supp. 1032 (Haw. 1973); *Redmond* v. *Warner,* 355 F. Supp. 812 (Haw. 1973) (holding that the military lacks jurisdiction over off-post drug offenses). Contra: *Scott* v. *Schlesinger,* No. C. A. 4–2371 (ND Tex. Oct. 1, 1973) (off-post sales of marihuana to servicemen held service connected).

[8] 28 U. S. C. § 1254 (1).

remedies, and (3) the propriety of a federal district court enjoining a pending court-martial proceeding." Since our resolution of these issues disposes of the case, we express no opinion on the "service-connection" question.

II

Presumably the District Court found jurisdiction under 28 U. S. C. § 1331,[9] which grants subject-matter jurisdiction of civil actions where the matter in controversy exceeds $10,000 "and arises under the Constitution, laws, or treaties of the United States." No contention is made that respondent's claim fails to assert a case arising under the Constitution. See *O'Callahan* v. *Parker, supra.* Petitioners argue, however, that even if the District Court might otherwise have had jurisdiction under § 1331, this was removed by enactment of Art. 76 of the Uniform Code of Military Justice, 10 U. S. C. § 876. That article, set forth in the margin,[10]

[9] The "complaint" filed in the District Court, see n. 5, *supra,* nowhere mentioned § 1331 nor alleged the requisite amount in controversy. The facts alleged and the claim asserted nonetheless were sufficient to demonstrate the existence of a federal question. See C. Wright, Law of Federal Courts 290–291 (2d ed. 1970). And although a complaint under § 1331 is fatally defective unless it contains a proper allegation of the amount in controversy, see, *e. g., Canadian Indemnity Co.* v. *Republic Indemnity Co.,* 222 F. 2d 601 (CA9 1955), respondent now claims that the matter in controversy does exceed the requisite amount. Brief for Respondent on the Jurisdictional Issues 4–5. Defective allegations of jurisdiction may be amended, 28 U. S. C. § 1653. In view of our disposition of the case, however, no purpose would be served by requiring a formal amendment at this stage.

[10] "The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the pro-

provides in pertinent part that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter . . . are final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all . . . courts . . . of the United States . . . ."

Petitioners rely on the legislative history of Art. 76 as demonstrating that Congress intended to limit collateral attack in civilian courts on court-martial convictions to proceedings for writs of habeas corpus under 28 U. S. C. § 2241. If this is so, petitioners further argue that Congress must have intended to remove any jurisdiction the civilian courts might otherwise have had to intervene before the court-martial has taken place. In short, it is argued that with respect to court-martial proceedings and convictions, Art. 76 acts as a *pro tanto* repealer of § 1331 and all other statutes, with the exception of § 2241, conferring subject-matter jurisdiction on Art. III courts.

We have declined to decide this question in the past.[11] We now conclude that although the article is highly relevant to the proper scope of collateral attack on court-martial convictions and to the propriety of equitable intervention into pending court-martial proceedings, it does not have the jurisdictional consequences petitioners ascribe to it.

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ceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President."

[11] *United States* v. *Augenblick*, 393 U. S. 348, 349–353 (1969); *Secretary of the Navy* v. *Avrech*, *supra*. Cf. *Warner* v. *Flemings*, decided together with *Gosa* v. *Mayden*, 413 U. S. 665 (1973).

A

This Court repeatedly has recognized that, of necessity, "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns* v. *Wilson,* 346 U. S. 137, 140 (1953); *Parker* v. *Levy,* 417 U. S. 733, 744 (1974). Congress is empowered under Art. I, § 8, to "make Rules for the Government and Regulation of the land and naval Forces." It has, however, never deemed it appropriate to confer on this Court "appellate jurisdiction to supervise the administration of criminal justice in the military." *Noyd* v. *Bond,* 395 U. S. 683, 694 (1969). See *Ex parte Vallandigham,* 1 Wall. 243, 249–253 (1864).[12] Nor has Congress conferred on any Art. III court jurisdiction directly to review court-martial determinations. The valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have res judicata effect and preclude further litigation of the merits. See, *e. g.,* 1B J. Moore, Federal Practice ¶ 0.405 [4.–1], pp. 634–637 (2d ed. 1974). This Court therefore has adhered uniformly to "the general rule that the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise." *Smith* v. *Whitney,* 116 U. S. 167, 177 (1886). See *Hiatt* v. *Brown,* 339 U. S. 103, 111 (1950); *In re Grimley,* 137 U. S. 147, 150 (1890).

But this general rule carries with it its own qualification—that the court-martial's acts be "within the scope of its jurisdiction and duty." Collateral attack seeks, as a necessary incident to relief otherwise within the court's

[12] See also *In re Yamashita,* 327 U. S. 1, 8 (1946); *In re Vidal,* 179 U. S. 126 (1900). Cf. *Crawford* v. *United States,* 380 U. S. 970 (1965) (motion for leave to file petition for writ of certiorari to Court of Military Appeals denied).

power to grant, a declaration that a judgment is void.[13] A judgment, however, is not rendered void merely by error, nor does the granting of collateral relief necessarily mean that the judgment is invalid for all purposes.[14] On the contrary, it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences.

These settled principles of the law of judgments have been held from the start fully applicable to court-martial determinations.[15] Habeas corpus proceedings have been and remain by far the most common form of collateral attack on court-martial judgments; but historically they have not been the exclusive means of collateral attack. Nor were they the earliest. In *Wise* v. *Withers,* 3 Cranch 331 (1806), an action for trespass against a collector of court-martial fines, the Court held that the plaintiff, a federal official, was exempt from military duty and that the court-martial lacked jurisdiction. The Court concluded that "it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it." *Id.,* at 337. See *Dynes* v. *Hoover,* 20 How. 65 (1857); *Martin* v. *Mott,* 12 Wheat. 19 (1827).[16] At

[13] Restatement of Judgments § 11 (1942); F. James, Civil Procedure § 11.5 (1965). Compare *Ashe* v. *McNamara,* 355 F. 2d 277 (CA1 1965), with *Davies* v. *Clifford,* 393 F. 2d 496 (CA1 1968).

[14] See *Fay* v. *Noia,* 372 U. S. 391, 423–424 (1963).

[15] See generally Weckstein, Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities, 54 Mil. L. Rev. 1 (1971); Bishop, Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 Col. L. Rev. 40 (1961).

[16] In *Dynes,* the Court stated:

"Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial .... In such cases, everything

the end of the last century, on the basis of the same principle the Court approved collateral attack in the form of backpay suits in the Court of Claims. *E. g., Runkle* v. *United States,* 122 U. S. 543 (1887). These cases, and the early military habeas cases,[17] demonstrate a uniform approach to the problem of collateral relief from the consequences of court-martial judgments: such relief was barred unless it appeared that the judgments were void.[18]

B

Petitioners argue that Art. 76 effected a change in this regime, not solely as a matter of the law of judgments, but as a matter of jurisdiction. This case, of course, does not concern a collateral attack on a court-martial judgment, at least in the normal sense, since there was no judgment to attack. Instead, Councilman, alleging the likelihood of irreparable injury, sought injunctive relief from an impending court-martial. He asserted, as the basis for such relief, that any judgment entered by

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which may be done is void—not voidable, but void; and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or void judgment." 20 How., at 81.

[17] *E. g., Ex parte Reed,* 100 U. S. 13 (1879).

[18] See, *e. g., McClaughry* v. *Deming,* 186 U. S. 49 (1902) (habeas corpus); and *United States* v. *Brown,* 206 U. S. 240 (1907) (backpay suit). In *Wales* v. *Whitney,* 114 U. S. 564 (1885), the Court refused to consider a habeas corpus attack on the jurisdiction of a pending court-martial proceeding because the petitioner was not in custody. The Court, however, observed:

"If that court finds him guilty, and imposes imprisonment as part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction . . . ." *Id.,* at 575.

the court-martial would be void and hence subject to collateral impeachment, at least by way of habeas. *E. g., O'Callahan* v. *Parker, supra.* Thus, the legal basis on which Councilman rested his claim for equitable relief did not go beyond recognized grounds for collateral attack.[19] In effect, Councilman is attempting to attack collaterally the military authorities' decision to convene the court-martial and the refusal of the military judge to dismiss the charges. Article 76, however, gives binding effect not only to court-martial judgments, but also to "all action taken pursuant to those proceedings . . . ." We therefore agree with petitioners that, as a jurisdictional matter, Councilman's suit stands on precisely the same footing as suits seeking possible postjudgment forms of collateral relief. If Art. 76 was intended to bar subject-matter jurisdiction in suits for collateral relief other than by way of habeas, it also must remove § 1331 jurisdiction prior to any court-martial judgment.

Article 76, however, does not expressly effect any change in the subject-matter jurisdiction of Art. III courts. Its language only defines the point at which military court judgments become final and requires that they be given res judicata effect. But, as the Court has recognized in the past, there is no necessary inconsistency between this and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject-matter jurisdiction.[20] In *Gusik* v. *Schilder,* 340 U. S. 128 (1950), this Court was required to determine the effect on military habeas proceedings of Art. 53 of the Articles of War, the immediate statutory predecessor of

[19] If it had, Councilman's suit would have been a species of pre-judgment direct attack, in which case the District Court would have had no jurisdiction whatever.

[20] See, *e. g.,* Weckstein, *supra,* n. 15, at 12.

the present Art. 76, containing identical finality language.[21] Petitioner had argued that Art. 53 deprived civilian courts of all jurisdiction to entertain suits collaterally attacking military court judgments, and thus worked an unconstitutional suspension of the writ of habeas corpus. The Court declined to give the article the suggested construction:

> "We read the finality clause of Article 53 as doing no more than describing the terminal point for proceedings within the court-martial system. If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. The finality language so adequately serves the more restricted purpose that we would have to give a strained construction in order to stir the constitutional issue that is tendered." 340 U. S., at 132–133.

Petitioners agree with *Gusik* insofar as it holds that habeas corpus remains available despite the mandate of Art. 76. It is argued, however, both from the legislative history of Art. 76 itself and from the judgment implicit in the establishment of a comprehensive system of review within the military, that Congress intended to confine collateral attack in Art. III courts exclusively to habeas corpus. In doing so, it is said, Congress was acknowledging the special constitutional status of that writ under the Suspension Clause,[22] a status shared by no other form of collateral relief. Petitioners point in particular to statements in the House

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[21] 62 Stat. 639.

[22] U. S. Const., Art. I, § 9. Cf. *In re Yamashita,* 327 U. S., at 8; *Fay* v. *Noia,* 372 U. S., at 399–400.

and Senate Committee Reports that "[s]ubject only to a petition for a writ of habeas corpus in Federal court, [Art. 76] provides for the finality of the court-martial proceedings and judgments." [23] In addition, the House Committee Report explained that the Court of Military Appeals, established by the Code, was intended as "the court of last resort for court-martial cases, except for the constitutional right of habeas corpus." [24]

Petitioners' interpretation of Art. 76, if its full reach were accepted, not only would prevent servicemen from obtaining injunctions under any circumstances against pending court-martial proceedings. It also would preclude any collateral relief in Art. III courts, even if the court-martial lacked jurisdiction in the most traditional sense, unless the serviceman could satisfy the requirements of habeas corpus jurisdiction. As pointed out above, certain remedies alternative to habeas, particularly suits for backpay, historically have been available. Indeed, this availability was reiterated shortly before enactment of the Code. See *Shapiro* v. *United States,* 107 Ct. Cl. 650, 69 F. Supp. 205 (1947). Yet nothing in Art. 76 distinguishes between habeas corpus and other remedies also consistent with well-established rules governing collateral attack. If Congress intended such a distinction, it selected singularly inapt language to express it.

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[23] S. Rep. No. 486, 81st Cong., 1st Sess., 32 (1949); H. R. Rep. No. 491, 81st Cong., 1st Sess., 35 (1949).

[24] H. R. Rep. No. 491, *supra,* at 7. See also 95 Cong. Rec. 5721 (1949) (remarks of Rep. Brooks). It had been suggested in committee hearings that any restriction on the availability of habeas corpus would involve constitutional problems. Hearings on H. R. 2498 before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 799 (1949). Senator Kefauver, in discussing Art. 76, stated that "Congress, through its enactment, did not, and could not, . . . intend to take away the jurisdiction of the Supreme Court or of other courts in habeas corpus matters." 96 Cong. Rec. 1414 (1950).

Nor does the legislative history justify an interpretation of the language so at odds with its clear purport. As we have had occasion recently to repeat, "repeals by implication are disfavored," and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available. *Regional Rail Reorganization Act Cases,* 419 U. S. 102, 133–136 (1974). It is true, as petitioners urge, that the writ of habeas corpus occupies a position unique in our jurisprudence, the consequence of its historical importance as the ultimate safeguard against unjustifiable deprivations of liberty. We read the statements attending congressional consideration as addressing the particular concern that Art. 76 not be taken as affecting the availability of habeas corpus, a concern of special significance because of the vital interests the writ protects and because it is the most common mode of collateral relief from court-martial convictions. But an affirmative intent to preclude all other forms of collateral relief, on whatever ground, cannot be inferred from these scattered statements in the legislative history. Restraint on liberty, although perhaps the most immediately onerous, is not the only serious consequence of a court-martial conviction. Such convictions may result, for example, in deprivation of pay and earned promotion, and even in discharge or dismissal from the service under conditions that can cause lasting, serious harm in civilian life.[25]

This is not to say, of course, that for every such consequence there is a remedy in Art. III courts. That depends on whether the relief is sought in an action other-

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[25] See *Augenblick* v. *United States,* 180 Ct. Cl. 131, 142, 377 F. 2d 586, 592 (1967), rev'd on other grounds, 393 U. S. 348 (1969); *Kauffman* v. *Secretary of the Air Force,* 135 U. S. App. D. C. 1, 5, 415 F. 2d 991, 995 (1969), cert. denied, 396 U. S. 1013 (1970).

wise within the court's subject-matter jurisdiction, on a ground that recognizes the distinction between direct and collateral attack, and in a form that the court is able with propriety to grant. See Part III, *infra*. We also emphasize that the grounds upon which military judgments may be impeached collaterally are not necessarily invariable. For example, grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief. Lacking a clear statement of congressional intent one way or the other, the question whether a court-martial judgment properly may be deemed void—*i. e.*, without res judicata effect for purposes of the matter at hand—may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress.

But we are concerned here only with petitioners' broad jurisdictional argument, which we reject for the reasons stated above. We therefore reiterate the construction given the Art. 76 language in *Gusik* and accepted by other courts, including the Court of Military Appeals,[26] and accordingly hold that Art. 76 does not stand as a jurisdictional bar to Captain Councilman's suit.

III

Our holding that the District Court had subject-matter jurisdiction, assuming the requisite jurisdictional

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[26] In *United States* v. *Frischholz*, 16 U. S. C. M. A. 150, 151, 36 C. M. R. 306, 307 (1966), the Court of Military Appeals stated: "[Article 76] does not insulate a conviction from subsequent attack in an appropriate forum. At best it provides finality only as to interpretations of military law by this Court. . . . It has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved."

amount,[27] does not carry with it the further conclusion that the District Court properly could reach the merits of Councilman's claim or enjoin the petitioners from proceeding with the impending court-martial. There remains the question of equitable jurisdiction, a question concerned, not with whether the claim falls within the limited jurisdiction conferred on the federal courts, but with whether consistently with the principles governing equitable relief the court may exercise its remedial powers.[28]

In support of his prayer for an injunction, Councilman claimed that he would incur "great and irreparable damage in that he [might] be deprived of his liberty without due process of law. . . ." The presiding military judge had refused to dismiss the charges against Councilman, rejecting the argument that they were not service connected and that therefore the court-martial lacked jurisdiction to act on them. Thus, when the District Court intervened, there was no question that Councilman would be tried. But whether he would be convicted was a matter entirely of conjecture. And even if one supposed that Councilman's service-connection contention almost certainly would be rejected on any eventual military review, there was no reason to believe that his possible conviction inevitably would be affirmed.

It therefore appears that Councilman was "threatened with [no] injury other than that incidental to every criminal proceeding brought lawfully and in good faith." *Douglas* v. *City of Jeannette,* 319 U. S. 157, 164 (1943). Of course, there is inevitable injury—often of serious proportions—incident to any criminal prosecution. But when the federal equity power is sought to be invoked against state criminal prosecutions, this Court has

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[27] See n. 9, *supra.*

[28] 2 J. Moore, Federal Practice ¶ 2.08, p. 406 (2d ed. 1974).

held that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, [can]not by themselves be considered 'irreparable' in the special legal sense of that term." *Younger* v. *Harris,* 401 U. S., at 46. "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." *Stefanelli* v. *Minard,* 342 U. S. 117, 120 (1951). This maxim of equitable jurisdiction originated as a corollary to the general subordination of equitable to legal remedies, which in turn "may originally have grown out of circumstances peculiar to the English judicial system . . . ." *Younger* v. *Harris, supra,* at 44.[29] The history is familiar enough. But ancient lineage, particularly if sprung from circumstances no longer existent, neither establishes the contemporary utility of a rule nor necessarily justifies the harm caused by delay in the vindication of individual rights.

As to state criminal prosecutions, such justification has been found to reside in the peculiarly compelling demands of federalism and the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law . . . ." *Stefanelli* v. *Minard, supra,* at 120. The precise content of constitutional rights almost invariably turns on the context of fact and law in which they arise. State courts are quite as capable as federal courts of determining the facts, and they alone can define and interpret state law. Equally important, under Art. VI of the Constitution, state courts

[29] It has been suggested that the continuing subordination of equitable to legal remedies is justified "under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings . . . ." *Younger* v. *Harris,* 401 U. S., at 44. See O. Fiss, Injunctions 12 (1972). Whatever relevance the first of these justifications has in the *Younger* context, it has none here.

share with federal courts an equivalent responsibility for the enforcement of federal rights, a responsibility one must expect they will fulfill. These considerations of comity, the necessity of respect for coordinate judicial systems, have led this Court to preclude equitable intervention into pending state criminal proceedings unless the harm sought to be averted is "both great and immediate," of a kind that "cannot be eliminated by . . . defense against a single criminal prosecution." *Fenner* v. *Boykin,* 271 U. S. 240, 243 (1926); *Younger* v. *Harris, supra,* at 46. See *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). Precisely these considerations underlie the requirement that petitioners seeking habeas relief from state criminal convictions must first exhaust available state remedies: the federal courts are "not at liberty . . . to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land . . . ." *Ex parte Royall,* 117 U. S. 241, 252 (1886). See *Darr* v. *Burford,* 339 U. S. 200, 204 n. 10 (1950).

To some extent, the practical considerations supporting both the exhaustion requirement in habeas corpus and the federal equity rule barring intervention into pending state criminal proceedings except in extraordinary circumstances are similar to those that underlie the requirement of exhaustion of administrative remedies. *E. g., Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50–51 (1938). The latter rule, looking to the special competence of agencies in which Congress has reposed the duty to perform particular tasks, is based on the need to allow agencies to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agency's ultimate decision will

obviate the need for judicial intervention. *E. g., McKart* v. *United States,* 395 U. S. 185, 194–195 (1969); *Parisi* v. *Davidson,* 405 U. S. 34, 37 (1972).

These considerations apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings. But as in the case of state criminal prosecutions there is here something more that, in our view, counsels strongly against the exercise of equity power even where, under the administrative remedies exhaustion rule, intervention might be appropriate.[30] While the peculiar demands of federalism are not implicated, the deficiency is supplied by factors equally compelling. The military is "a specialized society separate from civilian society" with "laws and traditions of its own [developed] during its long history." *Parker* v. *Levy,* 417 U. S., at 743. Moreover, "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," *Toth* v. *Quarles,* 350 U. S. 11, 17 (1955). To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress.

In enacting the Code, Congress attempted to balance these military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be

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[30] See *Levy* v. *Corcoran,* 128 U. S. App. D. C. 388, 390, 389 F. 2d 929, 931 (opinion of Leventhal, J.), cert. denied, 389 U. S. 960 (1967). Cf. Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483, 496–499 (1969).

adjusted. As a result, Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges "completely removed from all military influence or persuasion," [31] who would gain over time thorough familiarity with military problems. See *Noyd* v. *Bond,* 395 U. S., at 694–695.

As we have stated above, judgments of the military court system remain subject in proper cases to collateral impeachment. But implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights. We have recognized this, as well as the practical considerations common to all exhaustion requirements, in holding that federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted. *Gusik* v. *Schilder,* 340 U. S. 128 (1950); *Noyd* v. *Bond, supra.*[32] The same principles are relevant to striking the balance governing the exercise of equity power. We hold that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.

Respondent seeks to avoid this result by pointing to the several military habeas cases in which this Court has not

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[31] H. R. Rep. No. 491, 81st Cong., 1st Sess., 7 (1949).

[32] In *Gusik* v. *Schilder,* 340 U. S., at 131–132, the Court drew an explicit analogy to the exhaustion requirement for federal habeas attacks on state criminal convictions. See *Gosa* v. *Mayden,* 413 U. S., at 711–712 (MARSHALL, J., dissenting).

required exhaustion of remedies in the military system before allowing collateral relief. *Toth* v. *Quarles, supra; Reid* v. *Covert,* 354 U. S. 1 (1957); *McElroy* v. *Guagliardo,* 361 U. S. 281 (1960). In those cases, the habeas petitioners were *civilians* who contended that Congress had no constitutional power to subject them to the jurisdiction of courts-martial. The issue presented concerned not only the military court's jurisdiction, but also whether under Art. I Congress could allow the military to interfere with the liberty of civilians even for the limited purpose of forcing them to answer to the military justice system. In each of these cases, the disruption caused to petitioners' civilian lives and the accompanying deprivation of liberty made it "especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd* v. *Bond, supra,* at 696 n. 8. The constitutional question presented turned on the status of the persons as to whom the military asserted its power. As the Court noted in *Noyd,* it "did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented." *Ibid.*[33]

Assuming, *arguendo,* that, absent incarceration or other deprivation of liberty, federal court intervention would be appropriate in cases like *Toth* and its progeny despite failure to exhaust military remedies, the considerations supporting such intervention are not applicable here. Councilman was on active duty when the charges against him were brought. There is no question that he is subject to military authority and in proper cases to disciplinary sanctions levied through the military justice system. We see no injustice in requiring respondent to

[33] See *United States ex rel. Guagliardo* v. *McElroy,* 104 U. S. App. D. C. 112, 114, 259 F. 2d 927, 929 (1958), aff'd, 361 U. S. 281 (1960).

submit to a system established by Congress and carefully designed to protect not only military interests but his legitimate interests as well. Of course, if the offenses with which he is charged are not "service connected," the military courts will have had no power to impose any punishment whatever. But that issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred. See *Relford* v. *U. S. Disciplinary Commandant*, 401 U. S. 355 (1971). More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts.[34]

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[34] *Dooley* v. *Ploger*, 491 F. 2d 608, 612–615 (CA4 1974); *Sedivy* v. *Richardson*, 485 F. 2d 1115, 1118–1121 (CA3 1973). See Nelson & Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn. L. Rev. 1, 50–52 (1969).

The separate opinion of MR. JUSTICE BRENNAN states:

"Military tribunals have no expertise whatever to bring to bear on the determination whether a common everyday practice carried on by civilians becomes service connected when carried on by servicemen." *Post*, at 764–765. Moreover, that opinion finds the record devoid of evidence "that use of marihuana in any amounts under any circumstances adversely affects a serviceman's performance of his duties." *Post*, at 769.

Although we do not address factual issues in this opinion, we note—in view of MR. JUSTICE BRENNAN's position—the Solicitor General's statement that "drug abuse is a far more serious problem in the military context than in civilian life." Brief for Petitioners on Merits 15. The seriousness of the problem is indicated by information presented before congressional committees to the effect that some

We have no occasion to attempt to define those circumstances, if any, in which equitable intervention into pending court-martial proceedings might be justified. In the circumstances disclosed here, we discern nothing that outweighs the strong considerations favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes.

Reversed.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment because I believe that Art. 76 of the UCMJ applies only to postjudgment attacks upon the proceedings of courts-martial and that the District Court should have dismissed the complaint on the basis of *Younger* v. *Harris,* 401 U. S. 37 (1971).

86,000 servicemen underwent some type of rehabilitation for drug abuse in fiscal years 1972 and 1973, and only 52% of these were able to return to duty after rehabilitation. *Id.*, at 17–18, citing Hearing on Review of Military Drug and Alcohol Programs before the Subcommittee on Drug Abuse in the Military Services of the Senate Committee on Armed Services, 93d Cong., 1st Sess., 109, 110 (1973). See also Hearings on Military Drug Abuse, 1971, before the Subcommittee on Alcoholism and Narcotics of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., 120–127 (1971). It is not surprising, in view of the nature and magnitude of the problem, that in *United States* v. *Beeker,* 18 U. S. C. M. A. 563, 565, 40 C. M. R. 275, 277 (1969), the Court of Military Appeals found that "use of marihuana and narcotics by military persons on or off a military base has special military significance" in light of the "disastrous effects" of these substances " 'on the health, morale and fitness for duty of persons in the armed forces.' "

We express no opinion whether the offense with which respondent in this case was charged is in fact service connected. But we have no doubt that military tribunals *do* have both experience and expertise that qualify them to determine the facts and to evaluate their relevance to military discipline, morale, and fitness.

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

I agree that Art. 76 of the Uniform Code of Military Justice, 10 U. S. C. § 876, does not limit the jurisdiction of federal civil courts to habeas corpus review of court-martial convictions. I therefore join Part II of the Court's opinion.

I dissent, however, from the Court's holding in Part III that, as applied to his challenge that the offense charged was not service connected, this serviceman must exhaust every avenue within the military for determination and review of that question, and that, until he does, "federal district courts must refrain from intervention, by way of injunction or otherwise." The Court imposes this restraint upon the exercise by the District Court of its conceded jurisdiction for reasons that clearly are not persuasive. Moreover, today's holding departs from an unbroken line of our decisions that—consistent with our basic constitutional tenet that subordinates the military to the civil authority—restricts military cognizance of offenses to the narrowest jurisdiction deemed absolutely necessary, and precludes expansion of military jurisdiction at the expense of the constitutionally preferred civil jurisdiction. *Toth* v. *Quarles,* 350 U. S. 11 (1955); *Reid* v. *Covert,* 354 U. S. 1 (1957); *McElroy* v. *Guagliardo,* 361 U. S. 281 (1960); *Noyd* v. *Bond,* 395 U. S. 683 (1969).

I

It is, of course, settled that federal district courts may not entertain even a habeas corpus application of a serviceman convicted of offenses raising no question of service connection until the serviceman has exhausted all available military remedies, *Noyd* v. *Bond, supra.* But our opinion in *Noyd* carefully distinguished situations presenting challenges to the jurisdiction of the military

over the persons charged, *e. g., Toth* v. *Quarles, supra; Reid* v. *Covert, supra; McElroy* v. *Guagliardo, supra.* We noted that in each of those cases the Court "vindicated complainants' claims without requiring exhaustion of military remedies," and that "[w]e did so . . . because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd, supra,* at 696 n. 8.

That statement precisely fits the situation presented by this case. The respondent serviceman raises "substantial arguments denying the right of the military to try [him] at all," and the Court utterly fails to suggest any special "expertise of military courts," including the Court of Military Appeals, that even approximates the far greater expertise of civilian courts in the determination of constitutional questions of jurisdiction. Thus there is compelled here the conclusion in favor of civilian court cognizance without prior exhaustion of military remedies that was reached in *Toth* v. *Quarles, Reid* v. *Covert,* and *McElroy* v. *Guagliardo.*

The Court provides no reasoned justification for its departure from these holdings in requiring exhaustion in this case.[1] The Court's failure is not surprising since plainly there is wholly lacking in military tribunals the

[1] The Court would distinguish *Toth, Reid,* and *McElroy* on the ground that civilians, not servicemen, challenged the military's jurisdiction. But *Noyd* v. *Bond* did not rely on that fact. Rather, we focused on the lack of expertise of military courts-martial to deal with federal jurisdictional and constitutional issues. "[W]e did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented." 395 U. S. 683, 696 n. 8 (1969).

qualification ordinarily relied on to justify the exhaustion requirement, namely, the know-how or "expertise" of an agency particularly knowledgeable in the determination of the same or like questions. Military tribunals simply have no special, if any, expertise in the determination of whether the offense charged to respondent was service connected.[2] Civilian courts may properly defer to military tribunals when cases involve "extremely technical provisions of the Uniform Code," *Noyd* v. *Bond, supra,* at 696, or where deference may avoid unnecessary friction because the serviceman may well prevail before the military authorities. But this case presents neither situation.

The offense charged here is not enmeshed in "technical provisions of the Uniform Code." On the contrary, it is a common everyday type of drug offense that federal courts encounter all over the country every day. The Court agrees that a drug transaction is not a service-connected offense merely because the participants are servicemen. Rather, the Court analogizes military tribunals to administrative agencies and imposes the exhaustion requirement familiar in agency cases—and it does so even though the question presented is a constitutional determination whether the military has any jurisdiction to try the serviceman at all. The mere suggestion of such an analogy is well nigh incredible. Military tribunals have no expertise whatever to bring to bear on the determination whether a common everyday practice carried on by civilians becomes service connected when

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[2] The Court's reliance upon decisions restraining federal-court intervention in state criminal proceedings is misplaced. *Ante,* at 754–757. Those decisions invoke considerations of comity, equity, and general principles of "Our Federalism" which counsel against interference by the federal judicial system with proceedings pending in a state judicial system having like competence to decide federal constitutional questions. Military tribunals plainly lack a comparable competence.

carried on by servicemen.[3] It is virtually hornbook law that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *O'Callahan* v. *Parker,* 395 U. S. 258, 265 (1969). For " 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " *Id.,* at 262. Dealing with the "nice subtleties of constitutional law" is, however, a (if not *the*) primary business of civilian federal judges. It baffles me therefore how the Court can conclude that courts-martial or other military tribunals can be assigned on grounds of expertise, in preference to civilian federal judges, the responsibility for constitutional decisionmaking.

The Court's grounding of its requirement of deference to the military on the notion that respondent may prevail on his claim that the offense was not service connected is equally baffling. Petitioners concede that "the holdings of the Court of Military Appeals with regard to the 'service connection' of various kinds of drug offenses suggest that such a challenge to court-martial jurisdiction would probably have been unsuccessful." Brief for Petitioners on Jurisdictional Issues 19. A cursory survey

[3] The Court pays deserved respect to the fairness of the military justice system, observing that one of its "critical element[s] . . . is the Court of Military Appeals consisting of civilian judges 'completely removed from all military influence or persuasion,' who would gain over time thorough familiarity with military problems," *ante,* at 758, and adding "the view that the military court system generally is adequate to, and responsibly will, perform its assigned task." *Ibid.* I agree, but "thorough familiarity with military problems" is not "thorough familiarity" with constitutional problems of jurisdiction. The problem presented by this case is not a traditional "military problem." It is a constitutional question whether the military has any jurisdiction whatever to try respondent for the offense charged. That is the type of question rarely confronted by the Court of Military Appeals and certainly even more rarely by other military tribunals, composed of other servicemen, and, at least in the case of courts-martial, convened only for a single case.

of decisions of the Court of Military Appeals suggests that petitioners might well have made a more positive concession. See *United States* v. *Rose,* 19 U. S. C. M. A. 3, 41 C. M. R. 3 (1969); *United States* v. *Beeker,* 18 U. S. C. M. A. 563, 40 C. M. R. 275 (1969); *United States* v. *Teasley,* 22 U. S. C. M. A. 131, 46 C. M. R. 131 (1973). One of the latest is *United States* v. *Sexton,* 23 U. S. C. M. A. 101, 48 C. M. R. 662 (1974), which held that off-post sales and transfers of marihuana, as in this case, by a serviceman to an undercover serviceman agent was service connected. That track record of the Court of Military Appeals clearly compels the conclusion that where "the highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as [respondent, he] should not be required to await a similar decision in his case." *United States ex rel. Guagliardo* v. *McElroy,* 104 U. S. App. D. C. 112, 114 n. 4, 259 F. 2d 927, 929 n. 4 (1958), aff'd, 361 U. S. 281 (1960).

I would conclude, therefore, that the Court of Appeals properly affirmed the action of the District Court in refusing to defer to the military, and in deciding the jurisdictional question of service connection. In that circumstance, I reach the merits. I conclude that the offense was not service connected and would affirm the Court of Appeals' affirmance of the District Court's injunction against respondent's court-martial.

II

In *Relford* v. *U. S. Disciplinary Commandant,* 401 U. S. 355, 365 (1971), this Court identified 12 factors that *O'Callahan* v. *Parker, supra,* held should be weighed in determining whether an offense is service connected:

> "1. The serviceman's proper absence from the base.

"2. The crime's commission away from the base.

"3. Its commission at a place not under military control.

"4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

"5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

"6. The absence of any connection between the defendant's military duties and the crime.

"7. The victim's not being engaged in the performance of any duty relating to the military.

"8. The presence and availability of a civilian court in which the case can be prosecuted.

"9. The absence of any flouting of military authority.

"10. The absence of any threat to a military post.

"11. The absence of any violation of military property.

. . . . .

"12. The offense's being among those traditionally prosecuted in civilian courts." 401 U. S., at 365.

In weighing these factors, service connection cannot be established in this case. Respondent was properly absent from the post; the offense occurred in respondent's off-post apartment, while he was off duty; it was committed in the United States in peacetime; there was no connection between respondent's military duties and the crime; the offense is one which is prosecuted regularly in civilian courts, and these courts were available; and there was no threat to the security of the post or its property, or any flouting of military authority.

It is true that the undercover serviceman was performing a duty assigned to him by his military superiors. But this does not eliminate factor 7, for petitioners candidly admit that "Skaggs, was in fact an undercover

agent and hence not a 'victim' any more than in a civilian prosecution it would matter that a drug sale was made to a plainclothes policeman who did not intend to use the drug." Brief for Petitioners on Merits 5. See also *Schroth* v. *Warner*, 353 F. Supp. 1032, 1044 (Haw. 1973), holding that a military undercover agent "is not performing a function which has any special military significance."

But the petitioners urge that military significance is present in "the bearing of the offense in question on the discipline, morale, and effectiveness of fighting forces," Brief for Petitioners on Merits 4, and that this suffices to establish, for two reasons, that the offense is service connected. First, respondent, an officer, knew that he was dealing with an enlisted man, and that "in the tightly-knit, rumor-prone society of the military, word will usually circulate among the enlisted ranks concerning an officer's participation in such unlawfulness," *id.*, at 5, causing a breakdown in military discipline, effectiveness, and morale. Second, "possession of marijuana and other proscribed drugs, whether off base or on," *id.*, at 6, tends to impair the effectiveness of the Armed Forces.[4]

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[4] Petitioners' arguments were effectively rejected only six years ago in *O'Callahan* v. *Parker*, 395 U. S. 258 (1969). There, the Government argued that because *Toth*, *Reid*, and *McElroy* all concluded that courts-martial were without jurisdiction to try nonmilitary personnel "no matter how intimate the connection between their offense and the concerns of military discipline," it follows "that once it is established that the accused is a member of the Armed Forces, lack of relationship between the offense and identifiable military interests is irrelevant to the jurisdiction of a court-martial." *Id.*, at 267. We held that although military status is essential to court-martial jurisdiction, "it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." *Ibid.*

Neither reason is supported by the record. Respondent was stationed at Fort Sill, and the offense occurred in the civilian community of Lawton, Okla., while respondent was off duty, and out of uniform. The petitioners introduced no evidence that respondent's actions in any way impaired or threatened to impair the discipline and effectiveness of military personnel at Fort Sill. Similarly, and related, the record is devoid of any evidence whatever that use of marihuana in any amounts under any circumstances adversely affects a serviceman's performance of his duties. Whatever might be the judgment of medical, psychological, and sociological research in these particulars, none was introduced in this record.

I would affirm.

IANNELLI ET AL. *v.* UNITED STATES

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

No. 73–64. Argued December 17, 1974—Decided March 25, 1975

Each of the eight petitioners, along with seven unindicted coconspirators and six codefendants, was charged with conspiring to violate (18 U. S. C. § 371), and with violating, 18 U. S. C. § 1955, a provision of the Organized Crime Control Act of 1970 (Act) aimed at large-scale gambling activities; and each petitioner was convicted and sentenced under both counts. The Court of Appeals affirmed, finding that prosecution and punishment for both offenses were permitted by a recognized exception to Wharton's Rule. Under that Rule an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as necessarily to require the participation of two persons for its commission, in such a case the conspiracy being deemed to have merged into the completed offense. *Held:* Petitioners were properly convicted and punished for violating 18 U. S. C. § 1955 and for conspiring to violate that statute, it being clear that Congress in enacting the Act intended to retain each offense as an independent curb in combating organized crime. Pp. 777–791.

(a) Traditionally conspiracy and the completed offense have been considered to constitute separate crimes, and this Court has recognized that a conspiracy poses dangers quite apart from the substantive offense. Wharton's Rule is an exception to the general principle that a conspiracy and the substantive offense that is its immediate end do not merge upon proof of the latter. Pp. 777–782.

(b) The Rule—which traditionally has been applied to offenses such as adultery where the harm attendant upon commission of the substantive offense is confined to the parties to the agreement and where the offense *requires* concerted criminal activity—has current vitality only as a judicial presumption to be applied in the absence of a contrary legislative intent. Pp. 782–786.

(c) Here such a contrary intent existed, for in drafting the Act Congress manifested its awareness of the distinct nature of a con-

spiracy and the substantive offenses that might constitute its immediate end, as well as a desire to provide a number of discrete weapons for the battle against organized crime. Pp. 786–789.

(d) The requirement of participation of "five or more persons" as an element of the § 1955 substantive offense reflects no more than an intent to limit federal intervention to cases where federal interests are substantially implicated, leaving to local law enforcement efforts the prosecution of small-scale gambling activities. Pp. 789–790.

477 F. 2d 999, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in Part II of which STEWART and MARSHALL, JJ., joined, *post*, p. 791. BRENNAN, J., filed a dissenting opinion, *post*, p. 798.

James E. McLaughlin argued the cause for petitioners. With him on the briefs were *Charles Alan Wright* and *Stanton D. Levenson.*

Mark L. Evans argued the cause for the United States. With him on the brief were *Solicitor General Bork* and *Assistant Attorney General Petersen.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case requires the Court to consider Wharton's Rule, a doctrine of criminal law enunciating an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed.

I

Petitioners were tried under a six-count indictment alleging a variety of federal gambling offenses. Each of the eight petitioners, along with seven unindicted coconspirators and six codefendants, was charged, *inter alia,*

with conspiring[1] to violate and violating 18 U. S. C. § 1955, a federal gambling statute making it a crime for five or more persons to conduct, finance, manage, supervise, direct, or own a gambling business prohibited by state law.[2] Each petitioner was convicted of both offenses,[3] and each was sentenced under both the substantive and conspiracy counts.[4] The Court of Appeals

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[1] The general conspiracy statute under which this action was brought, 18 U. S. C. § 371, provides in pertinent part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . ."

[2] Title 18 U. S. C. § 1955 (1970 ed. and Supp. III) provides in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

"(2) 'gambling' includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. . . ."

[3] Petitioner Iannelli additionally was convicted of mailing gambling paraphernalia, 18 U. S. C. § 1302, and using a fictitious name for the purpose of conducting unlawful bookmaking activities by means of the Postal Service. 18 U. S. C. § 1342.

[4] On the substantive counts, each petitioner was fined and sentenced to imprisonment and a subsequent term of probation. Each petitioner also was sentenced to an additional probationary period for the conspiracy conviction. Petitioner Iannelli's probationary

for the Third Circuit affirmed, finding that a recognized exception to Wharton's Rule permitted prosecution and punishment for both offenses, 477 F. 2d 999 (1973). We granted certiorari to resolve the conflicts caused by the federal courts' disparate approaches to the application of Wharton's Rule to conspiracies to violate § 1955. 417 U. S. 907 (1974). For the reasons now to be stated, we affirm.

II

Wharton's Rule owes its name to Francis Wharton, whose treatise on criminal law identified the doctrine and its fundamental rationale:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. . . . In other words, when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—*e. g.,* adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy." 2 F. Wharton, Criminal Law § 1604, p. 1862 (12th ed. 1932).[5]

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sentence is equal in length to that imposed for the substantive violations and is to be served concurrently. The probationary sentence imposed on each of the other petitioners for the conspiracy offense likewise is to be served concurrently with the probationary term imposed for the § 1955 violation. In their cases, however, the probationary term for the conspiracy offense exceeds that imposed for violation of § 1955.

[5] The current edition of Wharton's treatise states the Rule more simply:

"An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature

The Rule has been applied by numerous courts, state [6] and federal [7] alike. It also has been recognized by this Court,[8] although we have had no previous occasion carefully to analyze its justification and proper role in federal law.

The classic formulation of Wharton's Rule requires that the conspiracy indictment be dismissed before trial. Wharton's description of the Rule indicates that, where it is applicable, an indictment for conspiracy "cannot be maintained," *ibid.*, a conclusion echoed by Anderson's more recent formulation, see n. 5, *supra*, and by state-

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as to necessarily require the participation of two persons for its commission." 1 R. Anderson, Wharton's Criminal Law and Procedure § 89, p. 191 (1957).

[6] See, *e. g.*, *People* v. *Wettengel*, 98 Colo. 193, 198, 58 P. 2d 279, 281 (1935); *People* v. *Purcell*, 304 Ill. App. 215, 217, 26 N. E. 2d 153, 154 (1940); *Robinson* v. *State*, 184 A. 2d 814, 820 (Md. Ct. App. 1962).

[7] See, *e. g.*, *United States* v. *New York C. & H. R. R. Co.*, 146 F. 298, 303–305 (CC SDNY 1906), aff'd, 212 U. S. 481 (1909); *United States* v. *Zeuli*, 137 F. 2d 845 (CA2 1943); *United States* v. *Dietrich*, 126 F. 659, 667 (CC Neb. 1904); *United States* v. *Sager*, 49 F. 2d 725, 727 (CA2 1931).

[8] The Court's most complete description of the Rule appears in *Gebardi* v. *United States*, 287 U. S. 112, 121–122 (1932):

"Of this class of cases we say that the substantive offense contemplated by the statute itself involves the same combination or community of purpose of two persons only which is prosecuted here as conspiracy.... [T]hose decisions ... hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without coöperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statute." (Citations omitted.)

See also *Pinkerton* v. *United States*, 328 U. S. 640, 642 (1946); *United States* v. *Katz*, 271 U. S. 354, 355 (1926); *United States* v. *Holte*, 236 U. S. 140, 145 (1915).

ments of this Court as well, see *Gebardi* v. *United States,* 287 U. S. 112, 122 (1932); *United States* v. *Katz,* 271 U. S. 354, 355 (1926). Federal courts earlier adhered to this literal interpretation and thus sustained demurrers to conspiracy indictments. See *United States* v. *New York C. & H. R. R. Co.,* 146 F. 298, 303–305 (CC SDNY 1906), aff'd, 212 U. S. 481 (1909); *United States* v. *Dietrich,* 126 F. 659 (CC Neb. 1904). More recently, however, some federal courts have differed over whether Wharton's Rule requires initial dismissal of the conspiracy indictment. In *United States* v. *Greenberg,* 334 F. Supp. 1092 (ND Ohio 1971), and *United States* v. *Figueredo,* 350 F. Supp. 1031 (MD Fla. 1972), rev'd *sub nom. United States* v. *Vaglica,* 490 F. 2d 799 (CA5 1974), cert. pending *sub nom. Scaglione* v. *United States,* No. 73–1503, District Courts sustained preliminary motions to dismiss conspiracy indictments in cases in which the prosecution also charged violation of § 1955. In this case, 339 F. Supp. 171 (WD Pa. 1972), and in *United States* v. *Kohne,* 347 F. Supp. 1178, 1186 (WD Pa. 1972), however, the courts held that the Rule's purposes can be served equally effectively by permitting the prosecution to charge both offenses and instructing the jury that a conviction for the substantive offense necessarily precludes conviction for the conspiracy.

Federal courts likewise have disagreed as to the proper application of the recognized "third-party exception," which renders Wharton's Rule inapplicable when the conspiracy involves the cooperation of a greater number of persons than is required for commission of the substantive offense. See *Gebardi* v. *United States, supra,* at 122 n. 6. In the present case, the Third Circuit concluded that the third-party exception permitted prosecution because the conspiracy involved more than the five persons required to commit the substantive offense, 477 F.

2d 999, a view shared by the Second Circuit, *United States* v. *Becker,* 461 F. 2d 230, 234 (1972), vacated and remanded on other grounds, 417 U. S. 903 (1974).[9] The Seventh Circuit reached the opposite result, however, reasoning that since § 1955 also covers gambling activities involving more than five persons, the third-party exception is inapplicable. *United States* v. *Hunter,* 478 F. 2d 1019, cert. denied, 414 U. S. 857 (1973).

The Courts of Appeals are at odds even over the fundamental question whether Wharton's Rule ever applies to a charge for conspiracy to violate § 1955. The Seventh Circuit holds that it does. *Hunter, supra; United States* v. *Clarke,* 500 F. 2d 1405 (1974), cert. denied, *post,* p. 925. The Fourth and Fifth Circuits, on the other hand, have declared that it does not. *United States* v. *Bobo,* 477 F. 2d 974 (CA4 1973), cert. pending *sub nom. Gray* v. *United States,* No. 73–231; *United States* v. *Pacheco,* 489 F. 2d 554 (CA5 1974), cert. pending, No. 73–1510.

As this brief description indicates, the history of the application of Wharton's Rule to charges for conspiracy to violate § 1955 fully supports the Fourth Circuit's observation that "rather than being a rule, [it] is a concept, the confines of which have been delineated in widely diverse fashion by the courts." *United States* v. *Bobo, supra,* at 986. With this diversity of views in mind, we turn to an examination of the history and purposes of the Rule.

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[9] This appears to represent a departure from the Second Circuit's earlier view. The conspiracy charge dismissed in *United States* v. *Sager,* 49 F. 2d 725 (CA2 1931), involved agreements by more than two persons to commit substantive offenses that could have been consummated by only two. In that case, however, the Second Circuit determined that Wharton's Rule precluded indictment for both offenses.

III

A

Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act. See, *e. g., United States* v. *Feola, ante,* p. 671; *Pinkerton* v. *United States,* 328 U. S. 640, 644 (1946); *Braverman* v. *United States,* 317 U. S. 49, 53 (1942).[10] Unlike some crimes that arise in a single transaction, see *Heflin* v. *United States,* 358 U. S. 415 (1959); *Prince* v. *United States,* 352 U. S. 322 (1957), the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. *Pinkerton* v. *United States, supra,* at 643.[11] Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to

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[10] The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case. See *Direct Sales Co.* v. *United States,* 319 U. S. 703, 711–713 (1943). In some cases reliance on such evidence perhaps has tended to obscure the basic fact that the agreement is the essential evil at which the crime of conspiracy is directed. See Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 933–934 (1959). Nonetheless, agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact, see *Pereira* v. *United States,* 347 U. S. 1, 11 (1954), and from other substantive offenses as well. *Id.,* at 11–12.

[11] This was not always the case. Under the early common law, a conspiracy, which was a misdemeanor, was considered to merge into the completed felony that was its object. That rule was based on the significant procedural differences then existing between felony and misdemeanor trials. As the procedural distinctions diminished, the merger concept lost its force and eventually disappeared. See generally *Callanan* v. *United States,* 364 U. S. 587, 589–590 (1961), and sources cited therein.

do an act and for the subsequent accomplishment of that end. *Feola, supra; Callanan* v. *United States,* 364 U. S. 587 (1961); *Pinkerton, supra; Carter* v. *McClaughry,* 183 U. S. 365 (1902). Indeed, the Court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose. *Clune* v. *United States,* 159 U. S. 590 (1895).

The consistent rationale of this long line of decisions rests on the very nature of the crime of conspiracy. This Court repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense.

> "This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." *Callanan* v. *United States, supra,* at 593–594.

As Mr. Justice Jackson, no friend of the law of conspiracy, see *Krulewitch* v. *United States,* 336 U. S. 440, 445

(1949) (concurring opinion), observed: "The basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish." *Dennis* v. *United States,* 341 U. S. 494, 573 (1951) (concurring opinion). See also *United States* v. *Rabinowich,* 238 U. S. 78, 88 (1915).

B

The historical difference between the conspiracy and its end has led this Court consistently to attribute to Congress "a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated." *Ibid.; Callanan, supra,* at 594. Wharton's Rule announces an exception to this general principle.

The Rule traces its origin to the decision of the Pennsylvania Supreme Court in *Shannon* v. *Commonwealth,* 14 Pa. 226 (1850), a case in which the court ordered dismissal of an indictment alleging conspiracy to commit adultery that was brought after the State had failed to obtain conviction for the substantive offense. Prominent among the concerns voiced in the *Shannon* opinion is the possibility that the State could force the defendant to undergo subsequent prosecution for a lesser offense after failing to prove the greater. The *Shannon* court's holding reflects this concern, stating that "where concert is a constituent part of the act to be done, as it is in fornication and adultery, *a party acquitted of the major cannot be indicted of the minor.*" *Id.,* at 227–228.

Wharton's treatise first reported the case as one based on principles of double jeopardy, see F. Wharton, Criminal Law 198 (2d ed. 1852), and indicated that it was

limited to that context.[12] Subsequently, however, Wharton came to view the principle as one of broader application. The seventh edition of Wharton's treatise reported the more general rule which is repeated in similar form today. *Shannon* v. *Commonwealth* was said to be an application of the principle rather than its source. 2 F. Wharton, Criminal Law 634 (7th ed. 1874).

This Court's previous discussions of Wharton's Rule have not elaborated upon its precise role in federal law. In most instances, the Court simply has identified the Rule and described it in terms similar to those used in Wharton's treatise. But in *United States* v. *Holte,* 236 U. S. 140 (1915), the sole case in which the Court felt compelled specifically to consider the applicability of Wharton's Rule, it declined to adopt an expansive definition of its scope. In that case, Wharton's Rule was advanced as a bar to prosecution of a female for conspiracy to violate the Mann Act. Rejecting that contention, the Court adopted a narrow construction of the Rule that focuses on the statutory requirements of the substantive offense rather than the evidence offered to prove those elements at trial:

> "The substantive offence might be committed without the woman's consent, for instance, if she were drugged or taken by force. Therefore the decisions that it is impossible to turn the concurrence

[12] The sixth edition of Wharton's treatise reported the principle of *Shannon* v. *Commonwealth,* 14 Pa. 226 (1850), in the following manner:

"It has been recently held in Pennsylvania, that no indictment lies for a conspiracy between a man and a woman to commit adultery. It was said by the learned judge who tried the case, that where concert is the essential ingredient to the act, there is no conspiracy; but from the peculiar circumstances of the case, it is clear that this authority cannot be used beyond the class of cases to which it belongs." 3 F. Wharton, Criminal Law § 2321, p. 78 (6th ed. 1868).

necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them do not apply." *Id.*, at 145.

Wharton's Rule first emerged at a time when the contours of the law of conspiracy were in the process of active formulation. The general question whether the conspiracy merged into the completed felony offense remained for some time a matter of uncertain resolution.[13] That issue is now settled, however, and the Rule currently stands as an exception to the general principle that a conspiracy and the substantive offense that is its im-

[13] As previously noted, the general rule in the early common law was that the conspiracy merged with the felony upon consummation of the latter. Thus, an indictment that charged conspiracy in terms indicating that the felony actually had been committed was considered invalid. See H. Carson, The Law of Criminal Conspiracies and Agreements as Found in the American Cases, published in R. Wright, The Law of Criminal Conspiracies and Agreements 191 (1887). When it was clear that the felony had been perpetrated, Carson considered a conspiracy indictment to be "futile." *Ibid.*

Wharton's treatises likewise recognized the difficulty posed by the concept of merger of the felony and the conspiracy to commit that offense. The seventh edition of the treatise notes that "[t]he technical rule of the old common law pleaders, that a misdemeanor always sinks into a felony when the two meet" had been applied to the law of conspiracy. 2 F. Wharton, Criminal Law § 2294, p. 637 (7th ed. 1874). Wharton was more critical of this concept than Carson, however, observing that the rule was one "with very little substantial reason." *Ibid.* He discussed approvingly English and American cases that were beginning to reflect a narrow view of the merger doctrine in the law of conspiracy and to indicate that the conspiracy might be pursued as an independent offense even when the felony was committed. *Id.*, at 638–639. Wharton subsequently indicated that the proper sentencing disposition in a case of conviction for both offenses was to apportion the penalty between the two. 2 F. Wharton, Criminal Law § 1344, p. 198 (8th ed. 1880), quoting from *R.* v. *Button*, 11 Q. B. (Ad. & E., N. S.) *929, 116 Eng. Rep. 720 (1848).

mediate end do not merge upon proof of the latter. See *Pinkerton* v. *United States,* 328 U. S. 640 (1946). If the Rule is to serve a rational purpose in the context of the modern law of conspiracy, its role must be more precisely identified.

C

This Court's prior decisions indicate that the broadly formulated Wharton's Rule does not rest on principles of double jeopardy, see *Pereira* v. *United States,* 347 U. S. 1, 11 (1954); *Pinkerton, supra,* at 643–644.[14] Instead, it has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary. The classic Wharton's Rule offenses—adultery, incest, bigamy, duelling—are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense,[15] and the immediate conse-

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[14] In a proper case, this Court's opinion in *Ashe* v. *Swenson,* 397 U. S. 436 (1970), can afford protection against reprosecution following acquittal, a concern expressed by the Pennsylvania Supreme Court in *Shannon.*

[15] An exception to the Rule generally is thought to apply in the case in which the conspiracy involves more persons than are required for commission of the substantive offense. For example, while the two persons who commit adultery cannot normally be prosecuted both for that offense and for conspiracy to commit it, the third-party exception would permit the conspiracy charge where a "matchmaker"—the third party—had conspired with the principals to encourage commission of the substantive offense. See 1 R. Anderson, Wharton's Criminal Law and Procedure § 89, p. 193 (1957); *State* v. *Clemenson,* 123 Iowa 524, 526, 99 N. W. 139 (1904). The rationale supporting this exception appears to be that the addition of a third party enhances the dangers presented by the crime. Thus, it is thought that the legislature would not have intended to preclude punishment for a combination of greater dimension than that required to commit the substantive offense. See

quences of the crime rest on the parties themselves rather than on society at large. See *United States* v. *Bobo,* 477 F. 2d, at 987. Finally, the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert.[16] It cannot, for

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Comment, Gambling Under the Organized Crime Control Act: Wharton's Rule and the Odds on Conspiracy, 59 Iowa L. Rev. 452, 460 (1973); Note, Developments in the Law, *supra,* n. 10, at 956.

Our determination that Congress authorized prosecution and conviction for both offenses in all cases, see Part IV, *infra,* makes it unnecessary to decide whether the exception to Wharton's Rule could properly be applied to conspiracies to violate § 1955 involving more than five persons. See *supra,* at 775. We note, however, that the statute and its legislative history seem to suggest that it could not. By its terms, § 1955 reaches gambling activities involving "five or more persons." Moreover, the legislative history of the statute indicates that Congress assumed that it would generally be applied in cases in which more than the statutory minimum number were involved. See n. 21, *infra.* It thus would seem anomalous to conclude that Congress intended the substantive offense to subsume the conspiracy in one case but not in the other.

[16] Commentators who have examined the Rule have identified its major underlying premise to be that agreements to commit crimes to which it applies do not seem to present the distinct dangers that the law of conspiracy seeks to avert. See Comment, Gambling Under the Organized Crime Control Act, *supra,* n. 15, at 456; Note, Developments in the Law, *supra,* n. 10, at 955. The same consideration is also apparent in *Shannon* v. *Commonwealth,* 14 Pa., at 227. As Chief Justice Gibson there noted:

"If confederacy constituted conspiracy, without regard to the quality of the act to be done, a party might incur the guilt of it by having agreed to be the passive subject of a battery, which did not involve him in a breach of the peace. By such preconcerted encounters, it has been said, a reputation for prowess is sometimes purchased by gentlemen of the fancy. In the same way there might be a conspiracy to commit suicide by drowning or hanging in concert, according to the method of the Parisian roués, though no one could be indicted if the felony were committed. It may be said, such conspiracies are ridiculous and improbable. But nothing is

example, readily be assumed that an agreement to commit an offense of this nature will produce agreements to engage in a more general pattern of criminal conduct. Cf. *Callanan* v. *United States,* 364 U. S. 587 (1961); *United States* v. *Rabinowich,* 238 U. S. 78 (1915).

The conduct proscribed by § 1955 is significantly different from the offenses to which the Rule traditionally has been applied. Unlike the consequences of the classic Wharton's Rule offenses, the harm attendant upon the commission of the substantive offense is not restricted to the parties to the agreement. Large-scale gambling activities seek to elicit the participation of additional persons—the bettors—who are parties neither to the conspiracy nor to the substantive offense that results from it. Moreover, the parties prosecuted for the conspiracy need not be the same persons who are prosecuted for commission of the substantive offense. An endeavor as complex as a large-scale gambling enterprise might involve persons who have played appreciably different roles, and whose level of culpability varies significantly. It might, therefore, be appropriate to prosecute the owners and organizers of large-scale gambling operations both for the conspiracy and for the substantive offense but to prosecute the lesser participants only for the substantive offense. Nor can it fairly be maintained that agreements to enter into large-scale gambling activities are not likely to generate additional agreements to engage in other criminal endeavors. As shown in Part IV hereof, the legislative history of § 1955 provides documented testimony to the contrary.

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more ridiculous than a conspiracy to commit adultery—were we not bound to treat it with becoming gravity, it might provoke a smile—or more improbable than that the parties would deliberately postpone an opportunity to appease the most unruly of their appetites. These are subtile premises for a legal conclusion; but their subtilty is in the analysis of the principle, not in the manner of treating it."

Wharton's Rule applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because *both* require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter.[17] Thus, absent legislative intent to the

[17] The test articulated in *Blockburger* v. *United States,* 284 U. S. 299 (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain "whether each provision requires proof of a fact which the other does not." *Id.,* at 304. As *Blockburger* and other decisions applying its principle reveal, see, *e. g., Gore* v. *United States,* 357 U. S. 386 (1958); *American Tobacco Co.* v. *United States,* 328 U. S. 781, 788–789 (1946), the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. See *Gore* v. *United States, supra.* We think that the *Blockburger* test would be satisfied in this case. The essence of the crime of conspiracy is agreement, see, *e. g., Pereira* v. *United States,* 347 U. S., at 11–12; *Braverman* v. *United States,* 317 U. S. 49, 53 (1942); *Morrison* v. *California,* 291 U. S. 82, 92–93 (1934), an element not contained in the statutory definition of the § 1955 offense. In a similar fashion, proof of violation of § 1955 requires establishment of a fact not required for conviction for conspiracy to violate that statute. To establish violation of § 1955 the prosecution must prove that the defendants actually did "conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business." § 1955 (a). The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy. See

contrary, the Rule supports a presumption that the two merge when the substantive offense is proved.[18]

But a legal principle commands less respect when extended beyond the logic that supports it. In this case, the significant differences in characteristics and consequences of the kinds of offenses that gave rise to Wharton's Rule and the activities proscribed by § 1955 counsel against attributing significant weight to the presumption the Rule erects. More important, as the Rule is essentially an aid to the determination of legislative intent, it must defer to a discernible legislative judgment. We turn now to that inquiry.

IV

The basic purpose of the Organized Crime Control Act of 1970, Pub. L. No. 91–452, 84 Stat. 922, 923, was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." The content of the Act reflects the dedication with which the Legislature pursued this purpose. In addition to enacting provisions to facilitate the discovery and proof of organized criminal activities, Congress passed a number of relatively severe penalty provisions. For example, Title X, codified in 18 U. S. C. §§ 3575–

Yates v. *United States*, 354 U. S. 298, 333–334 (1957); *Braverman*, *supra*.

[18] We do not consider initial dismissal of the conspiracy charge to be required in such a case. When both charges are considered at a single trial, the real problem is the avoidance of dual punishment. This problem is analogous to that presented by the threat of conviction for a greater and a lesser included offense, and should be treated in a similar manner. 8 J. Moore, Federal Practice ¶ 31.03 (2d ed. 1975). Cf. Comment, Gambling Under the Organized Crime Control Act, *supra*, n. 15, at 461–464.

3578, identifies for harsher sentencing treatment certain "dangerous special offenders," among them persons who initiate, direct, or supervise patterns of criminal conduct or conspiracies to engage in such conduct, and persons who derive substantial portions of their income from those activities.[19] § 3575 (e).

Major gambling activities were a principal focus of congressional concern. Large-scale gambling enterprises were seen to be both a substantive evil and a source of funds for other criminal conduct. See S. Rep. No. 91–617, pp. 71–73 (1969).[20] Title VIII thus was enacted

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[19] Additionally, Title IX, codified in 18 U. S. C. §§ 1961–1968, seeks to prevent the infiltration of legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity. See § 1962. Title IX provides penalties for such conduct, § 1963, and also affords civil remedies for its prevention and correction, including provisions permitting United States district courts to require divestiture of interests so acquired and impose reasonable restrictions on the future investment activities of persons identified by the statute. § 1964.

[20] "Law enforcement officials agree almost unanimously that gambling is the greatest source of revenue for organized crime. It ranges from lotteries, such as 'numbers' . . . to off-track horse betting . . . . In large cities where organized criminal groups exist, very few of the gambling operators are independent of a large organization. . . .

"Most large-city gambling is established or controlled by organized crime members through elaborate hierarchies.

. . . . . .

"There is no accurate way of ascertaining organized crime's gross revenue from gambling in the United States. Estimates of the annual intake have varied from $7 to $50 billion. Legal betting at racetracks reaches a gross annual figure of almost $5 billion, and most enforcement officials believe that illegal wagering on horse races, lotteries, and sporting events totals at least $20 billion each year. Analysis of organized criminal betting operations indicates that the profit is as high as one-third of gross revenue—or $6 to $7 billion each year. While the Commission cannot judge the accuracy of

"to give the Federal Government a new substantive weapon, a weapon which will strike at organized crime's principal source of revenue: illegal gambling." *Id.*, at 71. In addition to declaring that certain gambling activities violate federal as well as state law, 18 U. S. C. § 1955, Title VIII provides new penalties for conspiracies to obstruct state law enforcement efforts for the purpose of facilitating the conduct of these activities. 18 U. S. C. § 1511.

In drafting the Organized Crime Control Act of 1970, Congress manifested its clear awareness of the distinct nature of a conspiracy and the substantive offenses that might constitute its immediate end. The identification of "special offenders" in Title X speaks both to persons who commit specific felonies during the course of a pattern of criminal activity and to those who enter into conspiracies to engage in patterns of criminal conduct. 18 U. S. C. § 3575 (e). And Congress specifically utilized the law of conspiracy to discourage organized crime's corruption of state and local officials for the purpose of facilitating gambling enterprises. 18 U. S. C. § 1511.[21]

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these figures, even the most conservative estimates place substantial capital in the hands of organized crime leaders." Report of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 188–189 (1967).

[21] The Senate initially contemplated a more sweeping prohibition. The Senate version of that provision declared it unlawful for "two or more persons to participate in a scheme to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business." S. 30, 91st Cong., 1st Sess., § 802 (1969). Discussions in the Senate hearings reveal that this language was intentionally chosen to obtain the broadest possible coverage for that provision. It was hoped that prohibiting "schemes" rather than "conspiracies" would enable the prosecution to obtain convictions in cases in which they might be unable to establish the requisite knowledge of the major members of the enterprise required for a conspiracy conviction. See Hear-

But the § 1955 definition of "gambling activities" pointedly avoids reference to conspiracy or to agreement, the essential element of conspiracy. Moreover, the limited § 1955 definition is repeated in identifying the reach of § 1511, a provision that specifically prohibits conspiracies. Viewed in this context, and in light of the numerous references to conspiracies throughout the extensive consideration of the Organized Crime Control Act, we think that the limited congressional definition of "gambling activities" in § 1955 is significant. The Act is a carefully crafted piece of legislation. Had Congress intended to foreclose the possibility of prosecuting conspiracy offenses under § 371 by merging them into prosecutions under § 1955, we think it would have so indicated explicitly. It chose instead to define the substantive offense punished by § 1955 in a manner that fails specifically to invoke the concerns which underlie the law of conspiracy.

Nor do we find merit to the argument that the congressional requirement of participation of "five or more persons" as an element of the substantive offense under § 1955 represents a legislative attempt to merge the conspiracy and the substantive offense into a single crime. The history of the Act instead reveals that this requirement was designed to restrict federal intervention to cases in which federal interests are substantially implicated. The findings accompanying Title VIII, see note

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ings on S. 30 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 397 (1969). The Senate version was criticized in hearings before the House Judiciary Subcommittee, where it was asserted that this language was too vague. See Hearings on S. 30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., ser. 27, p. 498 (1970). The bill reported from the House Judiciary Committee prohibited conspiracies rather than schemes, and that version subsequently was enacted into law.

following 18 U. S. C. § 1511, would appear to support the assertion of federal jurisdiction over all illegal gambling activities, cf. *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241, 258 (1964); *Katzenbach* v. *McClung,* 379 U. S. 294 (1964). Congress did not, however, choose to exercise its power to the fullest. Recognizing that gambling activities normally are matters of state concern, Congress indicated a desire to extend federal criminal jurisdiction to reach only "those who are engaged in an illicit gambling business of major proportions." S. Rep. No. 91–617, p. 73 (1969). It accordingly conditioned the application of § 1955 on a finding that the gambling activities involve five or more persons and that they remain substantially in operation in excess of 30 days or attain gross revenues of $2,000 in a single day. 18 U. S. C. § 1955 (b)(1)(iii) (1970 ed. and Supp. III).[22] Thus the requirement of "concerted activity" in § 1955 reflects no more than a concern to avoid federal prosecution of small-scale gambling activities which pose a limited threat to federal interests and normally can be combated effectively by local law enforcement efforts.

Viewed in the context of this legislation, there simply is no basis for relying on a presumption to reach a result so

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[22] Congress was aware that the imposition of this requirement would have the practical effect of limiting federal criminal jurisdiction to even larger gambling enterprises than those identified in § 1955.

"It is anticipated that cases in which this standard can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than this definition would indicate, . . . because it is usually possible to prove only a relatively small proportion of the total operations of a gambling enterprise. Thus, the legislation would in practice not apply to gambling that is sporadic or of insignificant monetary proportions. It will reach only those who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be a matter of national concern." S. Rep. No. 91–617, p. 73 (1969).

plainly at odds with congressional intent. We think it evident that Congress intended to retain each offense as an "independent curb" available for use in the strategy against organized crime. *Gore* v. *United States,* 357 U. S. 386, 389 (1958). We conclude, therefore, that the history and structure of the Organized Crime Control Act of 1970 manifest a clear and unmistakable legislative judgment that more than outweighs any presumption of merger between the conspiracy to violate § 1955 and the consummation of that substantive offense.

V

In expressing these conclusions we do not imply that the distinct nature of the crimes of conspiracy to violate and violation of § 1955 should prompt prosecutors to seek separate convictions in every case, or judges necessarily to sentence in a manner that imposes an additional sanction for conspiracy to violate § 1955 and the consummation of that end. Those decisions fall within the sound discretion of each, and should be rendered in accordance with the facts and circumstances of a particular case. We conclude only that Congress intended to retain these traditional options. Neither Wharton's Rule nor the history and structure of the Organized Crime Control Act of 1970 persuade us to the contrary.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

The eight petitioners in this case were tried, along with other codefendants, on a multiple-count indictment alleging the commission of various offenses in connection with gambling activities. Petitioners were convicted both of participating in an "illegal gambling business," 18 U. S. C. § 1955, and of conspiring to commit that offense, 18 U. S. C. § 371. On both statutory and constitutional

grounds, I would hold that the simultaneous convictions under both statutes cannot stand.

I

In my view the Double Jeopardy Clause forbids simultaneous prosecution under §§ 1955 and 371. Wharton's Rule in its original formulation was rooted in the double jeopardy concern of avoiding multiple prosecutions. *Carter* v. *McClaughry,* 183 U. S. 365, 394–395 (1902), and later cases [1] confine the double jeopardy protection to prohibiting cumulative punishment of offenses that are absolutely identical, but I would not extend those cases so as to permit both convictions in this case to stand.

The evidence against petitioners consisted largely of conversations that involved gambling transactions. The Government's theory of the case was that petitioner Iannelli was the central figure in the enterprise who, through other employees or agents, received bets, arranged payoffs, and parceled out commissions. The evidence established, in the Government's view, "syndicated gambling," the kind of activity proscribed by § 1955. The very same evidence was relied upon to establish the conspiracy—a conspiracy, apparently, enduring as long as the substantive offense continued, and provable by the same acts that established the violation of § 1955. Thus the very same transactions among the defendants gave rise to criminal liability under both statutes.

Under these circumstances, I would require the prosecutor to choose between § 371 and § 1955 as the instrument for criminal punishment. See my dissenting opinion in *Gore* v. *United States,* 357 U. S. 386, 395–397 (1958), where the Government brought three charges based on

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[1] *E. g., Morgan* v. *Devine,* 237 U. S. 632, 641 (1915); *Pinkerton* v. *United States,* 328 U. S. 640, 643–644 (1946); *Gore* v. *United States,* 357 U. S. 386 (1958).

a single sale of narcotics. To permit this kind of multiple prosecution is to place in the hands of the Government an arbitrary power to increase punishment. Here, as in *Gore,* I would require the prosecutor to observe the "'"fundamental rule of law that out of the same facts a series of charges shall not be preferred,"'" *id.,* at 396, quoting *Regina* v. *Elrington,* 9 Cox C. C. 86, 90, 1 B & S 688, 696 (1861).

II

Apart from my views of the Double Jeopardy Clause, I would reverse on the additional ground that Congress did not intend to permit simultaneous convictions under §§ 371 and 1955 for the same acts. The rule that a conspiracy remains separable from the completed crime, thus permitting simultaneous conviction for both, rests on the assumption that the act of conspiring presents special dangers the Legislature did not address in defining the substantive crime and that are not adequately checked by its prosecution.[2] But the rule of separability is one of construction only, an aid to discerning legislative intent. Wharton's Rule teaches that where the substantive crime itself is aimed at the evils traditionally addressed by the law of conspiracy, separability should not be found unless the clearest legislative statement demands it. In my view this case fits the rationale of Wharton's Rule, and there is no legislative

[2] See *United States* v. *Rabinowich,* 238 U. S. 78, 88 (1915):

"For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered."

statement justifying the inference that Congress intended to permit multiple convictions.

Title 18 U. S. C. § 1955, which creates the substantive offense, is aimed at a particular form of concerted activity. The provision was added by the Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922. This statute, as its title indicates, was directed at criminal activity carried out by large organizations, described by Congress as hierarchical in structure and as having their own system of law and independent enforcement institutions.[3] Most of the Act was devoted to altering the powers and procedures of law enforcement institutions to deal with existing offenses.[4] Only a few provisions added new prohibitions of primary conduct. Among these was Title VIII, which appears under the heading "Syndicated Gambling." Section 1955, included in Title VIII, prohibits participation in an "illegal gambling business," which is defined as one involving at least five persons who "conduct, finance, manage, supervise, direct, or own all or part of" the enterprise. Congress thought that federal law enforcement resources would be used to combat large enterprises, "so continuous and so substantial as to be a matter of national concern." [5]

Conviction under § 1955 satisfies, in my view, the social concerns that punishment for conspiracy is supposed to address. The provision was aimed not at the single unlawful wager but at "syndicated gambling." Congress viewed this activity as harmful because on such a scale

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[3] See S. Rep. No. 91–617, pp. 36–41 (1969) (hereinafter Senate Report).

[4] Title I authorized the convening of special grand juries, and Titles II through VI were aimed at enhancing the prosecutor's ability to obtain testimony of witnesses. Title X provides for the enhancement of sentences of designated offenders.

[5] Senate Report 73.

it was thought to facilitate other forms of illicit activity, one of the reasons traditionally advanced for the separate prosecution of conspiracies. Where § 1955 has been violated, the elements of conspiracy will almost invariably be found. The enterprises to which Congress was referring in § 1955 cannot, as a practical matter, be created and perpetuated without the agreement and coordination that characterize conspiracy. Section 1955 is thus most sensibly viewed as a statute directed at conspiracy in a particular context.

All this the majority seems to concede when it acknowledges a "presumption that the two [crimes] merge when the substantive offense is proved." *Ante,* at 786. But the majority concludes that simultaneous conviction is authorized because it is not "explicitly excluded." *Ante,* at 789. The majority thus implicitly concedes that the statute is silent on the matter of simultaneous conviction.[6] To infer from silence an intention to permit multiple punishment is, I think, a departure from the "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment," *Bell* v. *United States,* 349 U. S. 81, 83 (1955). I would adhere to that principle, which is but a specific application of the "ancient rule that a criminal statute is to be strictly construed," *Callanan* v. *United States,* 364 U. S. 587, 602 (1961) (STEWART, J., dissenting).

The majority suggests, *ante,* at 784, that § 371 may be

[6] By the application of 18 U. S. C. § 1511 a defendant may be found guilty both of violating § 1955 and of conspiracy to "obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business." An essential element of the narrowly defined § 1511 conspiracy is participation of an "official or employee" of a governmental unit. That requirement is not satisfied here, and thus § 1511 is inapplicable.

used to enhance the punishment for a § 1955 offense committed by "owners and organizers" of the enterprise, leaving prosecution under § 1955 alone for "lesser participants." But this is the Court's suggestion, not that of Congress. Congress recognized that syndicated operations would include persons having varying degrees of authority [7] and set a maximum penalty accordingly.

Congress did address the matter of sentence enhancement in Title X of the Act, codified in 18 U. S. C. §§ 3575–3578. These provisions authorize augmented punishment, to a maximum of imprisonment for 25 years, for felonies committed by a "dangerous special offender," § 3575 (b). Some of the procedural obstacles to sentence enhancement under these provisions, and the constitutional questions raised thereby, are now being litigated in the District Courts.[8] Nothing in Title X, however, supports the majority's position. "Special offender," as defined in § 3575 (e), includes a defendant convicted of a felony that was committed in furtherance of a "conspiracy . . . to engage in a pattern of conduct criminal under applicable laws of any jurisdiction . . . ." The application of this language to a § 1955 conviction is not readily apparent. Though "pattern of criminal conduct" is not defined in the statute, it is clear from the legislative history that Congress was focusing on repeated offenders.[9] An enterprise proscribed by § 1955 will involve repeated transactions; yet I have

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[7] See Senate Report 40–41; H. R. Rep. No. 91–1549, p. 53 (1970).

[8] See *United States* v. *Kelly*, 384 F. Supp. 1394 (WD Mo. 1974); *United States* v. *Duardi*, 384 F. Supp. 874 (WD Mo. 1974); *United States* v. *Edwards*, 379 F. Supp. 617 (MD Fla. 1974).

[9] Repeated offenders included both those having prior convictions and those who, by virtue of particular positions in a criminal organization, had committed previously undetected crimes. Senate Report 87–88; H. R. Rep. No. 91–1549, *supra*, at 61–62.

doubt that Congress intended that proof of a § 1955 offense alone would constitute a "pattern."

In any case, the special procedures of Title X are at odds with any notion that § 371 would be used to enhance punishment. Sentence may be increased under § 3575 only if the judge makes special findings that the defendant is "dangerous," § 3575 (f). And § 3575 (a) requires that "[i]n no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial . . . [or] be disclosed to the jury . . . ." The trial judge must state the reasons for enhancing sentence, § 3575 (b), and there are provisions for appellate review, § 3576. Among the purposes of Title X was "improving the rationality, consistency, and effectiveness of sentencing by testing concepts of limiting and guiding sentencing discretion," [10] a purpose undercut by authorizing the prosecutor to add charges under § 371. If, as the majority says, the statute is a "carefully crafted piece of legislation," *ante,* at 789, we should leave the differentiation of offenders to the scheme Congress expressly created.

Conspiracy, if charged in a § 1955 prosecution, should be charged as a preparatory offense that merges with the completed crime, and considered by the jury only if it first acquits the defendant of the § 1955 charge. The trial judge did allude to this use of the conspiracy charge,[11] and he did suggest that the jury might defer

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[10] Senate Report 83.

[11] The trial judge explained:

"It is theoretically possible that two people could conspire to form a business of five [participants] or more. It would be theoretically possible, too, that if the business were underway and only reached a total of four, . . . there would be no violation of Section 1955, but there still could be a conspiracy charge on the part of those who planned the agreement to ultimately make a business of five, even though they never actually reached five." Tr. 2505.

consideration of the conspiracy count until after deliberation of the § 1955 charge. But that was only a suggestion; the instructions permitted convictions on both charges. The error cannot be corrected merely by vacating the sentences on the conspiracy count; it requires a new trial. We so held in *Milanovich* v. *United States,* 365 U. S. 551 (1961), where the trial judge had permitted the jury to convict the defendant both of larceny and of receiving stolen goods. We held that simultaneous conviction of both offenses was impermissible and that the proper remedy was a new trial:

> "[T]here is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither)." *Id.,* at 555.

I would accordingly reverse these convictions.

MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join Part II of this opinion.

MR. JUSTICE BRENNAN, dissenting.

In *Bell* v. *United States,* 349 U. S. 81 (1955), this Court held that in criminal cases "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.,* at 83. I agree with MR. JUSTICE DOUGLAS that "[§] 1955 is . . . most sensibly viewed as a statute directed at conspiracy in a particular context," *ante,* at 795, and that the statute is at best silent on whether punishment for both the substantive crime and conspiracy was intended. In this situation, I would invoke *Bell*'s rule of lenity. I therefore dissent.

MTM, INC., ET AL. *v.* BAXLEY, ATTORNEY GENERAL OF ALABAMA, ET AL.

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

No. 73-1119. Argued December 10, 1974—Decided March 25, 1975

This Court has no jurisdiction over an appeal under 28 U. S. C. § 1253 from a three-judge District Court's order denying injunctive relief against enforcement of a state-court temporary injunction under the Alabama nuisance statute closing appellant's theater, where the three-judge court did not reach the merits of appellant's constitutional attack on the nuisance statute but instead based its order on the impropriety of federal intervention in the state proceedings.

365 F. Supp. 1182, vacated and remanded.

Robert Eugene Smith argued the cause for appellants. With him on the brief was *Gilbert H. Deitch.*

Herbert Jenkins, Jr., argued the cause and filed a brief for appellees.*

PER CURIAM.

The State of Alabama brought suit against appellant MTM in state court under the Alabama nuisance law, Ala. Code, Tit. 7, §§ 1081–1108 (1958),[1] seeking to enjoin the continued operation of a nuisance by MTM. It alleged that because of convictions for violations of

**Barbara Scott* and *James Bouras* filed a brief for the Motion Picture Association of America, Inc., as *amicus curiae* urging reversal.

[1] Nuisance is defined in § 1091 of this Act as "any place . . . upon which lewdness, assignation or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose." The remainder of the law consists of detailed procedural provisions governing the maintenance of a nuisance action.

local obscenity laws by the Pussycat Adult Theater, an enterprise owned by MTM in Birmingham, Ala., the theater constituted a nuisance under this statute.[2] After a hearing on the complaint, the state court issued a temporary injunction under the nuisance law, closing the theater.[3]

After issuance of the temporary injunction and while action on the request for a permanent injunction was pending in state court, appellant filed this action in the United States District Court for the Northern District of Alabama under the Civil Rights Act of 1871, 42 U. S. C. § 1983. It asked the federal court to enjoin enforcement of the state-court temporary injunction and to declare the Alabama nuisance law unconstitutional. Appellant claimed that the challenged statutory provisions and the state-court temporary injunction infringed its First, Fifth, and Fourteenth Amendment rights.

A three-judge federal court was convened pursuant to 28 U. S. C. § 2281 to consider appellant's complaint. Without resolving the constitutional merits of the complaint, the three-judge court dismissed the complaint without prejudice.[4] In view of the pendency of the state proceedings, the three-judge District Court applied

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[2] In addition to MTM, Mobile Bookstore was a plaintiff below and is an appellant in the immediate action. There are no material differences in the facts surrounding Mobile's participation in this action and those surrounding MTM's participation. For simplicity, MTM and Mobile are hereinafter referred to collectively as appellant.

[3] Although expedited appeal of the temporary injunction was available in state courts under Ala. Code, Tit. 7, §§ 757, 1057 (1958), appellant initiated no state-court appeal prior to the three-judge court's decision on the merits. At the request of appellant, hearing on the permanent injunction in state court was deferred pending outcome of the federal suit.

[4] The decision of the three-judge court is reported at 365 F. Supp. 1182.

the test enunciated in *Younger* v. *Harris,* 401 U. S. 37 (1971),[5] and concluded that federal intervention as requested by appellant would be improper.

Appellant has brought the case directly to this Court, asserting that jurisdiction exists under 28 U. S. C. § 1253, and arguing that the requirements of *Younger* v. *Harris, supra,* did not preclude relief on these facts. We noted probable jurisdiction over this appeal and set this case for argument in tandem with *Huffman* v. *Pursue, Ltd., ante,* p. 592. 415 U. S. 974 (1974).

Unless jurisdiction over this direct appeal from the three-judge court decision below is conferred by 28 U. S. C. § 1253, we are without authority to entertain it.[6] Section 1253 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

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[5] We, of course, express no view on the correctness of the lower court's holding.

[6] The question of jurisdiction over this appeal under 28 U. S. C. § 1253 was not raised in the Jurisdictional Statement, the Motion to Dismiss, or in the initial briefs filed in this case. At oral argument in light of our intervening decision in *Gonzalez* v. *Employees Credit Union,* 419 U. S. 90 (1974), handed down after the filing of briefs in this case and on the day that this case was orally argued, it was suggested from the bench that supplemental briefs addressed to the issue of jurisdiction under 28 U. S. C. § 1253 in light of *Gonzalez, supra,* be submitted. Appellant has submitted a brief attempting to distinguish *Gonzalez, supra,* which we have considered in resolving this jurisdictional question. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 305–306 (1962). While our normal practice under Rule 16 (6) of this Court has been to postpone notation of probable jurisdiction to the hearing on the merits where jurisdictional problems are presented, our intervening decision in *Gonzalez, supra,* squarely raised the jurisdictional question encountered here after we had noted probable jurisdiction in the case.

> action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Appellant argues that its complaint presented a "suit . . . required . . . to be heard" by a three-judge court [7] and that the dismissal of its complaint seeking injunctive relief constituted "an order . . . denying . . . an interlocutory or permanent injunction" within the meaning of § 1253.

In *Gonzalez* v. *Employees Credit Union,* 419 U. S. 90 (1974), we recently discussed in some detail the question of what constitutes an order "denying" injunctive relief for purposes of § 1253. There we held that direct appeal to this Court under § 1253 did not lie from the order of a three-judge court dismissing a complaint because of an absence of standing where the three-judge court did not reach the merits of the constitutional claim presented. Although our decision rested at least partially on the ground that a three-judge court was not "required" where the ground for decision below was an absence of standing, 419 U. S., at 100, we also explored the question of whether an order of a three-judge court "denies" an injunction, for purposes of § 1253, where there is no adverse resolution of the constitutional claims presented. Although noting that certain decisions of this Court and a literal reading of § 1253 might be taken to support the notion that a denial of injunctive relief on any basis by a three-judge court is within the purview of § 1253, we concluded that *stare decisis* is entitled to

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[7] There is no occasion for us to decide in this case the circumstances under which a single judge may dismiss the complaint without convening a three-judge court where the ground for such dismissal rests solely on the impropriety of federal intervention. See *Steffel* v. *Thompson,* 415 U. S. 452, 457 n. 7 (1974); *Gonzalez* v. *Employees Credit Union, supra,* at 100.

less than its usual weight in this area, and that "the opaque terms and prolix syntax" of this statute were not capable of literal reading. 419 U. S., at 96–97. In focusing on the question of whether direct review by this Court under § 1253 is available in the absence of a three-judge court decision resting on resolution of the constitutional merits of a complaint, we stated:

> "Mercantile argues that § 1253 should be read to limit our direct review of three-judge-court orders denying injunctions to those that rest upon resolution of the constitutional merits of the case. There would be evident virtues to this rule. It would lend symmetry to the Court's jurisdiction since, in reviewing orders granting injunctions, the Court is necessarily dealing with a resolution of the merits. While issues short of the merits—such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention—are often of more than trivial consequence, that alone does not argue for our reviewing them on direct appeal. Discretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals. Furthermore, the courts of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most mandatory appeals in summary fashion." 419 U. S., at 99.

The conflicting decisions of this Court on the question of whether § 1253 jurisdiction attaches where a three-judge federal court fails to reach the merits of a constitutional claim for injunctive relief do not provide a consistent answer to this question. Compare *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972), with *Mengelkoch* v. *Industrial Welfare Comm'n*, 393 U. S. 83 (1968); *Rosado* v. *Wyman*, 395 U. S. 826 (1969); *Mitchell* v. *Donovan*, 398 U. S. 427 (1970). See *Gonzalez* v.

Employees Credit Union, supra, at 95 n. 11; 9 J. Moore, Federal Practice ¶ 110.03 [3], pp. 76–79 (2d ed. 1973). It is certain that the congressional policy behind the three-judge court and direct-review apparatus—the saving of state and federal statutes from improvident doom at the hands of a single judge—will not be impaired by a narrow construction of § 1253. A broad construction of the statute, on the other hand, would be at odds with the historic congressional policy of minimizing the mandatory docket of this Court in the interest of sound judicial administration. *Phillips* v. *United States,* 312 U. S. 246, 250–251 (1941); *Gonzalez* v. *Employees Credit Union, supra,* at 98.

In light of these factors, we conclude that a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.

In the instant case, the three-judge court below did not reach the merits of appellant's constitutional attack on the Alabama statute and instead based its order on the impropriety of federal intervention under our decision in *Younger* v. *Harris,* 401 U. S. 37 (1971). In such circumstances, we are without jurisdiction to consider this appeal. The correctness of the application of *Younger* on these facts by the District Court is for the Court of Appeals to determine. Accordingly, we vacate the order before us and remand this case to the District Court so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals.[8]

It is so ordered.

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[8] See *Stamler* v. *Willis,* 393 U. S. 407 (1969); *Mitchell* v. *Donovan,* 398 U. S. 427, 431 (1970).

MR. JUSTICE WHITE, concurring in the result.

The Court holds that dismissing a suit on *Younger* v. *Harris,* 401 U. S. 37 (1971), grounds is not an order denying an injunction for the purposes of 28 U. S. C. § 1253 and is therefore not appealable directly to this Court, even assuming that the order could be issued only by a three-judge court. I agree with the result but not with this mode of achieving it.

If only a three-judge court may order such a dismissal, I have great difficulty in excluding such an order from the reach of the plain terms of § 1253. The sole justification for so manhandling the language of the section is to avoid our hearing a direct appeal on a nonconstitutional issue of federal law that has little if any connection with the reasons for requiring either three-judge courts or direct review of their decisions. That procedure was adopted to protect state statutes from improvident injunctions issued by a single federal judge on federal constitutional grounds. The more straightforward approach to this case would be to hold that decisions on issues other than requests for injunctive relief challenging the constitutionality of state statutes need not be made by three judges but rather are to be made or deemed to be made by single-judge courts whose decisions are appealable only to the courts of appeals. Proceeding in this manner would require no more than construing 28 U. S. C. §§ 2281 and 2284 (3) and (4), in the light of their original purpose, as applying only to orders granting or denying interlocutory or permanent injunctions where the constitutionality of state statutes is involved.

This approach may appear to be at odds with *Idlewild Liquor Corp.* v. *Epstein,* 370 U. S. 713 (1962). There the Court held that a three-judge court is required where a statute was challenged on constitutional grounds but where a single judge ordered abstention pending presen-

tation of the issues to a state court. The court ruled that as long as the constitutional issue was substantial, a basis for equitable relief was at least alleged in the complaint, and the other requirements for three-judge-court jurisdiction were satisfied, a three-judge court must be convened. But even within this holding, if it appears on the face of the complaint that there is no ground for equitable relief, there would be no necessity for convening a three-judge court. A single judge should be able to dismiss such a case, therefore, if the pleadings show that there is litigation pending in the state court in which the constitutional challenge could be presented and nothing is alleged to excuse federal intervention.[1]

Even if grounds for equitable relief are alleged in a complaint, a single judge should be able to rule on a motion to dismiss based on *Younger* v. *Harris* grounds. Much water has gone over the dam since *Idlewild* was decided. For one thing, in *Swift & Co.* v. *Wickham,* 382 U. S. 111 (1965), the Court made very plain that the three-judge-court requirement applied only to injunction suits depending entirely upon a substantive provision of the Constitution; injunctions by a single judge could be granted or denied where the claim of invalidity rested on a conflict with a federal statute. In *Swift,* the "statutory" claim was joined with the constitutional issue, but

[1] Even on the Court's own terms, *Idlewild* is not a strong reason for its reluctance to say that a three-judge court was not required here. *Idlewild* concerned abstention under *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496 (1941). Under *Pullman* abstention, the federal court retains jurisdiction while the state-law issues are adjudicated in state court, and therefore no relief has been finally denied in federal court. In contrast to that deferral of relief, *Younger* v. *Harris,* 401 U. S. 37 (1971), abstention mandates dismissal of the federal action. It is straining the ordinary meaning of words to say that requested injunctive relief has not been denied in such a situation.

the latter was deemed frivolous, leaving only the statutory issue for which three judges were not required. But in *Hagans* v. *Lavine,* 415 U. S. 528, 543–545 (1974), we held that even where the statutory claim is joined with a substantial constitutional claim, the former could be, and should be, decided first by a single judge.

The plain import of these cases is that three judges are not required merely because a complaint states a cause of action for an injunction based on a constitutional challenge to a state statute. All non-three-judge-court issues may be sorted out and tried by a single judge. Cases like *Idlewild* are derelicts and should be expressly cleared from the scene.[2]

Gonzalez v. *Employees Credit Union,* 419 U. S. 90 (1974), has shown the way and I would follow its lead. This is especially desirable in this case; for the result of the Court's holding is to require a three-judge court to pass on *Younger* v. *Harris* issues *and* to direct appeals from those orders to the court of appeals, where they would normally be heard again by three judges. This is an exorbitant expenditure of judicial manpower, and without reason in light of our cases.

MR. JUSTICE DOUGLAS, dissenting.

Like my Brother WHITE, I have great difficulty understanding how it is possible, within the plain terms of 28 U. S. C. § 1253, to avoid a direct appeal to this Court from a dismissal which is required to be made by a district court of three judges. The Court does not decide whether one or three judges would be required for the disposition made below. Rather, it concludes that direct appeal to this Court under § 1253 lies only from the denial of injunctive relief by a three-judge court which

[2] To the extent that *Steffel* v. *Thompson,* 415 U. S. 452, 457 n. 7 (1974), suggests the contrary in dictum, it should not be followed.

"rests upon resolution of the merits of the constitutional claim presented below." *Ante,* at 804.

I could at least concur in the result if I believed that a single judge had the power to dismiss based on *Younger* v. *Harris,* 401 U. S. 37 (1971), grounds, but I have my doubts about that proposition as well. Recently the Court's hostility to three-judge courts has led it to restrict the need for such courts. See *Gonzalez* v. *Employees Credit Union,* 419 U. S. 90 (1974); *Hagans* v. *Lavine,* 415 U. S. 528 (1974). I joined in those decisions, but I have come to the conclusion that the Court is going too far. I therefore must register my dissent.

Many have argued in recent years that the three-judge court is no longer needed, that it has outlived its original purposes and should therefore be eliminated as a needless waste of judicial resources.[1] Whether the three-judge court is any longer needed for the reasons which led to its creation I do not know. But I note that at least some observers believe the three-judge court to be an important institution for litigants such as civil rights and welfare plaintiffs. Three judges may well display more sensitivity to national policies and perspectives than would a single judge, and when three judges decide in favor of a minority or an unpopular group their decision is likely to inspire more respect than would the decision of a single judge.[2]

I do not know how these various factors should be

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[1] See, *e. g.,* Statement of Charles Alan Wright, Hearings on S. 1876 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 92d Cong., 2d Sess., 763, 773 (1972).

[2] See Hearing on S. 271 and H. R. 8285 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess., 141–151 (1973); Note, The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships, 72 Yale L. J. 1646, 1652–1653 (1963).

weighed. Perhaps the three-judge-court system, along with direct review here, should be eliminated or altered in a major way; perhaps not. Under the Constitution this decision is one for the Congress and not the courts.[3] Moreover, there are practical reasons to avoid judicial usurpation of power over jurisdiction. Under the law as currently interpreted substantial difficulties can arise as to whether initial decisions should be made by a single judge or three judges and as to whether appeals should be to the courts of appeals or to this Court.[4] A case can be split into pieces, making it difficult for courts to resolve issues in a way which takes into account all relevant aspects of the lawsuit. See *Parks* v. *Harden,* 504 F. 2d 861, 865–867 (CA5 1974). We should not encourage this kind of fragmentation in the name of judicial economy, for it will ultimately lead to much delay and duplication of effort.

To some extent the confusion surrounding three-judge courts is the fault of the statutory scheme, but I think that much of the blame must be placed on this Court. What is the status of *Idlewild Liquor Corp.* v. *Epstein,* 370 U. S. 713 (1962), after today's decision? Perhaps *Idlewild* should be distinguished or overruled, as my Brother WHITE urges, but I remain unconvinced. I think we would do better to leave settled as many principles as we reasonably can in this troubled area, and I certainly do not think that we help matters by twisting

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[3] U. S. Const., Art. III, §§ 1 and 2. Congress is aware of the three-judge-court issue, as is illustrated by its recent actions in this area. See Antitrust Procedures and Penalties Act, Pub. L. No. 93–528, 88 Stat. 1706 (1974); Act of Jan. 2, 1975, Pub. L. No. 93–584, 88 Stat. 1917.

[4] See H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 967–974 (2d ed. 1973); 9 J. Moore, Federal Practice ¶ 110.03 [3] (2d ed. 1973); Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964).

the language of § 1253 in the way the majority has done here.

I would reverse the decision below for the reasons given in *Huffman* v. *Pursue, Ltd., ante,* p. 613 (dissenting opinion), and I would remand the case for consideration of appellant's constitutional claims.

Reporter's Note

The next page is purposely numbered 901. The numbers between 810 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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ORDERS FROM JANUARY 27 THROUGH MARCH 31, 1975

JANUARY 27, 1975 *

Dismissal Under Rule 60

No. 74–411. SHROPSHIRE *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 498 F. 2d 137.

Affirmed on Appeal

No. 74–472. NORTH CENTRAL TRUCK LINES, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 384 F. Supp. 1188.

No. 74–602. PORT ROYAL MARINE CORP. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. S. D. Ga. Reported below: 378 F. Supp. 345.

No. 74–481. VIRGINIA *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. Reported below: 386 F. Supp. 1319.

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

I dissent from the Court's summary affirmance of judgment of the District Court for the District of Columbia, which denied Virginia's request to be exempted from coverage of the Voting Rights Act of 1965. Although the court agreed that Virginia had made a prima facie case for entitlement to relief, it nevertheless concluded that the continued use until 1965 of a minimal literacy requirement had the effect of discriminating on the basis

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

of race. The question of whether Virginia should remain subject to the extensive consequences of continuing federal oversight under the Act, in a case where the conceded prima facie showing suggests the absence of any demonstrable need for such oversight, warrants plenary consideration by this Court. This is especially true in view of the dubious relevance of the grounds relied upon by the District Court to overcome Virginia's prima facie showing.* The fact that under the language of the present Act Virginia may well escape from federal tutelage sometime this year makes the case of less importance to her than it otherwise might be. But while this would be a sound reason for denying certiorari, it does not justify the Court's summary affirmance of the judgment of the District Court.

Appeals Dismissed

No. 73–5804. GILBERT *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of substantial federal

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*The only "literacy test" employed in Virginia was a requirement that a person wishing to register to vote "make application to register in his own handwriting, without aid, suggestion, or memorandum," using for this purpose a standard, relatively simple form. No literacy test of any kind has been required since 1965. The District Court believed that it could infer that the Virginia requirement had a discriminatory effect in 1963–1965 because the registration rate of Negro citizens was 10% lower than the rate among whites. But there was a differential of 11.5% in the Nation as a whole in 1966, the year following passage of the Act. U. S. Bureau of the Census, Current Population Reports, Series P–20, No. 208 (1970).

The residual impact of segregated schools, also relied upon by the Court of Appeals, is a condition not peculiar to Virginia or even to the limited number of States covered by the Act. If the consequences of segregated education were the justification for the Act, it would have embraced all of the substantial number of States in various sections of the country which have segregated schools. See, *e. g., Milliken* v. *Bradley,* 418 U. S. 717 (1974); *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973).

question. See *Daniel* v. *Louisiana, ante,* p. 31. Reported below: 286 So. 2d 345.

No. 73–6598. STUBBLEFIELD *v.* TENNESSEE. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question. See *Daniel* v. *Louisiana, ante,* p. 31.

No. 74–5280. DEVALL ET UX. *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. See *Daniel* v. *Louisiana, ante,* p. 31. Reported below: 296 So. 2d 802.

No. 74–254. SPANNAUS, ATTORNEY GENERAL OF MINNESOTA, ET AL. *v.* HODGSON ET AL. Appeal from D. C. Minn. dismissed for want of jurisdiction. An order granting only a declaratory judgment may not be appealed to this Court under 28 U. S. C. § 1253. *Mitchell* v. *Donovan,* 398 U. S. 427 (1970). It is of no consequence that a preliminary injunction was continued in effect until determination of this appeal, since no appeal was taken from the preliminary injunction. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.* Reported below: 378 F. Supp. 1008.

No. 74–613. CHAMBER OF COMMERCE OF THE UNITED STATES *v.* FRANCIS ET AL. Appeal from D. C. Md. Motion of appellee Francis for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Reported below: 379 F. Supp. 78.

No. 74–681. ALEXANDER ET AL. *v.* D'ALLESANDRO. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–693. MAHONEY ET AL. *v.* BOARD OF APPEALS OF WINCHESTER ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: —— Mass. ——, 316 N. E. 2d 606.

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*See also note, *supra,* p. 901.

Vacated and Remanded on Appeal

No. 73–678. GALLOGLY ET AL. *v.* LARSEN. Appeal from D. C. R. I. Judgment vacated and case remanded with directions to dismiss the cause as moot. See *Sosna* v. *Iowa,* 419 U. S. 393 (1975), and *United States* v. *Munsingwear,* 340 U. S. 36 (1950). Reported below: 361 F. Supp. 305.

No. 73–1248. SOUTH DAKOTA ET AL. *v.* MCCAY ET AL. Appeal from D. C. S. D. Judgment vacated and case remanded with directions to dismiss the cause as moot. See *Sosna* v. *Iowa,* 419 U. S. 393 (1975), and *United States* v. *Munsingwear,* 340 U. S. 36 (1950). Reported below: 366 F. Supp. 1244.

Miscellaneous Orders

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (Louisiana Boundary Case). Exceptions to Report of Special Master set for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order.* [For earlier orders herein, see, *e. g.,* 419 U. S. 990.]

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Exceptions to Report of Special Master set for oral argument and a total of four hours allotted for that purpose. [For earlier orders herein, see, *e. g.,* 419 U. S. 1102.]

No. 73–1701. UNITED STATES *v.* NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 419 U. S. 822.] Motion of the Solicitor General for additional time to permit the Securities and Exchange Commission to participate in oral argument as *amicus curiae* in support of appellees granted and 15 minutes allotted for that purpose. Appellant also allotted 15 additional minutes for oral argument.

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*See also note, *supra,* p. 901.

No. 73–1869. BEER ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 419 U. S. 822.] Motion of appellees Jackson et al. to dismiss appeal for lack of prosecution denied.

No. 73–2050. UNITED STATES *v.* ORTIZ; and

No. 73–6848. BOWEN *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 419 U. S. 824.] Motion of the Solicitor General to consolidate cases for oral argument granted and a total of one and one-half hours allotted for oral argument. Motion for appointment of new counsel in No. 73–2050 granted. It is ordered that Charles M. Sevilla, Esquire, of San Diego, Cal., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case, and John J. Cleary, Esquire, is hereby relieved of his prior appointment.

No. 74–70. GOLDFARB ET UX. *v.* VIRGINIA STATE BAR ET AL. C. A. 4th Cir. [Certiorari granted, 419 U. S. 963.] Motion of the Solicitor General for additional time to participate in oral argument as *amicus curiae* granted and 15 minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.*

No. 74–872. NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS *v.* UNITED STATES. Appeal from D. C. D. C. Motion of appellant for expedited consideration denied. Reported below: 389 F. Supp. 1193.

No. 74–723. ALBRIGHT, ADMINISTRATOR *v.* WEBER, U. S. DISTRICT JUDGE, ET AL.; and

No. 74–5701. CLARK *v.* DUMBAULD, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

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*See also note, *supra*, p. 901.

No. 74–5576. BROWN *v.* BRITT, WARDEN, ET AL.;

No. 74–5758. WOODELL *v.* PLOWFIELD, SHERIFF;

No. 74–5771. FREEMAN *v.* HAVENER, CORRECTIONAL SUPERINTENDENT; and

No. 74–5801. DONNELLY ET AL. *v.* DONNELLY ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 74–878. NATIONAL LEAGUE OF CITIES ET AL. *v.* BRENNAN, SECRETARY OF LABOR; and

No. 74–879. CALIFORNIA *v.* BRENNAN, SECRETARY OF LABOR. Appeals from D. C. D. C. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 406 F. Supp. 826.

Certiorari Granted

No. 74–712. UNITED STATES *v.* BORNSTEIN ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 504 F. 2d 368.

No. 73–2066. NATIONAL INDEPENDENT COAL OPERATORS' ASSN. ET AL. *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir.; and

No. 74–521. MORTON, SECRETARY OF THE INTERIOR *v.* DELTA MINING, INC., ET AL. C. A. 3d Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 73–2066, 161 U. S. App. D. C. 68, 494 F. 2d 987; No. 74–521, 495 F. 2d 38.

No. 74–18. FISHER ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir.; and

No. 74–611. UNITED STATES ET AL. *v.* KASMIR ET AL. C. A. 5th Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 74–18, 500 F. 2d 683; No. 74–611, 499 F. 2d 444.

No. 74–676. ESTELLE, CORRECTIONS DIRECTOR *v.* WILLIAMS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 500 F. 2d 206.

Certiorari Denied. (See also No. 74–681, *supra.*)

No. 73–1398. LEICHMAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 286 So. 2d 649.

No. 73–1799. LAWSON *v.* EDWARDS, CORRECTIONAL SUPERINTENDENT, ET AL.; and

No. 73–1800. QUICK *v.* HARRIS, SHERIFF. Sup. Ct. Va. Certiorari denied. Reported below: No. 73–1800, 214 Va. 632, 202 S. E. 2d 869.

No. 73–2065. CONCORDIA PARISH SCHOOL BOARD *v.* DAVIS. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 8.

No. 73–6151. BUTLER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 231 Ga. 276, 201 S. E. 2d 448.

No. 73–6317. DAVIS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 284 So. 2d 896.

No. 73–6849. CAIZZA *v.* CAIZZA. Sup. Ct. Fla. Certiorari denied. Reported below: 291 So. 2d 569.

No. 74–190. MARSHALL ET AL. *v.* GAVIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1371.

No. 74–272. SEMINOLE NATION OF OKLAHOMA *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 655, 498 F. 2d 1368.

No. 74–289. HALE HOSPITAL ET AL. *v.* DOE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 500 F. 2d 144.

No. 74–395. NORMAN ET AL. *v.* MISSOURI PACIFIC RAILROAD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 497 F. 2d 594.

No. 74–412. BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY ET AL. *v.* HIGGINBOTHAM, U. S. DISTRICT JUDGE. C. A. 3d Cir. Certiorari denied.

No. 74–508. CALIFORNIA HIGHWAY COMMISSION, DEPARTMENT OF PUBLIC WORKS, ET AL. *v.* KEITH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 506 F. 2d 696.

No. 74–557. LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS *v.* HIGGINBOTHAM, U. S. DISTRICT JUDGE. C. A. 3d Cir. Certiorari denied.

No. 74–650. CHARLES SCHNEIDER & CO., INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 500 F. 2d 148.

No. 74–661. SECURITIES AND EXCHANGE COMMISSION *v.* COFFEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 1304.

No. 74–675. NORMAND *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 298 So. 2d 823.

No. 74–678. ELLIS, TRUSTEE, ET AL. *v.* POWERS ET UX. C. A. 9th Cir. Certiorari denied.

No. 74–683. LENSKE *v.* OREGON STATE BAR. Sup. Ct. Ore. Certiorari denied. Reported below: 269 Ore. 146, 523 P. 2d 1262.

No. 74–688. ALLEN ET AL. *v.* RAMPEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 501 F. 2d 1090.

No. 74–696. Societé de Construction Mecaniques du Bugey et al. *v.* Bell Equipment Corp. et al. C. A. 3d Cir. Certiorari denied.

No. 74–708. Sizemore *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 308 N. E. 2d 400.

No. 74–729. Georgia-Pacific Corp. *v.* Workmen's Compensation Appeals Board et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5198. Tritz *v.* Montana. Sup. Ct. Mont. Certiorari denied. Reported below: 164 Mont. 344, 522 P. 2d 603.

No. 74–5318. Mastracchio *v.* Ricci et al. C. A. 1st Cir. Certiorari denied. Reported below: 498 F. 2d 1257.

No. 74–5367. Smith *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 20 Md. App. 577, 318 A. 2d 568.

No. 74–5419. Watkins *v.* United States;
No. 74–5429. Tanner *v.* United States; and
No. 74–5445. Pipkin *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 74–5423. Gereau et al. *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 502 F. 2d 914.

No. 74–5424. Sanchell *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 192 Neb. 380, 220 N. W. 2d 562.

No. 74–5426. Smith *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 74–5431. Greene *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 497 F. 2d 1068.

No. 74–5444. WILSON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 17 Ore. App. 375, 521 P. 2d 1317.

No. 74–5449. OJEDA-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5469. MONTGOMERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 503 F. 2d 55.

No. 74–5487. GILMORE *v.* HOGAN, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 74–5489. CLARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 499 F. 2d 889.

No. 74–5505. CONSTANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 2d 1284.

No. 74–5516. FORBES *v.* TEXAS Ct. Crim. App. Tex. Certiorari denied. Reported below: 513 S. W. 2d 72.

No. 74–5524. FRANCISCO-ROMANDIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 1020.

No. 74–5530. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 724.

No. 74–5534. GAUDIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 132.

No. 74–5535. WIGGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1183.

No. 74–5536. GREENFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1166.

No. 74–5564. Gonzales-Solano *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 74–5573. Ronan *v.* Briggs et al. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 313 N. E. 2d 428.

No. 74–5637. Pitts *v.* Woodward & Lothrop. Ct. App. D. C. Certiorari denied. Reported below: 327 A. 2d 816.

No. 74–5659. White *v.* Caudle, Correctional Superintendent, et al. C. A. 4th Cir. Certiorari denied.

No. 74–5661. Hurt *v.* Bedinger et al. C. A. 4th Cir. Certiorari denied.

No. 74–5667. Luckett *v.* Warden, Nevada State Prison. C. A. 9th Cir. Certiorari denied.

No. 74–5668. Smith *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 513 S. W. 2d 407.

No. 74–5670. Martin *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, and —— Ind. ——, 314 N. E. 2d 60 and 317 N. E. 2d 430.

No. 74–5676. Flores *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 74–5677. Henry *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5678. Liddy *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 166 U. S. App. D. C. 95, 509 F. 2d 428.

No. 74–5679. Pillis *v.* Fisher, t/a J. W. Fisher Taxi Service. Sup. Ct. Va. Certiorari denied.

No. 74–5682. Szaraz *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 74–5683. JOHNSON *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–5687. MCCORMICK, TRUSTEE *v.* ESPOSITO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 620.

No. 74–5720. BILLINGSLEY ET AL. *v.* WALLACE. Sup. Ct. Ala. Certiorari denied. Reported below: 292 Ala. 538, 297 So. 2d 362.

No. 74–5721. CARTER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1405.

No. 74–409. ROSE, WARDEN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION, ET AL. C. A. 6th Cir. Motion of respondent James Earl Ray for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 74–440. MALIZIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. See *Molinaro* v. *New Jersey,* 396 U. S. 365 (1970). Reported below: 503 F. 2d 578.

No. 74–444. JONES ET AL. *v.* SIMON, SECRETARY OF THE TREASURY, ET AL. C. A. 9th Cir. Motions of Association of O & C Counties and Oregon Homeowners Assn. for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 74–702. SWENSON, WARDEN *v.* WILWORDING. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 502 F. 2d 844.

No. 74–704. MICHIGAN *v.* WHITE. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 392 Mich. 404, 221 N. W. 2d 357.

Rehearing Denied

No. 73–1655. RUHM *v.* TURNER, SHERIFF, ET AL., 419 U. S. 882;

No. 74–64. ABATE ET AL. *v.* PITTSBURGH PLATE GLASS CO. ET AL., 419 U. S. 900;

No. 74–111. PFOTZER ET AL. *v.* CITY OF NORWALK ET AL., 419 U. S. 1047;

No. 74–145. BRAINERD *v.* BEAL ET AL., 419 U. S. 1069;

No. 74–247. SIMMONS *v.* UNITED STATES, 419 U. S. 1048;

No. 74–307. B & L MOTOR FREIGHT, INC., ET AL. *v.* HEYMANN, DIRECTOR, DIVISION OF MOTOR VEHICLES, ET AL., 419 U. S. 1042;

No. 74–324. CITY OF DALLAS ET AL. *v.* SOUTHWEST AIRLINES CO. ET AL., 419 U. S. 1079;

No. 74–457. CRANE *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL., 419 U. S. 1050; and

No. 74–468. WEBSTER *v.* KENTUCKY, 419 U. S. 1070. Petitions for rehearing denied.

No. 74–28. O'BRYAN *v.* CHANDLER, U. S. DISTRICT JUDGE, 419 U. S. 986. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

FEBRUARY 3, 1975

Dismissal Under Rule 60

No. 74–846. MARKS ET AL. *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari dismissed under this Court's Rule 60.

FEBRUARY 14, 1975

Certiorari Denied

No. 74–439. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part

*See also note, *supra,* p. 901.

in the consideration or decision of this petition. Reported below: 501 F. 2d 418.

FEBRUARY 18, 1975*

Appeals Dismissed

No. 74–58. THOMPSON *v.* THOMPSON. Appeal from Super. Ct. Pa. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question.

No. 74–674. ECONOMIC CONSULTANTS, INC., DBA E–C TAPE SERVICE, INC., ET AL. *v.* MERCURY RECORD PRODUCTIONS, INC., ET AL. Appeal from Sup. Ct. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 64 Wis. 2d 163, 218 N. W. 2d 705.

No. 74–777. KELLAR ET UX. *v.* WESTERN CAB CO. ET AL. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 90 Nev. 240, 523 P. 2d 842.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 74–100, *Garner* v. *United States*, *infra*, p. 923; No. 74–454, *Procunier* v. *Valrie*, *infra*, p. 938; No. 74–718, *Village of Burnsville* v. *Onischuk*, *infra*, p. 916; No. 74–719, *Neale* v. *Hayduk*, *infra*, p. 915; No. 74–730, *Roemer* v. *Board of Public Works of Maryland*, *infra*, p. 922; No. 74–5182, *Zamorano* v. *Illinois*, *infra*, p. 924; No. 74–5330, *Manuri* v. *California*, *infra*, p. 924; No. 74–5363, *Fulford* v. *Louisiana*, *infra*, p. 924; No. 74–5390, *Muse* v. *Gunn*, *infra*, p. 924; No. 74–5446, *Richards* v. *United States*, *infra*, p. 924; No. 74–5453, *Stagakis* v. *United States*, *infra*, p. 924; No. 74–5454, *Thornton* v. *United States*, *infra*, p. 924; No. 74–5497, *Duggan* v. *Brown*, *infra*, p. 916.

No. 74–808. HALL *v.* WISCONSIN. Appeal from Sup. Ct. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 65 Wis. 2d 18, 221 N. W. 2d 806.

No. 74–707. COMENOUT ET VIR *v.* BURDMAN, SECRETARY OF STATE OF WASHINGTON, ET AL. Appeal from Sup. Ct. Wash. Motion of Quinault Tribe of Indians et al. for leave to file a brief as *amici curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 84 Wash. 2d 192, 525 P. 2d 217.

No. 74–807. TONASKET *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash. Motion of Quinault Tribe of Indians et al. for leave to file a brief as *amici curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 84 Wash. 2d 164, 525 P. 2d 744.

No. 74–769. KILIAN MANUFACTURING CORP. *v.* NEW YORK STATE DIVISION OF HUMAN RIGHTS. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 35 N. Y. 2d 201, 318 N. E. 2d 770.

No. 74–5597. BRADFORD ET AL. *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 298 So. 2d 781.

No. 74–719. NEALE ET VIR *v.* HAYDUK ET AL. Appeal from Ct. App. N. Y. dismissed for failure to file notice of appeal within the time provided by this Court's Rule 11 and 28 U. S. C. § 2101 (c). Reported below: 35 N. Y. 2d 182, 316 N. E. 2d 861.

No. 74–5776. FAHRIG ET AL. *v.* COTTERMAN ET AL. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of substantial federal question.

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No. 74–643. STEED, GUARDIAN *v.* IMPERIAL AIRLINES ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 12 Cal. 3d 115, 524 P. 2d 801.

No. 74–718. VILLAGE OF BURNSVILLE ET AL. *v.* ONISCHUK, AUDITOR OF DAKOTA COUNTY, ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal. Reported below: 301 Minn. 137, 222 N. W. 2d 523.

No. 74–5497. DUGGAN *v.* BROWN, SECRETARY OF STATE OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 39 Ohio St. 2d 112, 313 N. E. 2d 847.

Vacated and Remanded on Appeal

No. 72–787. JEFFERIES *v.* SUGARMAN, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, ET AL.; and

No. 72–5758. HANDEL ET AL. *v.* SUGARMAN, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, ET AL. Appeals from D. C. S. D. N. Y. Motion for leave to proceed *in forma pauperis* in No. 72–5758 granted. Judgment vacated and cases remanded for further consideration in light of *Hagans* v. *Lavine,* 415 U. S. 528 (1974). Reported below: 345 F. Supp. 172.

No. 74–606. MENDEZ *v.* HELLER, JUDGE, ET AL. Appeal from D. C. E. D. N. Y. Judgment vacated and case remanded so that a fresh decree or order may be entered from which a timely appeal may be taken to the United States Court of Appeals. 28 U. S. C. § 1291. *Gonzalez* v. *Automatic Employees Credit Union,* 419 U. S. 90 (1974). Reported below: 380 F. Supp. 985.

Certiorari Granted—Vacated and Remanded

No. 73–1015. CROW ET AL. *v.* CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded with directions to consider question of mootness in light of *Sosna* v. *Iowa,* 419 U. S. 393 (1975), and *Indiana Employment Security Division* v. *Burney,* 409 U. S. 540 (1973). See *United States* v. *Munsingwear, Inc.,* 340 U. S. 36 (1950). If the court determines that the case is not moot, it should consider whether a three-judge court is required. See *Hagans* v. *Lavine,* 415 U. S. 528, 543–545 (1974); *Fusari* v. *Steinberg,* 419 U. S. 379 (1975); cf. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U. S. 713, 716 (1962). MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 490 F. 2d 580.

Miscellaneous Orders

No. A–463. HAJAL ET AL. *v.* UNITED STATES. C. A. 6th Cir. Application for bail, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.*

No. A–627 (74–932). LEKOMETROS *v.* UNITED STATES. C. A. 8th Cir. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.* Reported below: 508 F. 2d 1134.

No. A–650 (74–952). BLANTON, GOVERNOR OF TENNESSEE, ET AL. *v.* AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE ET AL. D. C. M. D. Tenn. Application for stay, presented to MR. JUSTICE STEWART,

*See also note, *supra,* p. 914.

and by him referred to the Court, granted pending final disposition on appeal in this Court. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.* Reported below: 384 F. Supp. 714.

No. A–656. PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. *v.* DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL. D. C. E. D. Mo. Application for stay of enforcement of "Missouri House Bill No. 1211" pending appeal, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.* Reported below: 392 F. Supp. 1362.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL.; and No. 52, Orig. UNITED STATES *v.* FLORIDA. Motion of the Solicitor General for reallocation and reduction of time for oral argument granted. It is ordered that a total of three hours be allotted for oral argument in No. 35, Orig., and that a total of one and one-half hours be allotted for oral argument in No. 52, Orig. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.* [For earlier orders herein, see, *e. g., ante,* p. 904 and 419 U. S. 814.]

No. D–26. IN RE DISBARMENT OF KETCHAM. Frank S. Ketcham, of Potomac, Md., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on January 13, 1975 [419 U. S. 1101], is hereby discharged.

No. D–29. IN RE DISBARMENT OF OSBORNE. It having been reported to this Court that George R. Osborne,

*See also note, *supra,* p. 914.

of New York, N. Y., has been suspended from the practice of law in all of the courts of the State of New York, and this Court by order of November 18, 1974 [419 U. S. 1016], having suspended the said George R. Osborne from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that a response has been filed;

It is ordered that the said George R. Osborne be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–30. IN RE DISBARMENT OF TARR. It having been reported to this Court that Leonard N. Tarr, of New York, N. Y., has been suspended from the practice of law in all of the courts of the State of New York, and this Court by order of November 18, 1974 [419 U. S. 1016], having suspended the said Leonard N. Tarr 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 Leonard N. Tarr 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. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.*

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*See also note, *supra,* p. 914.

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No. 73–1233. NATIONAL LABOR RELATIONS BOARD ET AL. *v.* SEARS, ROEBUCK & Co. C. A. D. C. Cir. [Certiorari granted, 417 U. S. 907.] Motion of respondent for leave to file supplemental brief after argument granted. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.*

No. 73–1908. CORT ET AL. *v.* ASH. C. A. 3d Cir. [Certiorari granted, 419 U. S. 992.] Motion of Judith Bonderman et al. for leave to file a brief as *amici curiae* granted. Motion of Common Cause for leave to file a brief as *amicus curiae* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.*

No. 74–304. GORDON *v.* NEW YORK STOCK EXCHANGE, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 419 U. S. 1018.] Motion of the Solicitor General to permit the United States and the Securities and Exchange Commission to participate in oral argument as *amici curiae* granted and a total of 40 additional minutes allotted for that purpose. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 74–156. HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY, ET AL. *v.* MIRANDA, DBA WALNUT PROPERTIES, ET AL. Appeal from D. C. C. D. Cal. [Probable jurisdiction postponed, 419 U. S. 1018.] Motions for additional time for oral argument granted and appellants allotted 15 additional minutes for that purpose. Appellees also allotted 15 additional minutes for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

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*See also note, *supra,* p. 914.

No. 74–70. GOLDFARB ET UX. *v.* VIRGINIA STATE BAR ET AL. C. A. 4th Cir. [Certiorari granted, 419 U. S. 963.] Motions of American Dental Assn. and National Organization of Bar Counsel for leave to file briefs as *amici curiae* granted. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL took no part in the consideration or decision of these motions.*

No. 74–201. CITY OF RICHMOND, VIRGINIA *v.* UNITED STATES ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 419 U. S. 1067.] Joint motion for additional time for oral argument granted and a total of one hour and 20 minutes allotted for that purpose. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.*

No. 74–452. TWENTIETH CENTURY MUSIC CORP. ET AL. *v.* AIKEN. C. A. 3d Cir. [Certiorari granted, 419 U. S. 1067]. Motion of Authors League of America, Inc., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 74–456. HILL, ATTORNEY GENERAL OF TEXAS, ET AL. *v.* PRINTING INDUSTRIES OF THE GULF COAST ET AL. Appeal from D. C. S. D. Tex. [Probable jurisdiction noted, 419 U. S. 1088.] Motion of Common Cause for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 74–584. SEARS *v.* DANN, COMMISSIONER OF PATENTS. C. A. 4th Cir. Motion to expedite consideration of petition for certiorari denied. Reported below: 502 F. 2d 122.

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*See also note, *supra*, p. 914.

No. 74–878. National League of Cities et al. *v.* Brennan, Secretary of Labor; and

No. 74–879. California *v.* Brennan, Secretary of Labor. Appeals from D. C. D. C. [Probable jurisdiction noted, *ante,* p. 906.] Motion of AFL–CIO et al. for leave to intervene denied. Mr. Justice Marshall took no part in the consideration or decision of this motion.*

No. 74–657. In re Smith, Trustee of the New York, New Haven & Hartford Railroad Co. Motion for leave to file petition for writ of certiorari and/or mandamus and/or prohibition denied.

No. 74–5840. Lemon *v.* Wainwright, Corrections Director; and

No. 74–5897. Patton *v.* Crisp, Warden. Motions for leave to file petitions for writs of habeas corpus denied.

No. 74–5655. McDonald *v.* United States Court of Appeals for the Sixth Circuit. Motion for leave to file petition for writ of mandamus denied.

No. 74–5738. Mason *v.* Matthes, Chief Judge, U. S. Court of Appeals; and

No. 74–5787. Saucke *v.* United States et al. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 74–730. Roemer et al. *v.* Board of Public Works of Maryland et al. Appeal from D. C. Md. Probable jurisdiction noted. Reported below: 387 F. Supp. 1282.

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*See also note, *supra,* p. 914.

Certiorari Granted

No. 74–100. GARNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 501 F. 2d 228.

No. 74–206. THERMTRON PRODUCTS, INC., ET AL. *v.* HERMANSDORFER, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari granted.

No. 74–489. DEPARTMENT OF THE AIR FORCE ET AL. *v.* ROSE ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 495 F. 2d 261.

No. 74–687. UNITED STATES *v.* MOORE ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 497 F. 2d 976.

No. 74–742. FOREMOST-MCKESSON, INC. *v.* PROVIDENT SECURITIES CO. C. A. 9th Cir. Certiorari granted. Reported below: 506 F. 2d 601.

No. 74–744. COMMISSIONER OF INTERNAL REVENUE *v.* SHAPIRO ET UX. C. A. D. C. Cir. Certiorari granted. Reported below: 162 U. S. App. D. C. 391, 499 F. 2d 527.

No. 74–753. UNITED STATES *v.* TESTAN ET AL. Ct. Cl. Certiorari granted. Reported below: 205 Ct. Cl. 330, 499 F. 2d 690.

No. 74–5566. BARRETT *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition which reads as follows: "Whether Title 18 U. S. C. Section 922 (h) applies to petitioner who purchased a firearm in an intrastate transaction, and was not involved in any manner with the interstate transportation of said firearm." Reported below: 504 F. 2d 629.

No. 74–759. UNITED STATES *v.* MOORE. C. A. D. C. Cir. Certiorari granted. Reported below: 164 U. S. App. D. C. 319, 505 F. 2d 426.

No. 74–538. UNITED STATES *v.* WATSON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 504 F. 2d 849.

Certiorari Denied. (See also Nos. 74–674, 74–777, 74–808, and 74–5497, *supra.*)

No. 74–5182. ZAMORANO *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 16 Ill. App. 3d 807, 306 N. E. 2d 902.

No. 74–5330. MANURI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5363. FULFORD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 299 So. 2d 789.

No. 74–5390. MUSE *v.* GUNN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 74–5446. RICHARDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 1025.

No. 74–5453. STAGAKIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1401.

No. 74–5454. THORNTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 11 Cal. 3d 738, 523 P. 2d 267.

No. 73–5808. JEFFERIES *v.* SUGARMAN, COMMISSIONER OF DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 481 F. 2d 414.

No. 73–6639. HALL *v.* UNITED STATES;
No. 73–6826. JENKINS *v.* UNITED STATES; and
No. 73–6903. WILCOX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 496 F. 2d 57.

No. 74–459. MERCADO, AKA CRESPO, ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 502 F. 2d 666.

No. 74–469. TAVARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 491 F. 2d 725.

No. 74–470. KERSH ET AL. *v.* BOUNDS, CORRECTIONS COMMISSIONER. C. A. 4th Cir. Certiorari denied. Reported below: 501 F. 2d 585.

No. 74–495. SHUMAR *v.* UNITED STATES; and
No. 74–5482. CLARKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 500 F. 2d 1405.

No. 74–504. BARRY ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 501 F. 2d 578.

No. 74–510. THORNE, AKA OM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 74–512. SICA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–513. CAPPETTO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 1351.

No. 74–525. ROGERS ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–540. MENDRIN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–544. McGregor et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 503 F. 2d 1167.

No. 74–545. Laborers' International Union of North America, AFL–CIO, Local 478 *v.* National Labor Relations Board. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 101, 503 F. 2d 192.

No. 74–547. Kawasaki Motors Corp. *v.* Train, Administrator, Environmental Protection Agency, et al. C. A. 9th Cir. Certiorari denied.

No. 74–577. Feinberg *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 1180.

No. 74–591. Chip Steak Co., Inc., et al. *v.* Butz, Secretary of Agriculture, et al. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 2d 764.

No. 74–597. Minkin *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 504 F. 2d 350.

No. 74–614. Nance et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 502 F. 2d 615.

No. 74–621. Named Individual Members of the San Antonio Conservation Society et al. *v.* Texas Highway Department et al. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1017.

No. 74–641. Central National Life Insurance Co. *v.* International Union of Operating Engineers, Local No. 953 et al. C. A. 10th Cir. Certiorari denied. Reported below: 501 F. 2d 902.

No. 74–652. WERSETSKY, ADMINISTRATOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 502 F. 2d 1161.

No. 74–660. WILLOUGHBY *v.* STEVER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 202, 504 F. 2d 271.

No. 74–663. HUNSUCKER *v.* PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 29.

No. 74–673. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1166.

No. 74–677. JACKSON *v.* STATLER FOUNDATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–679. UNITED STATES *v.* STOECO HOMES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 498 F. 2d 597.

No. 74–680. BLUMBERG *v.* BAUSCH & LOMB OPTICAL CO. C. A. 6th Cir. Certiorari denied.

No. 74–685. ROBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–692. MOORE *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–700. MOTTO *v.* GENERAL SERVICES ADMINISTRATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1165.

No. 74–715. PIONEER LUMBER CORP. *v.* MAYS. C. A. 4th Cir. Certiorari denied. Reported below: 502 F. 2d 106.

No. 74–716. MADDEN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–721. RHODES ET AL., CO-ADMINISTRATORS *v.* REPUBLIC NATIONAL LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 1213.

No. 74–725. MORETTI ET AL. *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 74–727. GRANT ET AL. *v.* SILVESTRI ET AL. C. C. P. A. Certiorari denied. Reported below: 496 F. 2d 593.

No. 74–734. VACCARO *v.* DEPARTMENT OF LAW AND PUBLIC SAFETY, BOARD OF MEDICAL EXAMINERS. Super. Ct. N. J. Certiorari denied.

No. 74–737. HOOD *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: See 512 S. W. 2d 528.

No. 74–741. KETCHUM *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 740, 320 N. E. 2d 645.

No. 74–745. TORRENCE *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 192 Neb. 213, 219 N. W. 2d 772.

No. 74–747. FARVER *v.* CITY OF WESTLAKE ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 74–756. FURNCO CONSTRUCTION CORP. *v.* BATISTE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 447.

No. 74–760. SCHABATKA ET AL. *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 18 Ill. App. 3d 635, 310 N. E. 2d 192.

No. 74–761. HAWKINS *v.* MOSS, CHIEF JUSTICE, SUPREME COURT OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 503 F. 2d 1171.

No. 74–765. GULF OIL CORP. *v.* LEHRMAN. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 659.

No. 74–770. CELANESE CORP. *v.* ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 502 F. 2d 188.

No. 74–785. EVES ET UX. *v.* FORD MOTOR CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1403.

No. 74–788. ADDRISI *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 725.

No. 74–790. SCHMITT *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 310 N. E. 2d 73.

No. 74–791. SIBLEY *v.* HORN ADVERTISING, INC. Ct. Civ. App. Tex. Certiorari denied. Reported below: 505 S. W. 2d 417.

No. 74–792. CIURUS ET AL. *v.* NEW, TREASURER OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1402.

No. 74–796. WOODSTOCK, INC. *v.* KARRIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 19 Ill. App. 3d 1, 312 N. E. 2d 426.

No. 74–797. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* BENCHCRAFT, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 503 F. 2d 560.

No. 74–798. LITTLESTONE CO. ET AL. *v.* COUNTY OF COOK ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 19 Ill. App. 3d 222, 311 N. E. 2d 268.

No. 74–803. YATZOR *v.* ALLEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1400.

No. 74–812. CHAMPION OIL SERVICE CO. *v.* SINCLAIR OIL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 502 F. 2d 709.

No. 74–814. MCCARTHY *v.* AMERICAN RED BALL TRANSIT CO., INC. Sup. Ct. N. H. Certiorari denied.

No. 74–815. EVANS *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–826. BERGSTRALH *v.* LOWE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 2d 1276.

No. 74–829. MCCLURE *v.* FIRST NATIONAL BANK OF LUBBOCK, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 490.

No. 74–5347. WARD *v.* GRIGGS, INSTITUTION SUPERINTENDENT, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 74–5348. WARD *v.* GRIGGS, INSTITUTION SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 74–5357. SHORT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 511 S. W. 2d 288.

No. 74–5381. STENGEL *v.* CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5399. MAXIE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 513 S. W. 2d 338.

No. 74–5414. AGUIRRE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–5455. COWPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 503 F. 2d 130.

No. 74–5459. WARD *v.* GRIGGS, INSTITUTION SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 74–5460. SUTTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 784.

No. 74–5473. BAERGA *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 309.

No. 74–5475. CRUZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5483. HERBERT ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5488. ROHRBAUGH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 74–5491. GREEN *v.* DAGGETT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 74–5493. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1400.

No. 74–5504. TRIANA-PACHECO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5507. MATHEWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5510. ORAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5511. RIADON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–5512. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 315.

No. 74–5515. TRIMMINGS *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 86.

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No. 74–5517. RAMSEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 524.

No. 74–5519. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 575.

No. 74–5523. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1399.

No. 74–5539. HALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5543. MAJORS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 490 F. 2d 1321.

No. 74–5548. TURLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5553. MCDANIEL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5556. BURGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 731.

No. 74–5562. ARCEDIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 731.

No. 74–5563. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1401.

No. 74–5570. WALLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 1014.

No. 74–5572. MOSELY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5575. TORBICH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1400.

No. 74–5580. RICKUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1052.

No. 74–5581. PEREZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5585. LEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 731.

No. 74–5586. JEMISON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 728.

No. 74–5587. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 731.

No. 74–5589. HARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 505 F. 2d 495.

No. 74–5591. FELICIANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1402.

No. 74–5593. BOLLELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 727.

No. 74–5598. KESHISHIAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1401.

No. 74–5604. HAIRRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 843.

No. 74–5612. FLAKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–5615. HEARD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 202, 504 F. 2d 271.

No. 74–5616. LEYBA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 504 F. 2d 441.

No. 74–5635. POITRA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5638. SCHMITZ *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–5639. FELAN *v.* DAGGETT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 74–5643. DORROUGH *v.* MULLIKIN. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1401.

No. 74–5656. MITCHELL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 74–5690. PILLIS *v.* JOHNSON. Sup. Ct. Va. Certiorari denied.

No. 74–5698. REED *v.* JONES, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 784.

No. 74–5700. PHILLIPS ET AL. *v.* MONEY, DBA DAN MONEY'S STANDARD SERVICE CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 990.

No. 74–5702. MATRA *v.* COURT OF APPEALS OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–5708. PERKINS *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5712. MUNOZ ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5717. SMITH *v.* DARIN & ARMSTRONG CONSTRUCTION CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 503 F. 2d 1404.

No. 74–5716. JOHNSON *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5718. NEWMAN *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 74–5719. DRAGO *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 74–5726. HICKS *v.* LEEKE, CORRECTIONS DIRECTOR. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1397.

No. 74–5730. JONES *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 74–5733. SMITH *v.* CITY OF IRONDALE. Sup. Ct. Ala. Certiorari denied. Reported below: 293 Ala. 357, 303 So. 2d 130.

No. 74–5735. MILLER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 512 S. W. 2d 941.

No. 74–5739. CLARK *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 74–5740. GUPTA ET UX. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. C. A. 3d Cir. Certiorari denied.

No. 74–5761. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 19 Ill. App. 3d 689, 312 N. E. 2d 405.

No. 74–5756. ROBINSON, AKA JENKINS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 784.

No. 74–5751. KELLY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 111 Ariz. 181, 526 P. 2d 720.

No. 74–5747. GRIFFIN *v.* NANGLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 74–5749. BERKOWITZ *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 74–5755. NICHOLS *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5762. STURGIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 58 Ill. 2d 211, 317 N. E. 2d 545.

No. 74–5763. HOUSTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 21 Ill. App. 3d 209, 315 N. E. 2d 192.

No. 74–5764. MASON *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 2d 1345.

No. 74–5766. GILMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 74–5768. HAMILTON ET AL. *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 514 S. W. 2d 188.

No. 74–5770. FRANZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5772. DIAZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5773. GONZALEZ *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 1397.

No. 74–5780. DAVENPORT *v.* ILLINOIS. App. Ct. Ill., 1st Jud. Dist. Certiorari denied. Reported below: 21 Ill. App. 3d 209, 315 N. E. 2d 192.

No. 74–5779. PACE *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 74–5783. COLEMAN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 51 Mich. App. 539, 215 N. W. 2d 585.

No. 74–5785. ALECK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 10 Wash. App. 796, 520 P. 2d 645.

No. 74–5792. VAUGHAN ET UX. *v.* GILL, JUDGE, ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–5793. PADILLA *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 74–5795. NEWTON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 42 Cal. App. 3d 292, 116 Cal. Rptr. 690.

No. 74–5802. SHEPHARD *v.* THE NOPAL PROGRESS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 963.

No. 74–5809. SULLIVAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–293. PENNSYLVANIA *v.* WEEDEN ET AL. Sup. Ct. Pa. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 457 Pa. 436, 322 A. 2d 343.

No. 74–496. CROOKS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. See *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970). Reported below: 10 Wash. App. 1023.

No. 74–5805. STAGGS *v.* EVANS, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–5816. TRIGG *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 507 F. 2d 949.

No. 74–5835. BARRETT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 74–454. PROCUNIER, CORRECTIONS DIRECTOR *v.* VALRIE. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 12 Cal. 3d 139, 524 P. 2d 812.

No. 74–623. KENTUCKY CARBON CORP. ET AL. *v.* INTERIOR BOARD OF MINE OPERATIONS APPEALS ET AL. C. A. D. C. Cir. Motion of American Mining Congress for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 163 U. S. App. D. C. 104, 500 F. 2d 772.

No. 74–772. CALIFORNIA ET AL. *v.* GORDON ET AL. Sup. Ct. Cal. Certiorari denied, there being no present case or controversy such as to confer jurisdiction on this Court. Reported below: 12 Cal. 3d 323, 525 P. 2d 72.

No. 74–5552. PILCHER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court for consideration of questions not adequately presented by the record before us. These include question whether, in view of all of the circumstances attendant upon the trial, petitioner received a fair trial before an impartial judge and by an impartial jury as required by the Fourteenth Amendment. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 296 So. 2d 682.

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*See also note, *supra,* p. 914.

No. 74–5644. LUCAS *v.* REGAN, CHAIRMAN, NEW YORK STATE DIVISION OF PAROLE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL dissents from denial of certiorari for reasons stated by Judge Oakes in the court below. 503 F. 2d 1, 5 (1974) (dissenting opinion). Reported below: 503 F. 2d 1.

Rehearing Denied

No. 73–5677. SCHICK *v.* REED, CHAIRMAN, UNITED STATES BOARD OF PAROLE, ET AL., 419 U. S. 256;

No. 74–211. TOLLETT *v.* LAMAN ET AL., 419 U. S. 1088;

No. 74–225. MARSHALL ET AL. *v.* OHIO, 419 U. S. 1062;

No. 74–226. KENSINGER *v.* OHIO, 419 U. S. 1062;

No. 74–229. POMMERENING ET AL. *v.* UNITED STATES, 419 U. S. 1088;

No. 74–301. WASHBURN *v.* UNITED STATES, 419 U. S. 1106;

No. 74–502. SMART *v.* JONES ET AL., 419 U. S. 1090;

No. 74–5042. HALE *v.* UNITED STATES, 419 U. S. 999;

No. 74–5144. O'BRIEN *v.* CALIFORNIA, 419 U. S. 1111;

No. 74–5157. MEYERS *v.* VENABLE ET AL., 419 U. S. 1090;

No. 74–5457. AGUR *v.* WILSON, GOVERNOR OF NEW YORK, ET AL., 419 U. S. 1072;

No. 74–5477. PAQUETTE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT, 419 U. S. 1073;

No. 74–5496. BARTLETT *v.* TOLEDO BAR ASSN., 419 U. S. 1073; and

No. 74–5595. RATCLIFF *v.* TEXAS ET AL., 419 U. S. 1103. Petitions for rehearing denied.

No. 74–245. HUTTER ET AL. *v.* CITY OF CHICAGO, 419 U. S. 870. Motion for leave to file petition for rehearing denied.

FEBRUARY 21, 1975

Miscellaneous Order

No. A–687. LOVELACE ET AL. *v.* DECHAMPLAIN. Application for stay of order of the United States District Court for the Western District of Missouri, directing applicants to hold an evidentiary hearing to determine whether respondent is entitled to pretrial release, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, granted. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this application. Reported below: See 510 F. 2d 419.

FEBRUARY 24, 1975*

Affirmed on Appeal

No. 74–594. WEISBROD *v.* LYNN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Motion of American Medical Assn. for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.† Reported below: 383 F. Supp. 933.

Appeal Dismissed

No. 74–767. CHU *v.* UNITED STATES. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following: No. 74–5281, *Spross* v. *Gunn*, *infra*, p. 955; No. 74–5435, *Imbler* v. *Pachtman*, *infra*, p. 945; and No. 74–5466, *Vigil* v. *New Mexico*, *infra*, p. 955.

†See also note, *supra*.

No. 74–813. ABRAHAM ET AL. *v.* FLORIDA ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 301 So. 2d 11.

Miscellaneous Orders

No. D–38. IN RE DISBARMENT OF DONNELLY. It is ordered that John J. Donnelly, Jr., of Geneva, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.*

No. D–39. IN RE DISBARMENT OF ROSENBERG. It is ordered that Harvey Rosenberg, of Silver Spring, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.*

No. D–40. IN RE DISBARMENT OF GILBERT. It is ordered that Donald E. Gilbert, of East Northport, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him so show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.*

No. D–41. IN RE DISBARMENT OF SIEGEL. It is ordered that George J. Siegel, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to

*See also first note, *supra*, p. 940.

show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.*

No. D–42. IN RE DISBARMENT OF DEAN. It is ordered that John W. Dean III, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.*

No. D–43. IN RE DISBARMENT OF ANDRESEN. It is ordered that Peter C. Andresen, of Kensington, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE MARSHALL took no part in the consideration or decision of this matter.*

No. 73–1573. WITHROW ET AL. *v.* LARKIN. Appeal from D. C. E. D. Wis. [Probable jurisdiction noted, 417 U. S. 943.] Motion of appellee for leave to file supplemental brief after argument granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 73–7031. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Certiorari granted, 419 U. S. 963.] Motion of the Attorney General of California for additional time to participate in oral argument as *amicus curiae* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

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*See also first note, *supra*, p. 940.

No. 73–1966. Aberdeen & Rockfish Railroad Co. et al. *v.* Students Challenging Regulatory Agency Procedures (SCRAP) et al.; and

No. 73–1971. United States et al. *v.* Students Challenging Regulatory Agency Procedures (SCRAP) et al. Appeals from D. C. D. C. [Probable jurisdiction noted, 419 U. S. 822.] Joint motion of appellants for additional time for oral argument granted and 10 additional minutes granted each side. Mr. Justice Marshall and Mr. Justice Powell took no part in the consideration or decision of this motion.*

No. 73–6336. Rogers *v.* United States. C. A. 5th Cir. [Certiorari granted, 419 U. S. 824.] Motion of petitioner for appointment of counsel granted. It is ordered that Ralph W. Parnell, Jr., Esquire, of Shreveport, La., be, and he is hereby, appointed to serve as counsel for petitioner in this case. Mr. Justice Marshall took no part in the consideration or decision of this motion.*

No. 73–6587. Herring *v.* New York. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept. [Probable jurisdiction noted, 419 U. S. 893.] Motion of the Attorney General of New York to permit two counsel to argue orally on behalf of the State of New York granted. Mr. Justice Marshall took no part in the consideration or decision of this motion.*

No. 74–8. O'Connor *v.* Donaldson. C. A. 5th Cir. [Certiorari granted, 419 U. S. 894.] Motion of respondent for leave to file supplemental brief after argument granted. Mr. Justice Marshall took no part in the consideration or decision of this motion.*

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*See also first note, *supra*, p. 940.

No. 74–70. GOLDFARB ET UX. *v.* VIRGINIA STATE BAR ET AL. C. A. 4th Cir. [Certiorari granted, 419 U. S. 963.] Motion of the District of Columbia Bar for reconsideration of motion for leave to file a brief as *amicus curiae* denied. Motion of the Association of the Bar of the City of New York for reconsideration of motion for leave to file a brief as *amicus curiae* granted and it is ordered that the brief be filed. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL took no part in the consideration or decision of these motions.*

No. 74–124. BLUE CHIP STAMPS ET AL. *v.* MANOR DRUG STORES. C. A. 9th Cir. [Certiorari granted, 419 U. S. 992.] Motion of the Solicitor General for additional time to permit the Securities and Exchange Commission to participate in oral argument as *amicus curiae* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 74–389. ALBEMARLE PAPER CO. ET AL. *v.* MOODY ET AL.; and

No. 74–428. HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS & PAPERWORKERS, AFL–CIO *v.* MOODY ET AL. C. A. 4th Cir. [Certiorari granted, 419 U. S. 1068.] Motion of American Society for Personnel Administration for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.*

No. 74–5951. HARRELSON *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 74–5797. ELLINGBURG *v.* HENLEY, CHIEF JUDGE, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus denied.

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*See also first note, *supra*, p. 940.

No. 74–6019. STEELE *v.* SUPREME COURT OF COLORADO ET AL. Motion to expedite consideration denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 74–5788. MASTRIAN *v.* CUDD, U. S. MAGISTRATE, DISTRICT OF MINNESOTA, ET AL. Motion for leave to file petition for writ of mandamus and/or habeas corpus denied.

Certiorari Granted

No. 74–5435. IMBLER *v.* PACHTMAN, DISTRICT ATTORNEY. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 500 F. 2d 1301.

Certiorari Denied. (See also No. 74–767, *supra.*)

No. 74–188. TEXAS *v.* LANDRY. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 504 S. W. 2d 580.

No. 74–416. MATARAZZO *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 262 S. C. 662, 207 S. E. 2d 93.

No. 74–431. VITA FOOD PRODUCTS OF ILLINOIS, INC. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 715.

No. 74–556. CALABRESE, MAYOR OF SAND CITY, ET AL. *v.* AVERY ET AL.; and

No. 74–831. AVERY ET AL. *v.* CALABRESE, MAYOR OF SAND CITY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–567. PEEL *v.* UNITED STATES; and

No. 74–593. MYERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 1369.

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*See also first note, *supra*, p. 940.

No. 74–561. RICHARDS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 21 N. C. App. 686, 205 S. E. 2d 369.

No. 74–571. INDIANA & MICHIGAN ELECTRIC CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 163 U. S. App. D. C. 334, 502 F. 2d 336.

No. 74–574. NATIONAL NUTRITIONAL FOODS ASSN. ET AL. *v.* FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 504 F. 2d 761.

No. 74–575. SEGURA, AKA TOMANENG *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 74–578. BURKHART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 501 F. 2d 993.

No. 74–579. TUCKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 944.

No. 74–583. MCCONNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 347.

No. 74–592. SUTHERLAND *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 74–595. SIMPKINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 505 F. 2d 562.

No. 74–607. CLEVELAND MILLS CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 502 F. 2d 153.

No. 74–620. IRONS *v.* DANN, COMMISSIONER OF PATENTS. C. A. D. C. Cir. Certiorari denied.

No. 74–694. General Steel Products Co., a Division of Seng Co. *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. Reported below: 503 F. 2d 896.

No. 74–701. Economy Finance Corp. et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 501 F. 2d 466.

No. 74–748. Purvis *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 311.

No. 74–766. Wallace et al. *v.* Kern et al. C. A. 2d Cir. Certiorari denied. Reported below: 499 F. 2d 1345.

No. 74–805. Binder *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 18 Ill. App. 3d 960, 310 N. E. 2d 661.

No. 74–817. Ross *v.* Ross. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. ——, 314 N. E. 2d 888.

No. 74–818. Regina et al. *v.* LaVallee, Correctional Superintendent, et al. C. A. 2d Cir. Certiorari denied. Reported below: 504 F. 2d 580.

No. 74–832. Bay *v.* Western Pacific Co. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–852. Grayco Constructors, Inc., et al. *v.* Great Lakes Gas Transmission Co. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 498.

No. 74–881. Morgan *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 516 S. W. 2d 188.

No. 74–5436. Horne *v.* United States. C. A. 5th Cir. Certiorari denied.

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No. 74–5478. MILLER *v.* LOVE. C. A. 4th Cir. Certiorari denied.

No. 74–5579. BOWDACH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 2d 220.

No. 74–5594. DEARGUMENDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 727.

No. 74–5600. COY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 566.

No. 74–5602. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1403.

No. 74–5603. BYARS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 734.

No. 74–5609. LAYTHAM *v.* UNITED STATES; and
No. 74–5627. JANIEC *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 983.

No. 74–5620. CHASE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 571.

No. 74–5623. RISER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1166.

No. 74–5624. MEZES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1052.

No. 74–5625. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1401.

No. 74–5628. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5641. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 208.

No. 74–5642. TURNER *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 784.

No. 74–5645. SAMUELS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 731.

No. 74–5647. KILIYAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 504 F. 2d 1153.

No. 74–5671. VAUGHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 74–5688. PHARO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1402.

No. 74–5689. BISHOP *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 843.

No. 74–5811. COOPER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 670, 319 N. E. 2d 202.

No. 74–5814. TRUJILLO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5821. WOJLOH *v.* DEVITO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1399.

No. 74–5824. KELLY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 74–5829. SMILGUS *v.* MICHIGAN CONSOLIDATED GAS CO. ET AL. Sup. Ct. Mich. Certiorari denied.

No. 74–5940. QUALLS *v.* BRISCOE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1402.

No. 74–533. MCKINNEY *v.* CITY OF BIRMINGHAM;
No. 74–534. MCKINNEY *v.* CITY OF BIRMINGHAM; and
No. 74–535. HARLOW ET AL. *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. Reported below: No. 74–533, see 292 Ala. 726, 296 So. 2d 236; No. 74–534, 52 Ala. App. 605, 296 So. 2d 197; No. 74–535, 52 Ala. App. 612, 296 So. 2d 202.

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

Petitioners were convicted in the Jefferson Circuit Court of selling or exhibiting obscene material in violation of Birmingham Ordinance No. 67–2, § 3, which provides:

> "It shall be unlawful for any person to knowingly . . . exhibit, sell, or offer for sale, in the City or the police jurisdiction thereof, any obscene matter."

As used in Ordinance No. 67–2, "obscene" meant at the time of the alleged offenses:

> "that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." § 1.

On appeal, the Alabama Court of Criminal Appeals affirmed the convictions. Petitions for writs of certiorari

were filed with the Supreme Court of Alabama and denied.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, Ordinance No. 67–2 as it existed at the time of the alleged offenses was constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari and, since the judgments of the Court of Criminal Appeals were rendered after *Miller,* reverse the convictions. In that circumstance, I have no occasion to consider whether the other questions presented in these cases merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Further, it does not appear from the petitions or responses that the obscenity of the disputed material was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their cases decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgments below and remand for a determination whether petitioners should be afforded new trials under local community standards.

No. 74–573. CUYLER, CORRECTIONAL SUPERINTENDENT *v.* MATTHEWS. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 503 F. 2d 339.

No. 74–670. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 733.

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

Petitioner was convicted in the United States District Court for the Southern District of Florida of shipping obscene films by common carrier in interstate commerce in violation of 18 U. S. C. § 1462 and of transporting the films in interstate commerce for the purpose of sale or distribution in violation of 18 U. S. C. § 1465. Title 18 U. S. C. § 1462 provides in pertinent part:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .
>
> . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

The Court of Appeals for the Fifth Circuit affirmed the conviction, 500 F. 2d 733 (1974).

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C.

§ 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 74–717. HERMAN ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 256 Ark. 840, 512 S. W. 2d 923.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, dissenting.

Petitioners were convicted in the Pulaski County, Arkansas, Circuit Court of exhibiting an allegedly obscene film in violation of Ark. Stat. Ann. § 41–2729

(Supp. 1973), which provides in pertinent part as follows:

> "Hereafter, it shall be unlawful for any person knowingly to exhibit . . . any obscene film."

"Obscene" is defined in § 41–2730 (2), which provides:

> " 'Obscene' means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The Supreme Court of Arkansas affirmed. 512 S. W. 2d 923 (1974).

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 41–2729, as it incorporates the definition of "obscene" in § 41–2730 (2), is unconstitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Supreme Court of Arkansas was rendered after *Miller,* reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States,* 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process

Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded new trials under local community standards.

No. 74–784. REAMER *v.* BEALL, UNITED STATES ATTORNEY, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 506 F. 2d 1345.

No. 74–5500. BERGER *v.* UNITED STATES; and
No. 74–5619. FALCONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 505 F. 2d 478.

No. 74–5281. SPROSS *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari.

No. 74–5466. VIGIL *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5479. BECHTEL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari and other relief denied.

No. 74–5813. HEALD *v.* MULLANEY, WARDEN, ET AL. C. A. 1st Cir. Motion to amend petition granted. Certiorari denied. Reported below: 505 F. 2d 1241.

Rehearing Denied

No. 73–848. FUSARI, COMMISSIONER OF LABOR *v.* STEINBERG ET AL., 419 U. S. 379. Petition for rehearing denied.

No. 73–1055. Bowman Transportation, Inc. *v.* Arkansas-Best Freight System, Inc., et al., 419 U. S. 281;

No. 73–1069. Johnson Motor Lines, Inc. *v.* Arkansas-Best Freight System, Inc., et al., 419 U. S. 281;

No. 73–1070. Red Ball Motor Freight, Inc. *v.* Arkansas-Best Freight System, Inc., et al., 419 U. S. 281;

No. 73–1071. Lorch-Westway Corp. et al. *v.* Arkansas-Best Freight System, Inc., et al., 419 U. S. 281;

No. 73–1072. United States et al. *v.* Arkansas-Best Freight System, Inc., et al., 419 U. S. 281;

No. 74–313. Buckley et al. *v.* American Federation of Television & Radio Artists, 419 U. S. 1093;

No. 74–314. Lewis *v.* American Federation of Television & Radio Artists, 419 U. S. 1093;

No. 74–407. Infelice *v.* United States, 419 U. S. 1107;

No. 74–435. Ward *v.* Philadelphia Electric Co., 419 U. S. 1049;

No. 74–629. Placid Oil Co. et al. *v.* Louisiana et al., 419 U. S. 1110;

No. 74–638. Texaco Inc. *v.* Louisiana et al., 419 U. S. 1110;

No. 74–5005. Alexander et al. *v.* California, 419 U. S. 1122; and

No. 74–5614. Harsany *v.* Workmen's Compensation Appeals Board et al., 419 U. S. 1125. Petitions for rehearing denied.

No. 74–551. Lee et al. *v.* Arrowood, Co-Executor, et al., 419 U. S. 1116. Petition for rehearing

denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.*

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Fifth Circuit during the period May 12 to May 15, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

FEBRUARY 26, 1975

Miscellaneous Order

No. A–690 (74–1062). CALDWELL *v.* CITY OF NEW ORLEANS. Sup. Ct. La. Application for stay of execution and enforcement of sentence, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

MARCH 3, 1975†

Affirmed on Appeal

No. 74–552. JEWELL ET AL. *v.* DOCKING, GOVERNOR OF KANSAS, ET AL. Affirmed on appeal from D. C. Kan.

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*See also first note, *supra*, p. 940.

†MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 74–552, *Jewell et al.* v. *Docking et al.*, *infra* this page; No. 74–682, *Crete Carrier Corp.* v. *United States et al.*, *infra*, p. 958; No. 74–5568, *Garcia* v. *United States*, *infra*, p. 960; No. 74–5599, *Grace* v. *California*, *infra*, p. 960; No. 74–5633, *Iannarelli* v. *Morton, Secretary of the Interior, et al.*, *infra*, p. 960; No. 74–5634, *Stone et al.* v. *United States*, *infra*, p. 960; No. 74–5636, *Patterson* v.

No. 74–682. CRETE CARRIER CORP. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Neb.

No. 74–885. SUNUNU ET AL. *v.* STARK, SECRETARY OF STATE OF NEW HAMPSHIRE. Affirmed on appeal from D. C. N. H. Reported below: 383 F. Supp. 1287.

Appeal Dismissed

No. 74–794. HALPRIN ET AL. *v.* CALIFORNIA ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 73–6980. SWIGERT ET AL. *v.* MILLER ET AL. Appeal from Ct. App. Ohio, Hamilton County. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Wood* v. *Strickland, ante,* p. 308.

Miscellaneous Orders

No. ———. MARK TRAIL CAMP GROUNDS, INC. *v.* FIELD ENTERPRISES, INC., DBA PUBLISHERS-HALL SYNDICATE. C. A. 5th Cir. Motion of petitioner to reconsider denial of motion for leave to proceed *in forma pauperis* [419 U. S. 1043] denied.

United States, infra, p. 961; No. 74–5646, *Curry* v. *United States, infra,* p. 961; No. 74–5651, *Martinez* v. *United States, infra,* p. 961; No. 74–5658, *Marrocco* v. *United States, infra,* p. 961; No. 74–5664, *Hoog* v. *United States, infra,* p. 961; No. 74–5665, *Gaither* v. *United States, infra,* p. 961; No. 74–5674, *Villasencia-Garcia* v. *United States, infra,* p. 961; No. 74–5680, *Olmstead* v. *United States, infra,* p. 961; No. 74–5681, *Wright* v. *United States, infra,* p. 961; No. 74–5686, *Segura* v. *United States, infra,* p. 961; No. 74–5691, *Sloan* v. *United States, infra,* p. 961; No. 74–5607, *Crenshaw* v. *Wolff, Warden, infra,* p. 966; No. 74–5629, *Granillo* v. *United States, infra,* p. 966; and No. 74–5648, *Lyon* v. *United States, infra,* p. 966.

No. A–664. MARKS *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution and enforcement of sentence, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the application.

No. A–676. UNITED STATES *v.* MISSOURI ET AL. Application to vacate stay heretofore entered by the United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. 66, Orig. MONTGOMERY *v.* CONGRESS OF THE UNITED STATES ET AL. Motion for leave to file bill of complaint and for all other relief denied.

No. 73–1046. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* DIAZ ET AL. Appeal from D. C. S. D. Fla. [Probable jurisdiction noted, 416 U. S. 980]; and

No. 73–1596. HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. *v.* MOW SUN WONG ET AL. C. A. 9th Cir. [Certiorari granted, 417 U. S. 944.] Cases restored to calendar for reargument.

No. 73–1820. PHILBROOK, COMMISSIONER, DEPARTMENT OF SOCIAL WELFARE *v.* GLODGETT ET AL. [Probable jurisdiction noted, 419 U. S. 963]; and

No. 74–132. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* GLODGETT ET AL. [Probable jurisdiction postponed, 419 U. S. 963.] Appeals from D. C. Vt. Motion of appellants for divided argument granted.

No. 74–124. BLUE CHIP STAMPS ET AL. *v.* MANOR DRUG STORES. C. A. 9th Cir. [Certiorari granted, 419 U. S. 992.] Motion of respondent for divided argument granted.

No. 74–1015. INTERCOUNTY CONSTRUCTION CORP. ET AL. *v.* WALTER, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Motion to expedite consideration of petition for writ of certiorari denied.

No. 74–1031. FILES *v.* HEISKELL, SECRETARY OF STATE OF WEST VIRGINIA, ET AL. Sup. Ct. App. W. Va. Motion to expedite consideration of petition for writ of certiorari denied.

No. 74–5967. VECCHIARELLO *v.* UNITED STATES; and

No. 74–5985. SAUNDERS *v.* HOGAN, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 74–5784. JACKSON *v.* BROWNING ET AL., JUDGES, U. S. COURT OF APPEALS; and

No. 74–5856. CARTER *v.* HANNAY, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 74–5818. BONNER *v.* NANGLE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition denied.

Certiorari Denied. (See also No. 74–794, *supra.*)

No. 74–5568. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 670.

No. 74–5599. GRACE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5633. IANNARELLI *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1398.

No. 74–5634. STONE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1403.

No. 74–5636. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 74–5646. CURRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 502 F. 2d 1163.

No. 74–5651. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 74–5658. MARROCCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 1395.

No. 74–5664. HOOG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 504 F. 2d 45.

No. 74–5665. GAITHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 452.

No. 74–5674. VILLASENCIA-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5680. OLMSTEAD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 1405.

No. 74–5681. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1183.

No. 74–5686. SEGURA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5691. SLOAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 310, 505 F. 2d 417.

No. 73–1798. BEATRICE FOODS CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 493 F. 2d 1259.

No. 73–2015. BOYKINS ET AL. *v.* FAIRFIELD BOARD OF EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 492 F. 2d 697.

No. 73–6950. MEGA *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 74–342. PYRAMID LAKE PAIUTE TRIBE OF INDIANS *v.* MORTON, SECRETARY OF THE INTERIOR. C. A D. C. Cir. Certiorari denied. Reported below: 163 U. S. App. D. C. 90, 499 F. 2d 1095.

No. 74–503. BELL *v.* HONGISTO, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 501 F. 2d 346.

No. 74–563. GOLDSTEIN *v.* UNITED STATES; and
No. 74–5653. SPERLING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 1323.

No. 74–619. POLLARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–658. ROHM & HAAS CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 167.

No. 74–662. TIMES-PICAYUNE PUBLISHING CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 392.

No. 74–666. TEWA TESUQUE ET AL. *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 498 F. 2d 240.

No. 74–667. ANGLIN *v.* JOHNSTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 504 F. 2d 1165.

No. 74–630. HASKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–633. QUINONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 710.

No. 74–698. DIXON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 504 F. 2d 69.

No. 74–733. GRAVES ET AL. *v.* LYNN, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 502 F. 2d 1062.

No. 74–740. THIERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1166.

No. 74–755. CARVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–774. HARTEN ET UX. *v.* COONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 502 F. 2d 1363.

No. 74–787. WILLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–816. CARR STALEY, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1366.

No. 74–819. PITTMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 731.

No. 74–835. NIENDORFF *v.* WILLIAMS, KING COUNTY TREASURER, ET AL. Ct. App. Wash. Certiorari denied.

No. 74–839. LOUISIANA & ARKANSAS RAILWAY CO. ET AL. *v.* GOSLIN, SHERIFF, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 300 So. 2d 483 and 488.

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No. 74–844. ORAM *v.* GENERAL AMERICAN OIL COMPANY OF TEXAS ET AL. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 503 S. W. 2d 607.

No. 74–847. CIRAVOLA *v.* LOUISIANA. 24th Jud. Dist. Ct. La., Jefferson Parish. Certiorari denied.

No. 74–875. BURTON ET AL. *v.* WALLER, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1261.

No. 74–893. THE SVENDBORG ET AL. *v.* MARINE ENGINE SPECIALTIES CORP. C. A. 2d Cir. Certiorari denied. Reported below: 501 F. 2d 376.

No. 74–5673. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 504 F. 2d 337.

No. 74–5692. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 505 F. 2d 539.

No. 74–5695. SAWYER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–5696. MACHADO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5704. MARINACCI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–5707. NAZIEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 394.

No. 74–5725. WORTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 505 F. 2d 1206.

No. 74–5703. COHENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 74–5750. MANN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1401.

No. 74–5799. MERIWETHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–5831. YATES *v.* KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 74–5832. SMITH *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 11 Wash. App. 1006.

No. 74–5843. DESOTO ET AL. *v.* COUNTY OF VENTURA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5846. VERDUGO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5848. WRIGHT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5849. BELLFIELD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 215 Va. 303, 208 S. E. 2d 771.

No. 74–5851. RUFFIN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 74–5858. HAMPTON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 74–5862. VICK *v.* MEMPHIS & SHELBY COUNTY BAR ASSN., INC. Sup. Ct. Tenn. Certiorari denied.

No. 74–5866. MA *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–5867. SPANO *v.* SCHOOL DISTRICT OF THE BOROUGH OF BRENTWOOD. Sup. Ct. Pa. Certiorari denied.

No. 74–5868. DEYERMOND *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: See 19 Md. App. 698, 313 A. 2d 709.

No. 74–5871. BLAINE *v.* McGRAW EDISON CO., FOOD EQUIPMENT DIVISION, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 74–338. AKRIDGE *v.* BARRES ET AL. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.* Reported below: 65 N. J. 266, 321 A. 2d 230.

No. 74–404. SOLOMON *v.* ENZENSPERGER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would grant certiorari.

No. 74–5607. CRENSHAW *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 504 F. 2d 377.

No. 74–5629. GRANILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 503 F. 2d 1401.

No. 74–5648. LYON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

Rehearing Denied

No. 73–776. SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* BALLARD, 419 U. S. 498. Petition for rehearing denied.

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*See also second note, *supra*, p. 957.

No. 74–396. MATHIS *v.* ALABAMA, 419 U. S. 1106;

No. 74–5283. RODRIGUEZ-PRECIADO *v.* IMMIGRATION AND NATURALIZATION SERVICE, 419 U. S. 1112;

No. 74–5463. MILLER *v.* MARYLAND, 419 U. S. 1072;

No. 74–5465. LAUGHLIN *v.* UNITED STATES, 419 U. S. 1114;

No. 74–5583. TURNER *v.* CALIFORNIA, 419 U. S. 1099; and

No. 74–5667. LUCKETT *v.* WARDEN, NEVADA STATE PRISON, *ante*, p. 911. Petitions for rehearing denied.

No. 73–1323. GENERAL MOTORS ACCEPTANCE CORP. ET AL. *v.* EASON ET AL., 416 U. S. 960. Motion for leave to file petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.*

MARCH 7, 1975

Dismissals Under Rule 60

No. 74–5654. JONES *v.* UNITED STATES; and

No. 74–5786. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60.

MARCH 10, 1975

Dismissal Under Rule 60

No. 74–5844. WOODS *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 60.

MARCH 12, 1975

Dismissal Under Rule 60

No. 74–854. DATA PRODUCTS CORP. *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 60.

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*See also second note, *supra*, p. 957.

MARCH 17, 1975*

Affirmed on Appeal

No. 74–515. B–H TRANSFER CO. *v.* UNITED STATES ET AL. Appeal from D. C. M. D. Ga. Motion of American Short Line Railroad Assn. for leave to file a brief as *amicus curiae* granted. Judgment affirmed. Reported below: 379 F. Supp. 1027.

Appeals Dismissed

No. 74–664. SILVERS *v.* DOWLING, JUDGE. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–780. HUMPHREYS ET AL. *v.* HUMPHREYS ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 299 So. 2d 595.

No. 74–924. UNITED STATES FIDELITY & GUARANTY CO. *v.* CITY OF SPARTANBURG ET AL. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. Reported below: 263 S. C. 169, 209 S. E. 2d 36.

Vacated and Remanded on Appeal

No. 74–684. WESTBY, SECRETARY, SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* DOE. Appeal from D. C. S. D. Motion of National Black Feminist Organization et al. for leave to file a brief as *amici curiae* granted. Judgment vacated and case remanded for further consideration in light of *Hagans* v. *Lavine,* 415 U. S. 528, 543–545 (1974). Reported below: 383 F. Supp. 1143.

Certiorari Granted—Reversed. (See No. 74–479, *ante,* p. 534.)

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

Miscellaneous Orders

No. A–637 (74–1056). DROBACK *v.* UNITED STATES. C. A. 9th Cir. Application for bail, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–697. DECHAMPLAIN *v.* LOVELACE ET AL. C. A. 8th Cir. Application for bail, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant the application.

No. A–721. UNITED STATES STEEL CORP. ET AL. *v.* RODGERS ET AL. Order heretofore entered on March 5, 1975, by MR. JUSTICE BRENNAN is vacated and application for recall and stay of mandate of the United States Court of Appeals for the Third Circuit denied. Reported below: 508 F. 2d 152.

No. A–725. FIRST AMERICAN BANK & TRUST CO. ET AL. *v.* ELLWEIN, STATE EXAMINER AND COMMISSIONER, DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS, ET AL. D. C. N. D. Application for stay pending appeal, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. Reported below: 397 F. Supp. 810.

No. 73–1869. BEER ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 419 U. S. 822.] Motion of appellees for divided argument granted.

No. 74–7031. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Certiorari granted, 419 U. S. 963.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 minutes allotted for that purpose. Petitioner allotted 15 additional minutes for oral argument.

No. 73–1908. CORT ET AL. *v.* ASH. C. A. 3d Cir. [Certiorari granted, 419 U. S. 992.] Motion of Common Cause for reconsideration of motion for leave to file a brief as *amicus curiae* denied.

No. 74–22. IVAN ALLEN CO. *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 419 U. S. 1067.] Motion of American Trading & Production Corp. for leave to file a brief as *amicus curiae* granted.

No. 74–363. UNITED STATES *v.* RELIABLE TRANSFER CO., INC. C. A. 2d Cir. [Certiorari granted, 419 U. S. 1018.] Motion of the Solicitor General to permit John P. Rupp, Esquire, to present oral argument *pro hac vice* on behalf of the United States granted.

No. 74–878. NATIONAL LEAGUE OF CITIES ET AL. *v.* BRENNAN, SECRETARY OF LABOR; and

No. 74–879. CALIFORNIA *v.* BRENNAN, SECRETARY OF LABOR. Appeals from D. C. D. C. [Probable jurisdiction noted, *ante,* p. 906.] Motion of appellants for additional time for oral argument granted and 30 additional minutes allotted for that purpose. Appellee allotted 30 additional minutes for oral argument.

No. 74–1170. AUSTIN ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied.

No. 74–6035. ALBRITTON *v.* DAVIS, CORRECTIONS DIRECTOR; and

No. 74–6039. FOSTER *v.* JONES, TURNEY CENTER SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 73–6935. YOUAKIM ET AL. *v.* MILLER, DIRECTOR, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, ET AL. Appeal from D. C. N. D. Ill. Motion of appellants for

leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 374 F. Supp. 1204.

No. 74–895. VIRGINIA STATE BOARD OF PHARMACY ET AL. *v.* VIRGINIA CITIZENS CONSUMER COUNCIL, INC. ET AL. Appeal from D. C. E. D. Va. Probable jurisdiction noted. Reported below: 373 F. Supp. 683.

Certiorari Granted

No. 74–54. TRANSAMERICAN FREIGHT LINES, INC. *v.* BRADA MILLER FREIGHT SYSTEMS, INC., ET AL. C. A. 7th Cir. Certiorari granted.

No. 74–125. ALAMO LAND & CATTLE CO., INC. *v.* ARIZONA. C. A. 9th Cir. Certiorari granted. Reported below: 495 F. 2d 12.

No. 74–220. HANCOCK, ATTORNEY GENERAL OF KENTUCKY *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 497 F. 2d 1172.

No. 74–869. UNITED STATES *v.* UNITED CONTINENTAL TUNA CORP. C. A. 9th Cir. Certiorari granted. Reported below: 499 F. 2d 774.

No. 74–884. UNITED STATES *v.* POWELL. C. A. 9th Cir. Certiorari granted. Reported below: 501 F. 2d 1136.

No. 74–773. HUDGENS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Motion to defer consideration denied. Certiorari granted. Reported below: 501 F. 2d 161.

No. 74–966. AMERICAN FOREIGN STEAMSHIP CO. *v.* MATISE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: See 488 F. 2d 469.

Certiorari Denied. (See also No. 74–664, *supra.*)

No. 73–6987. TUBBS *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–465. ROBINSON, STATE FARM SUPERINTENDENT *v.* WILLIAMS. C. A. 4th Cir. Certiorari denied.

No. 74–514. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1131.

No. 74–518. LEVY *v.* PARKER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: See 478 F. 2d 772.

No. 74–542. PRINCE WILLIAM HOSPITAL CORP. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 503 F. 2d 282.

No. 74–549. ALLIED PILOTS ASSN. *v.* CIVIL AERONAUTICS BOARD ET AL.;

No. 74–709. AIR LINE DISPATCHERS' ASSN. ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL.; and

No. 74–710. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 163 U. S. App. D. C. 451, 502 F. 2d 453.

No. 74–596. THRALL *v.* WOLFE, REGIONAL COMMISSIONER, INTERNAL REVENUE SERVICE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 313.

No. 74–601. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* INTERSTATE COMMERCE COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 501 F. 2d 908.

No. 74–603. KINSER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 291 So. 2d 80.

No. 74–655. CARRATT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 215 Va. 55, 205 S. E. 2d 653.

No. 74–656. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701 *v.* INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 50, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 2d 1209.

No. 74–671. CALIFORNIA *v.* HARRIS ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 500 F. 2d 1124.

No. 74–689. MIRABILE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 503 F. 2d 1065.

No. 74–705. HOSCHLER, REGISTRAR, CONTRACTORS' LICENSE BOARD OF CALIFORNIA *v.* GRIMES. Sup. Ct. Cal. Certiorari denied. Reported below: 12 Cal. 3d 305, 525 P. 2d 65.

No. 74–711. DUNLAP ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–724. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 2d 1222.

No. 74–731. BROWN, CHAIRMAN, CALIFORNIA ADULT AUTHORITY *v.* LA CROIX. Sup. Ct. Cal. Certiorari denied. Reported below: 12 Cal. 3d 146, 524 P. 2d 816.

No. 74–789. SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* BRENNAN, SECRETARY OF LABOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1155.

No. 74–732. DYE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 1226.

No. 74–771. HECKETHORN MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied.

No. 74–822. SOUTHLAND CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1182.

No. 74–856. CHESTER HOUSING AUTHORITY *v.* PENNSYLVANIA HUMAN RELATIONS COMMISSION. Sup. Ct. Pa. Certiorari denied. Reported below: 458 Pa. 67, 327 A. 2d 335.

No. 74–860. BURTCHETT *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 530 P. 2d 471.

No. 74–866. DEAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 300 So. 2d 797.

No. 74–868. SUGARMAN *v.* MARYLAND STATE BAR ASSN., INC. Ct. App. Md. Certiorari denied. Reported below: 273 Md. 306, 329 A. 2d 1.

No. 74–880. PALOMARES *v.* WORKMEN'S COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–888. RALEY *v.* LEAGUE TO SAVE LAKE TAHOE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 507 F. 2d 517.

No. 74–892. SKIL CORP. *v.* LUCERNE PRODUCTS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 745.

No. 74–890. DUDLEY ET UX. *v.* GRUT ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–894. RYAN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 313 N. E. 2d 351.

No. 74–897. STONER ET AL. *v.* VENDO CO. Sup. Ct. Ill. Certiorari denied. Reported below: 58 Ill. 2d 289, 321 N. E. 2d 1.

No. 74–898. POTTER, DBA RFI SHIELD-ROOMS *v.* CHRISTENSEN & FOSTER ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–905. HENNEPIN BROADCASTING ASSOCIATES, INC., DBA RADIO STATIONS KTCR/AM, ET AL. *v.* AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 301 Minn. 508, 223 N. W. 2d 391.

No. 74–908. KERR STEAMSHIP CO., INC., ET AL. *v.* CITY OF GALVESTON. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1401.

No. 74–909. J. HOWARD SMITH, INC., ET AL. *v.* THE MARANON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 501 F. 2d 1275.

No. 74–911. JONES ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–917. GORDON, ADMINISTRATOR *v.* DAHL, ADMINISTRATRIX, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 505 F. 2d 517.

No. 74–918. ELLIS ET AL. *v.* HARADA ET AL. Sup. Ct. Haw. Certiorari denied.

No. 74–920. WEINER *v.* DAYTON BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 40 Ohio St. 2d 7, 317 N. E. 2d 783.

No. 74–927. FOREST HILLS UTILITY CO. *v.* WHITMAN, DIRECTOR OF ENVIRONMENTAL PROTECTION. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 74–936. VOLL *v.* SHAUL, DIRECTOR OF COMMERCE. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 74–939. QUICK *v.* HANSEN. C. A. 9th Cir. Certiorari denied.

No. 74–941. BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. *v.* LOMBARD. C. A. 2d Cir. Certiorari denied. Reported below: 502 F. 2d 631.

No. 74–5413. BURKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1182.

No. 74–5544. MACK *v.* CALIFORNIA ADULT AUTHORITY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 74–5611. BLACKWELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 298 So. 2d 798.

No. 74–5613. DOTCH *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 298 So. 2d 742.

No. 74–5662. NELSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5666. LUPINO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 505 F. 2d 693.

No. 74–5669. MASTURZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1166.

No. 74–5672. EDWARDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 838.

No. 74–5675. LAYNE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 1103.

No. 74–5693. RICHERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5697. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 1373.

No. 74–5699. FRAZIER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 74–5705. CLARK *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 285 N. C. 760, 208 S. E. 2d 380.

No. 74–5709. MOSLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–5713. CRAFT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 844.

No. 74–5723. BROWER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1050.

No. 74–5715. STROTHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 784.

No. 74–5722. LEVIN *v.* UNITED STATES; and

No. 74–5742. WHITE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 715.

No. 74–5714. LARA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1402.

No. 74–5724. HAWKE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 505 F. 2d 817.

No. 74–5727. HENKEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1398.

No. 74–5728. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 731.

No. 74–5731. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 506 F. 2d 640.

No. 74–5732. GRAY *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 74–5734. BETHEA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–5737. ANDERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 326 A. 2d 807.

No. 74–5745. STONE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 506 F. 2d 561.

No. 74–5748. RICHARDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 357.

No. 74–5754. RENDON-ROJAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 74–5757. LERMA-BRAMBILA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5760. Ellifrits *v.* United States Board of Parole et al. C. A. 10th Cir. Certiorari denied.

No. 74–5767. Glumb *v.* Doggett, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1400.

No. 74–5769. Jimenez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 288.

No. 74–5774. Jackson *v.* McCune, Warden. C. A. 10th Cir. Certiorari denied.

No. 74–5775. Lueder *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 74–5778. Gocke *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 507 F. 2d 820.

No. 74–5781. Kowalski *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 203.

No. 74–5782. Little et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 1395.

No. 74–5791. Wilcox *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 507 F. 2d 364.

No. 74–5794. McGrady *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 13.

No. 74–5798. McGann *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 74–5826. Oxidean *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 74–5837. Steen *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 844.

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No. 74–5828. LIDDY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 166 U. S. App. D. C. 289, 510 F. 2d 669.

No. 74–5879. OLDEN *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 74–5880. HATFIELD *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 74–5882. BROWN *v.* SAN DIEGO COUNTY ADVISORY COMMITTEE OF MEXICAN-AMERICANS ON ANTI-POVERTY, INC. Super. Ct. Cal., County of San Diego. Certiorari denied.

No. 74–5883. RHODES *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 192 Neb. 557, 222 N. W. 2d 837.

No. 74–5885. DAVILA *v.* BRITT, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5888. DELORIO *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–5889. ESSER *v.* KNAPP ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–5893. SKIDMORE *v.* PENN CENTRAL TRANSPORTATION CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 727.

No. 74–5899. HUNTER *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 504 F. 2d 1104.

No. 74–5905. MITCHELL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 54 Ala. App. 203, 306 So. 2d 296.

No. 74–5904. PHILLIPS *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–5907. GLUCKSMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 341, 320 N. E. 2d 633.

No. 74–5908. DONGIVINE, AKA ROCCO, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–5910. JORDAN *v.* COLBERT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1400.

No. 74–5914. NOLAN *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5915. HAMILTON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: —— Pa. ——, 329 A. 2d 212.

No. 74–5916. LEDFORD *v.* BOUNDS, CORRECTION COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–5918. CALLAHAN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 263 S. C. 35, 208 S. E. 2d 284.

No. 74–5923. TATE *v.* GRAY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–5924. BAXTER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 294 So. 2d 392.

No. 74–5927. BROWN ET AL. *v.* BOUNDS, CORRECTION COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–5933. In re Troy. C. A. 1st Cir. Certiorari denied. Reported below: 505 F. 2d 746.

No. 74–5934. Carpio *v.* Tucson High School District No. 1 of Pima County et al. Sup. Ct. Ariz. Certiorari denied. Reported below: 111 Ariz. 127, 524 P. 2d 948.

No. 74–5936. Hill *v.* Fifty-Sixth District Court of Texas et al. C. A. 5th Cir. Certiorari denied.

No. 74–5938. Hayes *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 74–5944. Norwoods *v.* Superior Court in and for the County of Orange et al. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–5947. Thomas *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–5969. Nugent et ux. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 461.

No. 74–5991. Porter *v.* Moore Business Forms, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 759.

No. 74–5992. Yates *v.* Kentucky. C. A. 6th Cir. Certiorari denied.

No. 74–438. Atheneum Book Store, Inc. *v.* City of Miami Beach. Cir. Ct. Fla., Dade County. Certiorari denied. Reported below: See 297 So. 2d 26.

Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting.

On June 15, 1971, a Miami Beach Municipal Court Judge ordered the materials in petitioner's bookstore seized for use as evidence at a subsequent trial. The

order followed a 13-minute examination of the store's contents which convinced the judge that some of the publications on sale "based upon previous judicial decisions, constitute hard core pornography" and that the owners of the store were "pandering both to heterosexual and homosexual individuals." The Circuit Court of the Eleventh Judicial Circuit affirmed, and the Third District Court of Appeal and the Supreme Court of Florida denied certiorari.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, the Municipal Court Judge's order was invalid. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Supreme Court of Florida was rendered after *Miller,* reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 74–576. STERRETT ET AL. *v.* TAYLOR ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 499 F. 2d 367.

No. 74–874. MICHIGAN *v.* RAINWATER. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 74–921. STANTON, ADMINISTRATOR, DEPARTMENT OF PUBLIC WELFARE OF INDIANA, ET AL. *v.* BOND ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 504 F. 2d 1246.

No. 74–901. HOLMAN ET AL. *v.* COIE ET AL. Ct. App. Wash. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.* Reported below: 11 Wash. App. 195, 522 P. 2d 515.

No. 74–914. THOMPSON ET AL. *v.* SHEPPARD ET AL. C. A. 5th Cir. Motion for leave to amend petition granted. Certiorari denied. Reported below: 490 F. 2d 830 and 502 F. 2d 1389.

Rehearing Denied

No. 74–272. SEMINOLE NATION OF OKLAHOMA *v.* UNITED STATES, *ante*, p. 907;

No. 74–481. VIRGINIA *v.* UNITED STATES ET AL., *ante*, p. 901;

No. 74–482. CISSNA *v.* MCQUAID, TRUSTEE IN BANKRUPTCY, 419 U. S. 1050;

No. 74–5367. SMITH *v.* MARYLAND, *ante*, p. 909;

No. 74–5701. CLARK *v.* DUMBAULD, U. S. DISTRICT JUDGE, *ante*, p. 905; and

No. 74–5721. CARTER *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante*, p. 912. Petitions for rehearing denied.

No. 74–424. BOWMAN TRANSPORTATION, INC. *v.* FRANKS ET AL., 419 U. S. 1050; and

No. 74–5337. MARTIN-MENDOZA *v.* IMMIGRATION AND NATURALIZATION SERVICE, 419 U. S. 1113. Motions for leave to file petitions for rehearing denied.

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*See also note, *supra*, p. 968.

MARCH 24, 1975*

Affirmed on Appeal

No. 74–977. ROSENTHAL *v.* BOARD OF EDUCATION OF CENTRAL HIGH SCHOOL DISTRICT NO. 3 OF THE TOWN OF HEMPSTEAD ET AL. Affirmed on appeal from D. C. E. D. N. Y. Reported below: 385 F. Supp. 223.

Appeals Dismissed

No. 74–374. TIMES-PICAYUNE PUBLISHING CORP. *v.* SCHULINGKAMP. Appeal from Sup. Ct. La. dismissed as moot. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 297 So. 2d 207.

No. 74–919. CROOKSHANKS *v.* CROOKSHANKS. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 41 Cal. App. 3d 475, 116 Cal. Rptr. 10.

Certiorari Granted—Reversed. (See No. 74–751, *ante*, p. 734.)

Miscellaneous Orders

No. A–687. LOVELACE ET AL. *v.* DECHAMPLAIN. Application for further stay of order of United States District Court for the Western District of Missouri, presented to MR. JUSTICE BLACKMUN, and by him referred

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 74–374, *Times-Picayune Publishing Corp.* v. *Schulingkamp*, *infra*, this page; No. 74–706, *Pacelli* v. *United States*, *infra*, p. 995; No. 74–749, *Art Theatre Guild, Inc.* v. *Parrish*, *infra*, p. 995; No. 74–5499, *Carter* v. *Lee*, *infra*, p. 995; No. 74–5706, *Orange* v. *North Carolina*, *infra*, p. 996; No. 74–5741, *Hardwick* v. *Caldwell*, *infra*, p. 996; No. 74–5810, *May* v. *United States*, *infra*, p. 996; No. 74–5815, *Murphy* v. *United States*, *infra*, p. 996; No. 74–5855, *Wright* v. *United States*, *infra*, p. 997; and No. 74–5942, *Brown* v. *Estelle*, *infra*, p. 996.

to the Court, granted pending the filing on or before April 10, 1975, of petition for writ of certiorari and final disposition thereon. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would deny the application except upon condition that respondent be released on bail.

No. A–700 (74–6089). ESCAMILLA *v.* BOGUE, U. S. DISTRICT JUDGE. C. A. 8th Cir. Application for stay of trial, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–739 (74–1169). ROGERS ET AL. *v.* INMATES' COUNCILMATIC VOICE ET AL. Appeal from D. C. N. D. Ohio. Application for stay of execution of paragraph 7 of order of the United States District Court for the Northern District of Ohio, presented to MR. JUSTICE STEWART, and by him referred to the Court, granted pending final disposition of appeal.

No. D–27. IN RE DISBARMENT OF MCDERMOTT. It having been reported to this Court that Francis X. McDermott, of New York, N. Y., 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 18, 1974 [419 U. S. 1016], having suspended the said Francis X. McDermott 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 Francis X. McDermott be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–34. In re Disbarment of Kerr. It having been reported to this Court that Elaine Worley Kerr, of Bailey's Crossroads, Va., has been disbarred from the practice of law in all of the courts of the State of Maryland and disbarred from the practice of law in the District of Columbia, and this Court by order of January 20, 1975 [419 U. S. 1118], having suspended the said Elaine Worley Kerr from the practice of law in this Court and directed that a rule issue requiring her to show cause why she should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that a response has been filed;

It is ordered that the said Elaine Worley Kerr be, and she is hereby, disbarred from the practice of law in this Court and that her name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–35. In re Disbarment of Raimondi. Thomas Paul Raimondi, of Baltimore, Md., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on January 20, 1975 [419 U. S. 1118], is hereby discharged.

No. 74–157. United Housing Foundation, Inc., et al. *v.* Forman et al.; and

No. 74–647. New York et al. *v.* Forman et al. C. A. 2d Cir. [Certiorari granted, 419 U. S. 1120.] Motion of petitioners for additional time for oral argument granted and ten additional minutes allotted for that purpose. Respondents allotted ten additional minutes for oral argument.

No. D–44. In re Disbarment of Morgan. It is ordered that Edward LeRoy Morgan, of Phoenix, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 73–6739. Costarelli *v.* Massachusetts. Appeal from Municipal Ct. of Boston. [Probable jurisdiction postponed, 419 U. S. 893.] Motion of Massachusetts Defenders Committee for leave to file a brief as *amicus curiae* granted.

No. 74–389. Albemarle Paper Co. et al. *v.* Moody et al.; and

No. 74–428. Halifax Local No. 425, United Papermakers & Paperworkers, AFL–CIO *v.* Moody et al. C. A. 4th Cir. [Certiorari granted, 419 U. S. 1068.] Motion of petitioners for additional time for oral argument granted and ten additional minutes allotted for that purpose. Respondents allotted ten additional minutes for oral argument. Mr. Justice Powell took no part in the consideration or decision of this motion.*

No. 74–511. Trainor, Acting Director, Department of Public Aid of Illinois *v.* Vargas. C. A. 7th Cir. Motion for leave to supplement petition for writ of certiorari granted.

No. 74–5988. Hohensee *v.* Muir, U. S. District Judge. Motion for leave to file petition for writ of mandamus denied.

No. 74–5823. Martin *v.* United States Court of Appeals for the Eighth Circuit. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

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*See also note, *supra,* p. 985.

No. 74–6101. THERIAULT *v.* PITTMAN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. Motion for leave to file petition for writ of habeas corpus and/or mandamus denied.

Probable Jurisdiction Noted

No. 74–952. BLANTON, GOVERNOR OF TENNESSEE, ET AL. *v.* AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE ET AL. Appeal from D. C. M. D. Tenn. Probable jurisdiction noted and case set for oral argument with No. 74–730, *Roemer* v. *Board of Public Works of Maryland* [probable jurisdiction noted, *ante,* p. 922].

Certiorari Granted

No. 74–728. FRANKS ET AL. *v.* BOWMAN TRANSPORTATION CO., INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 495 F. 2d 398.

No. 74–850. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WEBER. C. A. 9th Cir. Certiorari granted. Reported below: 503 F. 2d 1049.

No. 74–754. UNITED STATES *v.* MANDUJANO. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 496 F. 2d 1050.

Certiorari Denied

No. 73–953. FARR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 487 F. 2d 1023.

No. 73–6009. HICKMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1404.

No. 73–6659. BUTLER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 759.

No. 73–5489. POLESTI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–6868. FERNANDEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 497 F. 2d 730.

No. 74–604. DEPARTMENT OF HIGHWAYS OF LOUISIANA *v.* BEAIRD-POULAN, INC. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 54.

No. 74–632. IRALI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 1295.

No. 74–659. CAPRA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 501 F. 2d 267.

No. 74–690. ANONYMOUS *v.* KISSINGER, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 163 U. S. App. D. C. 92, 499 F. 2d 1097.

No. 74–699. ABBOTT LABORATORIES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 505 F. 2d 565.

No. 74–714. DELLINGER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 813.

No. 74–720. DIGIORGIO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 727.

No. 74–752. RUSSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–763. GROSSMAN *v.* STRIEPEKE, SHERIFF. C. A. 9th Cir. Certiorari denied.

No. 74–776. PHELPS *v.* CHRISTISON, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 1405.

No. 74–800. MOSELEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 507 F. 2d 257.

No. 74–801. MAURO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 507 F. 2d 802.

No. 74–804. CROUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–809. HINMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 1397.

No. 74–811. REEVES *v.* ADMINISTRATOR, FEDERAL ENERGY OFFICE, ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 507 F. 2d 455.

No. 74–825. CLINCHER ET AL. *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 205 Ct. Cl. 8, 499 F. 2d 1250.

No. 74–827. ANDERSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 390, 509 F. 2d 312.

No. 74–830. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–834. DEMOPOULOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1171.

No. 74–836. GUTWEIN ET AL. *v.* EASTON PUBLISHING CO. Ct. App. Md. Certiorari denied. Reported below: 272 Md. 563, 325 A. 2d 740.

No. 74–840. GULF OIL CORP. *v.* WOOD. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 760.

No. 74–843. GORDON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 505 F. 2d 845.

No. 74–849. GARRAMONE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–853. GERACI, EXECUTRIX *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 502 F. 2d 1148.

No. 74–855. FRITTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 505 F. 2d 168.

No. 74–862. KRILICH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 680.

No. 75–867. PUGET SOUND POWER & LIGHT CO. *v.* LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO. C. A. 9th Cir. Certiorari denied. Reported below: 506 F. 2d 523.

No. 74–887. RAYNER ET AL. *v.* CITY COUNCIL OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 912.

No. 74–916. RADISICH *v.* RADISICH. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–929. DAVID R. MCGEORGE CAR CO., INC. *v.* LEYLAND MOTOR SALES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 504 F. 2d 52.

No. 74–5777. PEERAER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–959. BAEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–938. LAUSCHE *v.* COMMISSIONER OF PUBLIC WELFARE ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 302 Minn. 165, 225 N. W. 2d 366.

No. 74–945. RIESS ET UX. *v.* MURCHISON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 999.

No. 74–962. BOYD *v.* PENNSYLVANIA STATE BOARD OF OSTEOPATHIC EXAMINERS. Pa. Commw. Ct. Certiorari denied. Reported below: 12 Pa. Commw. 620, 317 A. 2d 307.

No. 74–999. BEDFORD AVIATION, INC. *v.* MASSACHUSETTS PORT AUTHORITY. C. A. 1st Cir. Certiorari denied. Reported below: 508 F. 2d 835.

No. 74–5746. MORGAN *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 505 F. 2d 736.

No. 74–937. LOUIS ET AL. *v.* PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 730.

No. 74–5789. DEBENEDICTUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 500 F. 2d 1399.

No. 74–5796. REID *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–5812. SCHALL ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 503 F. 2d 1400.

No. 74–5820. SNYDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 595.

No. 74–5833. MESSINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 507 F. 2d 73.

No. 74–5836. EHLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1050.

No. 74–5864. RESNICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 1183.

No. 74–5874. BRUCE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 369, 505 F. 2d 476.

No. 74–5941. WOOD *v.* WILSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–5952. MOORE ET UX. *v.* CSAKAI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 2d 970.

No. 74–5953. TIPLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5959. HILL *v.* CALIFORNIA ADULT AUTHORITY PAROLE BOARD. C. A. 5th Cir. Certiorari denied.

No. 74–5962. WARD *v.* GRIGGS, INSTITUTION SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 74–5963. SMITH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 40 Cal. App. 3d 107, 115 Cal. Rptr. 109.

No. 74–5964. OLENZ *v.* CLEARY ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 19 Ill. App. 3d 946, 312 N. E. 2d 385.

No. 74–5972. CHACON *v.* YOUNGER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–5973. JOHNSON *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 507 F. 2d 1309.

No. 74–5974. POWELL *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 1396.

No. 74–5976. GRISOLIA, AKA DEROSSI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5980. FINLEY *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5981. KONJEVIC ET VIR *v.* FLORIDA DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION. Dist. Ct. App. Fla., 3d Dist. Certiorari denied.

No. 74–5983. LAPLANTE *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 505 F. 2d 780.

No. 74–5989. THOMPSON *v.* GRAY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 976.

No. 74–5995. STOKES *v.* ROBUCK, CHAIRMAN, KENTUCKY PAROLE BOARD, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 973.

No. 74–706. PACELLI *v.* UNITED STATES; and
No. 74–738. MALLAH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari in No. 74–706. Reported below: 503 F. 2d 971.

No. 74–749. ART THEATRE GUILD, INC., ET AL. *v.* PARRISH ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 503 F. 2d 133.

No. 74–5499. CARTER *v.* LEE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 503 F. 2d 565.

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No. 74–5706. ORANGE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 285 N. C. 762, 208 S. E. 2d 380.

No. 74–5741. HARDWICK *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 502 F. 2d 783.

No. 74–5810. MAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–5815. MURPHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 506 F. 2d 529.

No. 74–5942. BROWN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 503 F. 2d 1401.

No. 74–333. UNITED STATES *v.* COOKS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 493 F. 2d 668.

No. 74–615. PROCUNIER, CORRECTIONS DIRECTOR *v.* BYE. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 12 Cal. 3d 96, 524 P. 2d 854.

No. 74–786. LLOYD A. FRY ROOFING CO. *v.* ILLINOIS POLLUTION CONTROL BOARD ET AL. App. Ct. Ill., 1st Dist. Motion of respondents Hemmerick et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 20 Ill. App. 3d 301, 314 N. E. 2d 350.

No. 74–5855. WRIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 505 F. 2d 731.

No. 74–821. HARDING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 507 F. 2d 294.

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

Petitioner was convicted of receiving obscene materials which had been transported in interstate commerce in violation of 18 U. S. C. § 1462. The United States Court of Appeals for the Tenth Circuit affirmed the conviction. 475 F. 2d 480 (1973). We granted the petition for certiorari, and remanded the case for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973). 414 U. S. 964 (1973). On remand, the District Court determined that the material was obscene under the *Miller* standard, and reinstated the judgment of conviction. Again, the Tenth Circuit affirmed.

For the reasons stated in my dissent from the remand of this case, 414 U. S., at 965, and because the present judgment was rendered after *Miller,* I would grant the petition and reverse the judgment.

No. 74–935. CHICAGO BOARD OF HEALTH ET AL. *v.* FRIENDSHIP MEDICAL CENTER, LTD., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 505 F. 2d 1141.

No. 74–946. DUPLAN CORP. ET AL. *v.* MOULINAGE ET RETORDERIE DE CHAVANOZ. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 509 F. 2d 730.

No. 74–986. CHESAPEAKE & OHIO RAILWAY CO. *v.* PAYNTER. C. A. 4th Cir. Certiorari denied. MR. JUS-

TICE POWELL took no part in the consideration or decision of this petition.* Reported below: 506 F. 2d 1397.

Rehearing Denied

No. 74–5436. HORNE *v.* UNITED STATES, *ante,* p. 947; and

No. 74–5816. TRIGG *v.* TENNESSEE, *ante,* p. 938. Petitions for rehearing denied.

No. 74–5529. MCHAR *v.* MCHALE, 419 U. S. 1115. Motion for leave to file petition for rehearing denied.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties and sit on a panel in the United States Court of Appeals for the Third Circuit to hear the following cases: *Hartman* v. *Switzer* (No. 74–1861); *Hartman* v. *United States* (No. 74–1881); *Hartman* v. *Tannenwald* (No. 74–1882); *Adams* v. *Richardson* (No. 74–2193); *Cupp* v. *Secretary of the Treasury* (No. 73–1837); and *Cupp* v. *Saxbe* (No. 74–2147), pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit during the period beginning June 9, 1975, and ending June 13, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

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*See also note, *supra,* p. 985.

MARCH 31, 1975

Affirmed on Appeal

No. 74–743. COMET ELECTRONICS, INC., ET AL. *v.* UNITED STATES ET AL.;

No. 74–762. GEORGE T. COOK CO., INC., ET AL. *v.* UNITED STATES ET AL.; and

No. 74–833. TRANS-MARK SERVICES, INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 381 F. Supp. 1233.

No. 74–823. SERVITRON, INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. Affirmed on appeal from D. C. M. D. La. Reported below: 380 F. Supp. 1344.

Certiorari Granted—Vacated and Remanded

No. 73–1763. LUKHARD, DIRECTOR, DEPARTMENT OF WELFARE AND INSTITUTIONS OF VIRGINIA *v.* DOE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Burns* v. *Alcala, ante,* p. 575. Reported below: 493 F. 2d 54.

No. 74–637. TRAINOR, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* WILSON. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Burns* v. *Alcala, ante,* p. 575. Reported below: 499 F. 2d 155.

No. 73–1917. IMMIGRATION AND NATURALIZATION SERVICE *v.* ECHEVERRIA. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reid* v. *Immigration and Naturalization Service, ante,* p. 619.

No. 74–242. HOOKER, DIRECTOR, NEW HAMPSHIRE DIVISION OF WELFARE *v.* CARVER ET AL. C. A. 1st Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Burns* v. *Alcala, ante,* p. 575. Reported below: 501 F. 2d 1244.

Miscellaneous Orders

No. A–232. MINNESOTA ET AL. *v.* RESERVE MINING CO. ET AL.; and

No. A–262. UNITED STATES *v.* RESERVE MINING CO. ET AL. C. A. 8th Cir. Renewed applications to vacate indefinite stay order pending appeal, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. Reported below: 498 F. 2d 1073.

No. A–684. MAROE *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. D. C. C. D. Cal. Application for bail, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–697. DECHAMPLAIN *v.* LOVELACE ET AL. C. A. 8th Cir. Reapplication for bail, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A–728. B. COLEMAN CORP. ET AL. *v.* WALKER ET AL. C. A. 7th Cir. Application for stay or for injunction, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 74–362. INTERCOUNTY CONSTRUCTION CORP. ET AL. *v.* WALTER, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, 419 U. S. 1119.] Motion of the Solicitor General to permit Frank H. Easterbrook, Esquire, to argue *pro hac vice* granted.

No. A–765. PATTERSON ET AL. *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO ET AL. Sup. Ct. Cal. Application for stay, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Stay heretofore granted by MR. JUSTICE DOUGLAS on March 21, 1975, *post,* p. 1301, is vacated. MR. JUSTICE DOUGLAS dissents from Court's order vacating his previous stay.

No. D–45. IN RE DISBARMENT OF MITCHELL. It is ordered that John Newton Mitchell, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this matter.

No. D–46. IN RE DISBARMENT OF MARDIAN. It is ordered that Robert Charles Mardian, of Phoenix, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this matter.

No. 73–1888. UNITED STATES *v.* ALASKA. C. A. 9th Cir. [Certiorari granted, 419 U. S. 1045.] Motion of respondent for divided argument granted.

No. 74–466. DUNLOP, SECRETARY OF LABOR *v.* BACHOWSKI ET AL. C. A. 3d Cir. [Certiorari granted, 419 U. S. 1068.] Motion of United Steelworkers of America, AFL–CIO, for additional time to present oral argument denied. The alternative request for divided argument granted only if the Solicitor General agrees to cede some of the time allotted petitioner for oral argument.

No. 74–389. Albemarle Paper Co. et al. *v.* Moody et al.; and

No. 74–428. Halifax Local No. 425, United Papermakers & Paperworkers, AFL–CIO *v.* Moody et al. C. A. 4th Cir. [Certiorari granted, 419 U. S. 1068.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Mr. Justice Powell took no part in the consideration or decision of this motion.

No. 74–634. United States *v.* Nobles. C. A. 9th Cir. [Certiorari granted, 419 U. S. 1120.] Motion of respondent for additional time for oral argument, or in the alternative for divided argument, denied.

No. 74–878. National League of Cities et al. *v.* Dunlop, Secretary of Labor; and

No. 74–879. California *v.* Dunlop, Secretary of Labor. Appeals from D. C. D. C. [Probable jurisdiction noted, *ante,* p. 906.] Motion of Florida Police Benevolent Assn. for leave to file a brief as *amicus curiae* granted.

No. A–776 (74–1185). Firestone Plastics Co., a Division of Firestone Tire & Rubber Co., et al. *v.* United States Department of Labor et al. C. A. 2d Cir. Application for stay, presented to Mr. Justice Marshall, and by him referred to the Court, denied. Mr. Justice Douglas and Mr. Justice Powell took no part in the consideration or decision of this application. Reported below: 509 F. 2d 1301.

No. 74–6154. Morton et al. *v.* Meacham, Warden, et al. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted

No. 74–799. UNITED STATES *v.* FOSTER LUMBER CO., INC. C. A. 8th Cir. Certiorari granted. Reported below: 500 F. 2d 1230.

No. 74–942. RIZZO, MAYOR OF PHILADELPHIA, ET AL. *v.* GOODE ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 506 F. 2d 542.

No. 74–492. OHIO *v.* GALLAGHER. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 38 Ohio St. 2d 291, 313 N. E. 2d 396.

No. 74–928. UNITED STATES *v.* DINITZ. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 504 F. 2d 854.

No. 74–5822. HAMPTON, AKA BYERS *v.* UNITED STATES. C. A. 8th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 507 F. 2d 832.

Certiorari Denied

No. 74–622. PEOPLE OF SAIPAN, BY GUERRERO ET AL. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 2d 90.

No. 74–649. BELLIZZI *v.* SUPERIOR COURT OF STANISLAUS COUNTY. Sup. Ct. Cal. Certiorari denied. Reported below: 12 Cal. 3d 33, 524 P. 2d 148.

No. 74–795. CURBELO-TALVARA ET AL. *v.* UNITED STATES; and

No. 74–5857. ARIAS-DIAZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 F. 2d 165.

No. 74–841. PORTER ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 355, 496 F. 2d 583.

No. 74–870. LAWSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 507 F. 2d 433.

No. 74–871. NEW JERSEY CHAPTER, INC. OF THE AMERICAN PHYSICAL THERAPY ASSN., INC. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 40, 502 F. 2d 500.

No. 74–899. LEFAIVRE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 507 F. 2d 1288.

No. 74–907. KEYSER, DBA KEYSER TOWING CO., ET AL. *v.* DUNLOP, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 507 F. 2d 472.

No. 74–968. BARRERA *v.* ROSCOE, SNYDER & PACIFIC RAILWAY CO. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1058.

No. 74–969. OLYMPIC FASTENING SYSTEMS, INC. *v.* TEXTRON, INC. C. A. 6th Cir. Certiorari denied. Reported below: 504 F. 2d 609.

No. 74–971. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK *v.* NEWMAN. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 277.

No. 74–983. MALONEY, DBA APALACHICOLA TIMES *v.* GIBSON ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 295 So. 2d 120.

No. 74–5472. NUDD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 12 Cal. 3d 204, 524 P. 2d 844.

No. 74–1008. BACON ET AL. *v.* TEXACO INC. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 946.

No. 74–1013. ORIENT MID-EAST LINES, INC., ET AL. *v.* A SHIPMENT OF RICE NOW OR LATELY ON BOARD THE ORIENT TRANSPORTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 496 F. 2d 1032.

No. 74–5711. O'BRIEN *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 74–5729. NUNNERY *v.* BARBER, COMMISSIONER, ALCOHOL BEVERAGE CONTROL COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 503 F. 2d 1349.

No. 74–5744. MCFARLAND *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 84 Wash. 2d 391, 526 P. 2d 361.

No. 74–5753. SLAUGHTER ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 301 So. 2d 762.

No. 74–5759. FERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 1395.

No. 74–5790. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 305.

No. 74–5803. BARNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1400.

No. 74–5807. GANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 506 F. 2d 518.

No. 74–5817. HODGE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5819. Tocco et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 503 F. 2d 234.

No. 74–5838. Poole *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–5839. Lundy *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 76.

No. 74–5845. Hessbrook *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 1375.

No. 74–5847. Daniels *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–5853. Rivera *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 710.

No. 74–5886. Strawn *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 759.

No. 74–5891. Terry *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1399.

No. 74–5906. Brogan *v.* Weinberger, Secretary of Health, Education, and Welfare. C. A. 10th Cir. Certiorari denied.

No. 74–5920. Lee *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 166 U. S. App. D. C. 67, 509 F. 2d 400.

No. 74–5926. Jewell *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1405.

No. 74–5943. ABNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 1285.

No. 74–5987. MOORE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5993. FORMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 45 App. Div. 2d 820, 358 N. Y. S. 2d 353.

No. 74–5994. KOSKY *v.* WHEALON, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 843.

No. 74–5996. NOWLAN *v.* NOWLAN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–6001. COLE *v.* DISTRICT ATTORNEY OF PLACER COUNTY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 74–6004. EATON *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 843.

No. 74–6005. MUDD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 74–6009. MCHAR *v.* GOVERNMENT EMPLOYEES INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 74–6010. BLACK ET AL. *v.* HANRAHAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1404.

No. 74–6011. PORZUCZEK, GUARDIAN *v.* COUNTY OF SAN MATEO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–6013. BELL *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 263 S. C. 239, 209 S. E. 2d 890.

No. 74–6017. ROBINSON *v.* ROBINSON, STATE FARM SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 74–6023. HAWK *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–6024. EPPERSON *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–6031. TRAILOR *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–6054. SMITH *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–511. TRAINOR, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* VARGAS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 508 F. 2d 485.

No. 74–779. LOUISIANA *v.* SAIA. Sup. Ct. La. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 302 So. 2d 869.

No. 74–900. CITY OF PARMA, OHIO *v.* UNITED STATES. C. A. 6th Cir. Certiorari and other relief denied.

No. 74–980. LEE ET AL. *v.* ARROWOOD ET AL. Sup. Ct. Minn. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 302 Minn. 188, 224 N. W. 2d 489.

No. 74–979. TWOMEY, WARDEN, ET AL. *v.* WRIGHT. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 506 F. 2d 1404.

Rehearing Denied

No. 74–719. NEALE ET VIR *v.* HAYDUK ET AL., *ante*, p. 915; and

No. 74–5568. GARCIA *v.* UNITED STATES, *ante*, p. 960. Petitions for rehearing denied.

No. 74–5347. WARD *v.* GRIGGS, INSTITUTION SUPERINTENDENT, ET AL., *ante*, p. 930;

No. 74–5348. WARD *v.* GRIGGS, INSTITUTION SUPERINTENDENT, *ante*, p. 930;

No. 74–5459. WARD *v.* GRIGGS, INSTITUTION SUPERINTENDENT, *ante*, p. 930; and

No. 74–5510. ORAND *v.* UNITED STATES, *ante*, p. 931. Petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these petitions.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1009 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

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OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

PATTERSON ET AL. *v.* SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO ET AL.

ON APPLICATION FOR STAY

No. A–765. Decided March 21, 1975

Application to MR. JUSTICE DOUGLAS for stay of further state court proceedings against applicant newspaper reporters and managing editor, who were adjudged in contempt for refusing to answer investigating judge's questions as to how they had obtained access to a certain sealed grand jury transcript, is granted pending referral of the application to the full Court, since the applicants may be irreparably deprived of constitutional rights if the proceedings continue and they have stated their intention to seek certiorari from the state appellate courts' denial of extraordinary relief.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicants are two California reporters and the managing editor of their newspaper. In January 1975, they published a series of articles containing references to testimony offered in a Fresno County grand jury proceeding, despite the fact that the transcript of that proceeding had been ordered sealed by the local state-court judge before whom the grand jury's indictment was returned. The judge instituted an investigation seeking to uncover any possible violations of his order sealing the grand jury transcript; in the course of that investigation, numerous witnesses were called, including applicants. Applicants state that they were excluded from the courtroom during the testimony of the other witnesses, and that their

counsel was prevented from cross-examining any of these witnesses. Applicants themselves, when called, refused to answer questions concerning the manner in which they had obtained access to the grand jury transcript, citing various state and federal privileges (not including, except as to one applicant, their privilege against self-incrimination). The judge refused to recognize these claims of privilege, and found applicants in contempt of court on many occasions, although the record before me does not disclose whether these contempt adjudications have ever been formalized in any sense and does not indicate that any sanction has yet been imposed. Applicants unsuccessfully sought extraordinary relief in the state appellate courts, and now state their intention to seek a writ of certiorari to review the denial of such relief, claiming that their confrontation rights and their due process rights, including the right to a fair and impartial hearing, have been violated and will continue to be violated in these proceedings.

I am informed that proceedings are scheduled to continue in the Superior Court at 10 a. m. today. Intervention in a pending state proceeding of this sort undoubtedly is warranted only in extraordinary circumstances. The facts of this case, however, raise disquieting echoes of the constitutional infirmities which we identified in *In re Murchison,* 349 U. S. 133 (1955), and *In re Oliver,* 333 U. S. 257 (1948). If these proceedings continue in this fashion, applicants may well suffer a deprivation of constitutional rights which can never be adequately redressed. In light of applicants' expressed intention to seek certiorari from the denial of extraordinary relief below, I have this day entered an order staying further proceedings with respect to these applicants, pending my referral of this application to the full Court at the earliest opportunity.

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ABSENCE FROM TRIAL. See **Criminal Law**, 3–4.

ABSENCE IN MILITARY SERVICE. See **Military Selective Service Act.**

ABSENT PARENT'S SUPPORT OF CHILDREN. See **Social Security Act**, 1.

ABSTENTION.

Removal of county officers—Constitutionality of state statute.— In view of unsettled state of Texas law as to whether state constitutional provisions ensure justices of peace and constables tenure until their elected terms expire, even when their ouster would be required by challenged statute providing that when certain precinct boundaries are changed and more than allotted number of justices of peace and constables reside within changed district, offices shall become vacant and be filled as other vacancies, District Court should have abstained from deciding federal constitutionality of statute, it being far from certain under various Texas precedents that appellee officeholders must lose their jobs or that reinstatement relief ordered by District Court is available. Harris County Comm'rs Court v. Moore, p. 77.

ABUSE OF DISCRETION. See **Federal Water Pollution Control Act Amendments of 1972**, 1.

ACCESS TO GRAND JURY TRANSCRIPTS. See **Stays.**

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ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY. See **Federal Water Pollution Control Act Amendments of 1972.**

ADMISSIBILITY OF EVIDENCE. See **Evidence.**

ADVERSARY HEARINGS. See **Criminal Law**, 2.

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ALABAMA. See **Appeals,** 2.

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ANTITRUST ACTS.

1. *Clayton and Federal Trade Commission Acts—Consent order against "acquiring" assets—Continuing failure or neglect to obey—Penalties.*—"Acquiring" as used in consent order prohibiting respondent's predecessor from "acquiring" other bakeries means both initial transaction and maintaining of rights obtained without resale, and therefore violation of order is a "continuing failure or neglect to obey" a Federal Trade Commission order within meaning of § 11 (*l*) of Clayton Act and § 5 (*l*) of Federal Trade Commission Act and thus subject to daily penalties thereunder. United States v. ITT Continental Baking Co., p. 223.

2. *Clayton and Federal Trade Commission Acts—Consent order against acquisition of assets—Continuing violation—Penalties.*—Since consent order prohibiting "acquiring" assets, "as it is written," supports an interpretation that act of acquisition continues until assets are disgorged, there is no need to determine whether § 11 (*l*) of Clayton Act and § 5 (*l*) of Federal Trade Commission Act would permit imposition of daily penalties even if consent order must be read, as respondent claims, to proscribe only initial act of acquisition. United States v. ITT Continental Baking Co., p. 223.

3. *Clayton and Federal Trade Commission Acts—Order against "acquiring" assets—Continuing failure or neglect to obey—Penalties.*—Purpose of "continuing failure or neglect to obey" provisions of § 11 (*l*) of Clayton Act and § 5 (*l*) of Federal Trade Commission Act, as shown by their legislative history, to assure that penalty provisions would meaningfully deter violations whose *effect* is continuing and whose detrimental *effect* could be terminated or minimized by violator at some time after initiating violation, would be undermined and penalty would be converted into a minor tax if violation of an order prohibiting "acquiring" assets were treated as a single violation. United States v. ITT Continental Baking Co., p. 223.

APPEALS. See also **Constitutional Law,** II, 1–3; III, 2–4, 6; **Criminal Appeals Act; Habeas Corpus; Jurisdiction,** 1; **Procedure.**

1. *Constitutionality of state statute—Final judgment or decree.*—This Court has jurisdiction over appeal under 28 U. S. C. § 1257

APPEALS—Continued.

from Georgia Supreme Court's decision upholding, in damages action by rape victim's father against television reporter and broadcasting company claiming that his right to privacy had been invaded by broadcast of his daughter's name, constitutional validity of Georgia statute making it a misdemeanor to broadcast a rape victim's name. Constitutionality of statute was "drawn in question" within meaning of § 1257 (2), and Georgia Supreme Court's decision is a "final judgment or decree" within meaning of § 1257. Cox Broadcasting Corp. v. Cohn, p. 469.

2. *Denial of injunctive relief—Jurisdiction—No decision on constitutionality of state statute.*—This Court has no jurisdiction over an appeal under 28 U. S. C. § 1253 from a three-judge District Court's order denying injunctive relief against enforcement of a state-court temporary injunction under Alabama nuisance statute closing appellant's theater, where three-judge court did not reach merits of appellant's constitutional attack on nuisance statute but instead based its order on impropriety of federal intervention in state proceedings. MTM, Inc. v. Baxley, p. 799.

3. *Three-judge District Court—Reapportionment plan.*—This Court has jurisdiction of appeal under 28 U. S. C. § 1253 challenging constitutionality of reapportionment plan for state legislature ordered by three-judge District Court. Although plan was court ordered, its enforcement is based on State's Constitution and statutes, its effectuation directly depends on state election law machinery, and plan itself is a court-imposed replacement of state constitutional provisions and reapportionment statutes. Chapman v. Meier, p. 1.

APPEALS FROM POST-TRIAL RULINGS. See **Constitutional Law**, III, 2–4.

APPEALS FROM PRETRIAL ORDERS. See **Constitutional Law**, III, 1, 5–6; **Criminal Appeals Act.**

APPOINTED COUNSEL. See **Criminal Law**, 2.

APPORTIONMENT PLANS. See **Appeals**, 3; **Constitutional Law**, II, 1–2.

APPROPRIATIONS. See **Federal Water Pollution Control Act Amendments of 1972.**

ARKANSAS. See **Civil Rights Act of 1871; Judicial Review; Procedure.**

ARMED FORCES. See **Constitutional Law**, III, 3, 5; **Jurisdiction**, 2–3; **Military Selective Service Act.**

ARRESTS. See **Constitutional Law**, V; **Criminal Law**, 2; **Habeas Corpus.**

ASSAULT ON FEDERAL OFFICERS. See **Conspiracies**, 3; **Criminal Law**, 1.

ATLANTIC COASTAL STATES. See **Federal-State Relations**, 2.

AUTOMATIC DISMISSAL OF APPEALS. See **Constitutional Law**, II, 3.

BANKS. See **Internal Revenue Code**, 1.

BARGAINING REPRESENTATIVE. See **National Labor Relations Act**, 2.

BOUNDARIES. See **Water Rights.**

BROADCASTS OF LOTTERY INFORMATION. See **Mootness**, 2.

BROADCASTS OF RAPE VICTIM'S NAME. See **Appeals**, 1; **Constitutional Law**, IV, 1.

CAR SERVICE ORDERS. See **Interstate Commerce Commission.**

CASE OR CONTROVERSY. See **Mootness**, 1.

CASH TRANSACTIONS. See **Internal Revenue Code.**

CEASE-AND-DESIST ORDERS. See **Antitrust Acts.**

CENSORSHIP. See **Constitutional Law**, IV, 2–3.

CERTIFICATION OF CLASS ACTION. See **Mootness**, 1.

CHATTANOOGA. See **Constitutional Law**, IV, 2–3.

CHILD SUPPORT. See **Social Security Act**, 1.

CITIZENSHIP. See **Immigration and Nationality Act.**

CITY-LEASED THEATERS. See **Constitutional Law**, IV, 2–3.

CIVIL ANTITRUST PENALTIES. See **Antitrust Acts.**

CIVIL JURISDICTION. See **Indians**, 3.

CIVIL PROCEEDINGS. See **Federal-State Relations**, 1.

CIVIL RIGHTS ACT OF 1871. See also **Judicial Review**; **Procedure.**

Students—Disciplinary action—School officials' liability.—While on basis of common-law tradition and public policy, school officials are entitled to a qualified good-faith immunity from liability for damages under 42 U. S. C. § 1983, they are not immune from such liability if they knew or reasonably should have known that action they took within their sphere of official responsibility would violate constitutional rights of student affected, or if they took action with

CIVIL RIGHTS ACT OF 1871—Continued.

malicious intention to cause a deprivation of such rights or other injury to student. But a compensatory award will be appropriate only if school officials acted with such an impermissible motivation or with such disregard of student's clearly established constitutional rights that their action cannot reasonably be characterized as being in good faith. Wood v. Strickland, p. 308.

CIVIL RIGHTS ACT OF 1964. See **National Labor Relations Act**, 1.

CLAIMS AGAINST UNITED STATES. See **Jurisdiction**, 1.

CLASS ACTIONS. See **Mootness**, 1.

CLASSIFICATIONS. See **Constitutional Law**, II, 4.

CLAYTON ACT. See **Antitrust Acts.**

COLLECTIVE BARGAINING. See **National Labor Relations Act**, 1–2.

COLLECTIVE-BARGAINING AGREEMENTS. See **Military Selective Service Act.**

COLORADO RIVER. See **Federal Power Act.**

COMBATING ORGANIZED CRIME. See **Conspiracies**, 1.

COMITY. See **Constitutional Law**, VI; **Federal-State Relations**, 1.

COMMUTERS' INCOME TAXES. See **Constitutional Law**, VI.

COMPETENCE TO STAND TRIAL. See **Criminal Law**, 3–4.

COMPLETED OFFENSES. See **Conspiracies**, 2.

CONCERTED ACTIVITIES FOR MUTUAL AID OR PROTECTION. See **National Labor Relations Act**, 1, 3–4.

CONDITIONS OF ELIGIBILITY FOR AFDC BENEFITS. See **Social Security Act**, 1.

CONGRESS. See **Constitutional Law**, VIII; **Conspiracies**, 1; **Indians**, 1–2.

CONSENT ORDERS OF FEDERAL TRADE COMMISSION. See **Antitrust Acts.**

CONSPIRACIES. See also **Criminal Law**, 1.

1. *Conspiracy as separate offense—Organized Crime Control Act of 1970.*—Petitioners were properly convicted and punished for violating 18 U. S. C. § 1955, making it a crime for five or more persons to operate a gambling business prohibited by state law, and for conspiring to violate that statute, it being clear that Congress in enact-

CONSPIRACIES—Continued.
ing Organized Crime Control Act of 1970 intended to retain each offense as an independent curb in combating organized crime. Iannelli v. United States, p. 770.

2. *Conspiracy as separate offense—Wharton's Rule as exception.*—Traditionally conspiracy and completed offense have been considered to constitute separate crimes, and this Court has recognized that a conspiracy poses dangers quite apart from substantive offense. Wharton's Rule, under which an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when crime is of such a nature as necessarily to require participation of two persons for its commission, is an exception to general principle that a conspiracy and substantive offense that is its immediate end do not merge upon proof of latter. Iannelli v. United States, p. 770.

3. *Conspiracy to assault federal officers—Proof of knowledge of intended victim's identity.*—Where knowledge of facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiring to commit offense. Thus, in this case where proof of knowledge that intended victims were federal officers was not necessary to convict for assault on federal officers under 18 U. S. C. § 111, such knowledge did not have to be proved to convict of conspiring to commit that offense under 18 U. S. C. § 371. United States v. Feola, p. 671.

4. *Wharton's Rule—Judicial presumption.*—Wharton's Rule (under which an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when crime is of such a nature as necessarily to require participation of two persons for its commission, and which traditionally has been applied to offenses such as adultery where harm attendant upon commission of substantive offense is confined to parties to agreement and where offenses *require* concerted criminal activity) has current vitality only as a judicial presumption to be applied in absence of a contrary legislative intent. Iannelli v. United States, p. 770.

CONSTABLES. See **Abstention.**

CONSTITUTIONAL LAW. See also **Abstention; Appeals,** 1, 3; **Civil Rights Act of 1871; Criminal Appeals Act; Criminal Law,** 2, 4; **Federal-State Relations; Habeas Corpus; Indians,** 1–2; **Judicial Review; Jurisdiction,** 1; **Mootness,** 1; **Procedure; Stays.**

I. Due Process.

Prison disciplinary proceedings—Retroactivity.—In state prisoner's

CONSTITUTIONAL LAW—Continued.

action against prison officials seeking damages and expunction of records for alleged due process violations in summarily placing him in solitary confinement, relief cannot be based on rules requiring notice and a hearing in connection with serious prison discipline determinations announced in nonretroactive decision, *Wolff* v. *McDonnell,* 418 U. S. 539, or in *Landman* v. *Royster,* 333 F. Supp. 621, where discipline determinations in question all occurred before dates of those decisions. Cox v. Cook, p. 734.

II. Equal Protection of the Laws.

1. *Court-ordered legislative reapportionment—Impermissible population deviation.*—A population deviation of such magnitude as 20% variance involved here in court-ordered reapportionment plan for North Dakota Legislature is constitutionally impermissible absent significant state policies or other acceptable considerations requiring its adoption. Burden is on District Court to elucidate reasons necessitating any departure from approximate population equality and to articulate clearly relationship between variance and state policy furthered. Here District Court's allowance of 20% variance is not justified, as court claimed, by absence of "electorally victimized minorities," by sparseness of North Dakota's population, by division of State caused by Missouri River, or by asserted state policy of observing geographical boundaries and existing political subdivisions, especially when it appears that other, less statistically offensive, reapportionment plans already devised are feasible. Chapman v. Meier, p. 1.

2. *Court-ordered legislative reapportionment—Multimember districts vis-à-vis single-member districts.*—Absent persuasive justification, a federal district court in ordering state legislative reapportionment should refrain from imposing multimember districts upon a State. Here District Court has failed to articulate a significant state interest supporting its departure from general preference for single-member districts in court-ordered reapportionment plans that this Court recognized in *Connor* v. *Johnson,* 402 U. S. 690, and unless District Court can articulate such a "singular combination of unique factors" as was found to exist in *Mahan* v. *Howell,* 410 U. S. 315, 333, or unless 1975 North Dakota Legislative Assembly appropriately acts, court should proceed expeditiously to reinstate single-member districts. Chapman v. Meier, p. 1.

3. *Escaped felon—Automatic dismissal of appeal.*—Texas statute providing for automatic dismissal of an appeal by a felony defendant if he escapes from custody pending appeal, except that appeal will be reinstated if he voluntarily surrenders within 10 days of his

CONSTITUTIONAL LAW—Continued.

escape, or if he is under sentence of life imprisonment or death appellate court in its discretion may reinstate appeal if he returns to custody within 30 days of his escape, does not violate Equal Protection Clause of Fourteenth Amendment. Estelle v. Dorrough, p. 534.

4. *Social Security Act—Survivors' benefits—Gender-based distinction.*—Gender-based distinction mandated by provisions of Social Security Act, 42 U. S. C. § 402 (g), that grant survivors' benefits based on earnings of a deceased husband and father covered by Act both to his widow and to couple's minor children in her care, but that grant benefits based on earnings of a covered deceased wife and mother only to minor children and not to widower, violates right to equal protection secured by Due Process Clause of Fifth Amendment, since it unjustifiably discriminates against women wage earners required to pay social security taxes by affording them less protection for their survivors than is provided for men wage earners. Weinberger v. Wiesenfeld, p. 636.

III. Fifth Amendment.

1. *Double jeopardy—Attachment of jeopardy.*—Concept of "attachment of jeopardy" defines a point in criminal proceedings at which purposes and policies of Double Jeopardy Clause are implicated. Jeopardy does not attach until a defendant is put to trial, which in a jury trial occurs when jury is empaneled and sworn and in a nonjury trial when court begins to hear evidence. Serfass v. United States, p. 377.

2. *Double jeopardy—Post guilty-verdict ruling—Government appeal.*—When a trial judge rules in favor of defendant after a guilty verdict has been entered by trier of fact, Government may appeal from that ruling without contravening Double Jeopardy Clause. United States v. Wilson, p. 332.

3. *Double jeopardy—Post-trial ruling—Government appeal.*—Although it is not clear whether or not District Court's judgment "dismissing" indictment and "discharging" respondent following a bench trial on a charge of failing to report for induction was a resolution of factual issues against Government, it suffices for double jeopardy purposes, and therefore for determining appealability under 18 U. S. C. § 3731, that further proceedings of some sort, devoted to resolving factual issues going to elements of offense charged and resulting in supplemental findings, would have been required upon reversal and remand. Trial, which could have resulted in conviction, has long since terminated in respondent's favor, and to subject him to any further proceedings, even if District Court were to receive

CONSTITUTIONAL LAW—Continued.

no additional evidence, would violate Double Jeopardy Clause. United States v. Jenkins, p. 358.

4. *Double jeopardy—Postverdict rulings—Government appeals.*—Double Jeopardy Clause protects against Government appeals only where there is a danger of subjecting defendant to a second trial for same offense, and hence such protection does not attach to a trial judge's postverdict correction of an error of law which would not grant prosecution a new trial or subject defendant to multiple prosecutions. United States v. Wilson, p. 332.

5. *Double jeopardy—Pretrial dismissal of indictment.*—Jeopardy has not attached in this case when District Court prior to trial dismissed indictment for failure to report for induction, because petitioner had not then been put to trial. There had been no waiver of a jury trial; court had no power to determine petitioner's guilt or innocence; and petitioner's motion was premised on belief that its consideration before trial would serve "expeditious administration of justice." Serfass v. United States, p. 377.

6. *Double jeopardy—Pretrial dismissal of indictment—Government appeal.*—Double Jeopardy Clause does not bar an appeal by United States under 18 U. S. C. § 3731 from a pretrial order dismissing an indictment since in that situation criminal defendant has not been "put to trial before the trier of facts, whether the trier be a jury or a judge." Serfass v. United States, p. 377.

IV. First Amendment.

1. *Freedom of press—Publication of rape victim's name.*—State may not, consistently with First and Fourteenth Amendments, impose sanctions on accurate publication of a rape victim's name obtained from judicial records that are maintained in connection with a public prosecution and that themselves are open to public inspection. Here, under circumstances where appellant reporter based his televised news report of a rape case upon notes taken during court proceedings and obtained rape victim's name from official court documents open to public inspection, protection of freedom of press provided by First and Fourteenth Amendments bars Georgia from making reporter's and appellant broadcasting company's broadcast of rape victim's name basis of civil liability in cause of action by victim's father for invasion of privacy that penalizes pure expression—content of a publication. Cox Broadcasting Corp. v. Cohn, p. 469.

2. *Freedom of speech—Prior restraint—Procedural safeguards—Theatrical production.*—A system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards

CONSTITUTIONAL LAW—Continued.

designed to obviate the dangers of a censorship system," *viz.*, (1) burden of instituting judicial proceedings, and of proving that material is unprotected, must rest on censor; (2) any restraint before judicial review can be imposed only for a specified brief period and only to preserve status quo; and (3) a prompt judicial determination must be assured. Since those safeguards in several respects were lacking here, respondent municipal board members' denial to petitioner promoter of use of municipal facilities for musical production violated petitioner's First Amendment rights. Southeastern Promotions, Ltd. v. Conrad, p. 546.

3. *Freedom of speech—Prior restraint—Theatrical production.*—Respondent municipal board members' denial to petitioner promoter of use of municipal facilities for musical production, which was based on respondents' judgment of musical's content, constituted a prior restraint. Southeastern Promotions, Ltd. v. Conrad, p. 546.

V. Fourth Amendment.

1. *Detention of arrested person—Probable cause—Judicial determination.*—Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Accordingly, Florida procedures challenged here whereby a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination are unconstitutional. Gerstein v. Pugh, p. 103.

2. *Detention of arrested person—Probable cause—Prosecution by information—Judicial oversight.*—Constitution does not require judicial oversight of decision to prosecute by information, and a conviction will not be vacated on ground that defendant was detained pending trial without a probable cause determination. Gerstein v. Pugh, p. 103.

3. *Detention of arrested person—Probable cause—Prosecutor's assessment.*—Prosecutor's assessment of probable cause for detention of arrested person, standing alone, does not meet requirements of Fourth Amendment and is insufficient to justify restraint of liberty pending trial. Gerstein v. Pugh, p. 103.

VI. Privileges and Immunities Clause.

Commuters' income taxes.—Under rule requiring substantial equality of treatment for citizens of taxing State and nonresident taxpayers, New Hampshire Commuters Income Tax violates Privileges and Immunities Clause, since tax falls exclusively on nonresidents' in-

CONSTITUTIONAL LAW—Continued.

comes and is not offset even approximately by other taxes imposed upon residents alone. Austin v. New Hampshire, p. 656.

VII. Sixth Amendment.

Jury selection—Exclusion of women—Retroactivity.—Decision in *Taylor* v. *Louisiana,* 419 U. S. 522, wherein it was held that Sixth and Fourteenth Amendments require petit juries to be selected from a source fairly representative of community and that such requirement is violated by systematic exclusion of women from jury panels, is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empaneled prior to date of that decision. Daniel v. Louisiana, p. 31.

VIII. Supremacy Clause.

1. *State game laws—Applicability to Indians.*—In ratifying, pursuant to its plenary constitutional powers, 1891 Agreement by which Indian tribe had ceded reservation to Government, Congress manifested no purpose of subjecting rights conferred upon Indians to state regulation, and in view of unqualified ratification of Art. 6 of such Agreement specifying that Indians' hunting rights in common with other persons would not be taken away or abridged, any state qualification of those rights is precluded by Supremacy Clause. Antoine v. Washington, p. 194.

2. *State game laws—Applicability to Indians.*—Supremacy Clause precludes application of state game laws to violations of such laws allegedly committed by appellant Indians in area of former Indian reservation that tribe had ceded to Government by 1891 Agreement, since federal statutes ratifying such Agreement are "Laws of the United States . . . made in Pursuance" of Constitution and therefore like all "Treaties made" are made binding upon affected States. Nor does fact that Congress had abolished contract-by-treaty method of dealing with Indian tribes affect Congress' power to *legislate* on problems of Indians, including legislation ratifying contracts between Executive Branch with Indian tribes to which affected States were not parties. Antoine v. Washington, p. 194.

CONTEMPT. See **Stays.**

CONTINUING ANTITRUST VIOLATIONS. See **Antitrust Acts.**

CONTRACT GRIEVANCE PROCEDURES. See **National Labor Relations Act,** 2.

COURT-ORDERED REAPPORTIONMENT. See **Appeals,** 3; **Constitutional Law,** II, 1–2.

COURTS. See **Federal-State Relations**, 1.

COURTS-MARTIAL. See **Jurisdiction**, 2–3.

CREDIBILITY OF WITNESSES. See **Evidence.**

CRIMINAL APPEALS ACT. See also **Constitutional Law**, III, 2–3, 6.

Authorized appeals—Double jeopardy.—In light of language of present version of 18 U. S. C. § 3731 and of its legislative history, it is clear that Congress intended to authorize a Government appeal to a court of appeals so long as further prosecution would not be barred by Double Jeopardy Clause. Serfass v. United States, p. 377.

CRIMINAL JURISDICTION. See **Indians**, 3.

CRIMINAL LAW. See **Conspiracies**; **Constitutional Law**, I; II, 3; III; VII; VIII, 2; **Criminal Appeals Act**; **Evidence**; **Habeas Corpus**; **Jury Selection and Service Act of 1968.**

1. *Assault on federal officer—Proof of intent.*—Title 18 U. S. C. § 111, making it an offense to assault a federal officer in performance of his official duties, which was enacted both to protect federal officers and federal functions and to provide a federal forum in which to try alleged offenders, requires no more than proof of an intent to assault, not of an intent to assault a federal officer; and it was not necessary under statute to prove that respondent and his confederates knew that their victims were federal officers. United States v. Feola, p. 671.

2. *Detention of arrested person—Probable cause—Judicial determination—Hearing.*—Determination of probable cause for detention of arrested person, as an initial step in criminal justice process, may be made by a judicial officer without an adversary hearing. The sole issue is whether there is probable cause for detaining arrested person pending further proceedings, and this issue can be determined reliably by use of informal procedures. Because of its limited function and its nonadversary character, probable cause determination is not a "critical stage" in prosecution that would require appointed counsel. Gerstein v. Pugh, p. 103.

3. *Incompetence to stand trial—Consideration of evidence as to incompetency.*—In prosecution of petitioner and others for rape of petitioner's wife, Missouri courts failed to accord proper weight to evidence suggesting petitioner's incompetence to stand trial. When considered together with information available prior to trial contained in psychiatrist's report suggesting psychiatric treatment and testimony of petitioner's wife at trial repeating and confirming such report and stating that he had tried to kill her shortly before trial,

CRIMINAL LAW—Continued.
information concerning petitioner's suicide attempt during trial created sufficient doubt of his competence to stand trial to require further inquiry. Drope v. Missouri, p. 162.

4. *Mental illness—Incompetence to stand trial—Suicide attempt—Suspension of trial.*—Whatever relationship between mental illness and incompetency to stand trial, bearing of former on latter was sufficiently likely in prosecution of petitioner and others for rape of petitioner's wife, that, in light of evidence of petitioner's behavior including his suicide attempt and resultant hospitalization during trial, and there being no opportunity without his presence to evaluate that bearing in fact, correct course was to suspend trial until such an evaluation could be made. Drope v. Missouri, p. 162.

"CRITICAL STAGE" OF PROSECUTION. See **Criminal Law**, 2.

CROSS SECTION OF THE COMMUNITY. See **Constitutional Law**, VII.

CUSTOMS LAWS. See **Jurisdiction**, 1.

DAILY CIVIL ANTITRUST PENALTIES. See **Antitrust Acts.**

DAMAGES. See **Constitutional Law**, I.

DECREES. See **Water Rights.**

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Social Security Act**, 2.

DEPENDENT CHILD. See **Social Security Act**, 2.

DEPORTATION. See **Immigration and Nationality Act.**

DEPOSITS. See **Internal Revenue Code**, 1.

DEPRIVATION OF STUDENTS' CONSTITUTIONAL RIGHTS. See **Civil Rights Act of 1871**; **Judicial Review.**

DETENTION OF ARRESTED PERSON. See **Constitutional Law**, V; **Criminal Law**, 2.

DETERIORATED MONEY. See **Internal Revenue Code**, 1.

DETERMINATION OF PROBABLE CAUSE. See **Constitutional Law**, V; **Criminal Law**, 2.

DIRECT APPEALS. See **Appeals**, 2.

DISCHARGE OF DEFENDANT. See **Constitutional Law**, III, 3.

DISCHARGE OF EMPLOYEES. See **National Labor Relations Act**, 1.

DISCIPLINE DETERMINATIONS. See **Constitutional Law**, I.

DISCRETION. See **Federal Water Pollution Control Act Amendments of 1972.**

DISCRIMINATION. See **Constitutional Law,** II, 4; VI; **National Labor Relations Act,** 1–2.

DISMISSAL OF APPEALS. See **Constitutional Law,** II, 3.

DISMISSAL OF INDICTMENTS. See **Constitutional Law,** III, 2–6; **Criminal Appeals Act.**

DISTRICT COURTS. See **Abstention; Appeals,** 2–3; **Constitutional Law,** II, 1–2; **Federal-State Relations,** 1; **Jurisdiction.**

DOUBLE JEOPARDY. See **Constitutional Law,** III; **Criminal Appeals Act.**

DUE PROCESS. See **Civil Rights Act of 1871; Constitutional Law,** I; II, 4; **Criminal Law,** 3–4; **Judicial Review; Procedure.**

ELECTIONS. See **Appeals,** 3; **Constitutional Law,** II, 1–2.

ELIGIBILITY FOR AFDC BENEFITS. See **Social Security Act.**

EMERGENCY CAR SERVICE RULES. See **Interstate Commerce Commission.**

EMERGENCY POWERS OF INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Commission.**

EMPLOYER AND EMPLOYEES. See **Military Selective Service Act; National Labor Relations Act.**

EMPLOYMENT DISCRIMINATION. See **National Labor Relations Act,** 1–2.

ENJOINING COURT-MARTIAL PROCEEDINGS. See **Jurisdiction,** 2–3.

ENJOINING STATE CIVIL PROCEEDINGS. See **Federal-State Relations,** 1.

ENTRY INTO UNITED STATES. See **Immigration and Nationality Act.**

ENVIRONMENTAL PROTECTION AGENCY. See **Federal Water Pollution Control Act Amendments of 1972.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** II.

EQUITABLE INTERVENTION IN COURT-MARTIAL PROCEEDINGS. See **Jurisdiction,** 2–3.

EQUITABLE JURISDICTION. See **Jurisdiction,** 2–3.

EQUITY. See **Federal-State Relations,** 1; **Jurisdiction,** 2–3.

ESCAPED FELONS. See **Constitutional Law**, II, 3.

EVIDENCE. See also **Conspiracies**, 3; **Criminal Law**, 1, 3–4; **Judicial Review.**

Miranda warnings—Inculpatory information—Impeachment—Admissibilty.—When a suspect in police custody has been given and accepts full warnings prescribed by *Miranda* v. *Arizona*, 384 U. S. 436, and later states that he would like to telephone a lawyer, but is told he cannot do so until reaching station, and he then provides inculpatory information, such information is admissible in evidence at suspect's trial solely for impeachment purposes after he has taken stand and testified to contrary knowing such information had been ruled inadmissible for prosecution's case in chief. Oregon v. Hass, p. 714.

EXCLUSION OF ALIENS. See **Immigration and Nationality Act.**

EXCLUSION OF WOMEN FROM JURY. See **Constitutional Law**, VII.

EXCLUSIVE BARGAINING REPRESENTATIVE. See **National Labor Relations Act**, 2.

EXECUTIVE BRANCH. See **Constitutional Law**, VIII, 2.

EXHAUSTION OF REMEDIES. See **Federal-State Relations**, 1; **Jurisdiction**, 2–3.

EXPULSION FROM SCHOOL. See **Civil Rights Act of 1871; Judicial Review; Procedure.**

EXPUNCTION OF PRISON RECORDS. See **Constitutional Law**, I.

FAILURE TO REPORT FOR INDUCTION. See **Constitutional Law**, III, 3, 5.

FALSE REPRESENTATION OF CITIZENSHIP. See **Immigration and Nationality Act.**

FEDERAL COMMUNICATIONS COMMISSION. See **Mootness**, 2.

FEDERAL-COURT INTERVENTION IN COURT-MARTIAL PROCEEDINGS. See **Jurisdiction**, 2–3.

FEDERAL-COURT-ORDERED REAPPORTIONMENT. See **Appeals**, 3; **Constitutional Law**, II, 1–2.

FEDERAL EQUITY POWER. See **Jurisdiction**, 2–3.

FEDERAL FINANCIAL ASSISTANCE. See **Federal Water Pollution Control Act Amendments of 1972.**

FEDERAL GAMBLING OFFENSES. See **Conspiracies**, 1.

FEDERAL INTERVENTION IN STATE CIVIL PROCEEDINGS. See **Appeals**, 2; **Federal-State Relations**, 1.

FEDERAL OFFICERS. See **Conspiracies**, 3; **Criminal Law**, 1.

FEDERAL POWER ACT.

1. *Federal Power Commission—Licensing—Thermal-electric power plants.*—Sections 4 (e) and 23 (b) of Part I of Act giving FPC licensing jurisdiction over hydroelectric facilities do not also confer such jurisdiction over thermal-electric power plants. Chemehuevi Tribe of Indians v. FPC, p. 395.

2. *Licensing—Project works—Thermal-electric power plants.*—Structures constituting thermal-electric power plants are not "project works" within meaning of § 4 (e) of Part I of Act, as is clear from language of that provision when read together with rest of Act (none of whose provisions refers to development or conservation of steam power), Act's legislative history (which manifests congressional intent to regulate only hydroelectric generating facilities), Federal Power Commission's consistent interpretation of its authority as not including jurisdiction over thermal-electric power plants, and this Court's decision in *FPC* v. *Union Electric Co.*, 381 U. S. 90. Chemehuevi Tribe of Indians v. FPC, p. 395.

3. *Licensing—Surplus water—Thermal-electric power plants.*—Surplus water clause of § 4 (e) of Part I of Act does not authorize Federal Power Commission licensing of water used for cooling purposes in thermal-electric power plants, nothing in Act's language or legislative history disclosing any congressional intent that that clause should serve any broader interests than project works clause of § 4 (e). And, contrary to Court of Appeals' holding, Act does not vest FPC with all responsibilities that prior legislation had given to Waterways Commission, responsibilities that in any case did not include licensing use of surplus water by steam plants. Chemehuevi Tribe of Indians v. FPC, p. 395.

FEDERAL-QUESTION JURISDICTION. See **Jurisdiction**, 3.

FEDERAL RULES OF CIVIL PROCEDURE. See **Mootness**, 1.

FEDERAL-STATE RELATIONS. See **Appeals**, 2; **Constitutional Law**, VIII; **Federal Water Pollution Control Act Amendments of 1972**; **Indians**, 1–2; **Social Security Act**, 1; **Water Rights.**

1. *Enjoining state civil proceeding—Nuisance—Closure of theater.*—Where state court ordered theater closed under Ohio's public nuisance statute which provides that a place exhibiting obscene films

FEDERAL-STATE RELATIONS—Continued.

is a nuisance, and appellee theater operator filed suit in Federal District Court for injunctive and declaratory relief, alleging that appellant officials' use of nuisance statute constituted a deprivation of constitutional rights under color of state law, principles of *Younger* v. *Harris,* 401 U. S. 37, are applicable even though state proceeding is civil in nature. District Court should have applied tests laid down in *Younger* in determining whether to proceed to merits and should not have entertained action unless appellee established that early intervention was justified under exceptions recognized in *Younger,* where state proceeding is conducted with an intent to harass or in bad faith, or challenged statute is flagrantly and patently unconstitutional. Huffman v. Pursue, Ltd., p. 592.

2. *Rights to seabed and subsoil—United States as against coastal States.*—United States, to exclusion of defendant Atlantic Coastal States, has sovereign rights over seabed and subsoil underlying Atlantic Ocean, lying more than three geographical miles seaward from ordinary low-water mark and from outer limits of inland coastal waters, extending seaward to outer edge of Continental Shelf, that area, like seabed adjacent to coastline, being in domain of Nation rather than of separate States. United States v. Maine, p. 515.

FEDERAL TRADE COMMISSION. See **Antitrust Acts.**

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972.

1. *Municipal sewage treatment—Allotment of federal funds.*—Since holding in *Train* v. *City of New York, ante,* p. 35, that Administrator of Environmental Protection Agency has no authority to allot less than full amounts authorized to be appropriated under § 207 of 1972 Amendments for municipal waste treatment plants, is at odds with Court of Appeals' premise that there was discretion to control or delay allotments, that court's judgment that further proceedings in respondent's action to compel Administrator to allot full sums authorized by § 207 were essential to determine whether that discretion had been abused, is vacated and case is remanded for further proceedings consistent with *Train* v. *City of New York.* Train v. Campaign Clean Water, p. 136.

2. *Municipal sewers and sewage treatment—Allotment of federal funds.*—1972 Amendments do not permit Administrator of Environmental Protection Agency to allot to States under § 205 (a), which provides that "[s]ums authorized to be appropriated pursuant to

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972—Continued.

§ 207 . . . shall be allotted by the Administrator," less than entire amounts authorized to be appropriated by § 207, which authorizes appropriation of "not to exceed" specified amounts for each of three fiscal years. Train v. City of New York, p. 35.

FELONIES. See **Constitutional Law**, II, 3.

FICTITIOUS NAME. See **Internal Revenue Code.**

FIFTH AMENDMENT. See **Constitutional Law**, II, 4; III; **Criminal Appeals Act.**

FILMS. See **Federal-State Relations**, 1.

FINALITY CLAUSES. See **Jurisdiction**, 3.

FINAL JUDGMENT OR DECREE. See **Appeals**, 1.

FIRST AMENDMENT. See **Constitutional Law**, IV.

FLORIDA. See **Constitutional Law**, V; **Criminal Law**, 2.

FOURTEENTH AMENDMENT. See **Constitutional Law**, II, 3; IV; VII.

FOURTH AMENDMENT. See **Constitutional Law**, V.

FREEDOM OF SPEECH. See **Constitutional Law**, IV, 2–3.

FREEDOM OF THE PRESS. See **Constitutional Law**, IV, 1.

FREIGHT CAR SHORTAGE. See **Interstate Commerce Commission.**

GAMBLING. See **Conspiracies**, 1.

GAME LAWS. See **Constitutional Law**, VIII; **Indians**, 1.

GENDER-BASED DISTINCTIONS. See **Constitutional Law**, II, 4.

GOVERNMENT APPEALS. See **Constitutional Law**, III, 2–4, 6; **Criminal Appeals Act.**

GRADUATION FROM SCHOOL. See **Mootness**, 1.

GRAND JURIES. See **Jury Selection and Service Act of 1968.**

GRAND JURY TRANSCRIPTS. See **Stays.**

GREAT SALT LAKE. See **Water Rights.**

GRIEVANCE PROCEDURES. See **National Labor Relations Act**, 2.

GUILTY PLEAS. See **Habeas Corpus.**

HABEAS CORPUS.

Constitutional issues—State post-guilty plea review—Availability of federal habeas corpus.—When state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, such as lawfulness of a search or voluntariness of a confession, defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding. Thus, where a New York statute permitted an appeal from an adverse decision on a motion to suppress evidence allegedly obtained as a result of unlawful search and seizure though conviction was based on a guilty plea, respondent, who had been convicted in state court on a guilty plea to a drug charge and who had unsuccessfully presented to state courts on direct appeal his federal constitutional claim that evidence seized incident to an unlawful arrest should have been suppressed, was not precluded from raising such claim in a federal habeas corpus proceeding. Lefkowitz v. Newsome, p. 283.

"HAIR." See **Constitutional Law,** IV, 2–3.

HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Social Security Act,** 2.

HEARINGS. See **Constitutional Law,** I; **Criminal Law,** 2; **Interstate Commerce Commission.**

HIGH SCHOOLS. See **Civil Rights Act of 1871; Judicial Review; Procedure.**

HOLDING TIME FOR FREIGHT CARS. See **Interstate Commerce Commission.**

HUNTING RIGHTS OF INDIANS. See **Constitutional Law,** VIII, 2; **Indians,** 1.

HYDROELECTRIC GENERATING FACILITIES. See **Federal Power Act.**

IDENTIFICATION OF CLASS. See **Mootness,** 1.

IMMIGRATION AND NATIONALITY ACT.

Deportation—Entry without inspection.—Petitioners, husband and wife who had entered United States after falsely representing themselves to be United States citizens, and who thereafter had two children who were born in this country, were deportable under § 241 (a)(2) of Act, which establishes as a separate ground for deportation, quite independently of whether alien was excludable at time of his arrival, failure of an alien to present himself for inspection at time he made his entry. Aliens like petitioners who accomplish entry into this country by making a willfully false representation of United

IMMIGRATION AND NATIONALITY ACT—Continued.
States citizenship are not only excludable under § 212 (a) (19) but have also so significantly frustrated process for inspecting incoming aliens that they are also deportable as persons who have "entered the United States without inspection." Reid v. INS, p. 619.

IMMUNITY OF SCHOOL OFFICIALS FROM LIABILITY. See **Civil Rights Act of 1871.**

IMPARTIAL JURY TRIALS. See **Constitutional Law,** VII.

IMPEACHMENT OF WITNESSES. See **Evidence.**

INCOME TAXES. See **Constitutional Law,** VI; **Internal Revenue Code.**

INCULPATORY INFORMATION. See **Evidence.**

INDIANS. See also **Constitutional Law,** VIII.

1. *Agreements with Indians—Ratifying legislation—Construction.*—Although State is free to regulate non-Indian hunting rights in area of former Indian reservation that Indian tribe had ceded to Government by 1891 Agreement, legislation ratifying such Agreement must be construed to exempt Indians from like state control or Congress would have preserved nothing that Indians would not have had without legislation, which would have been "an impotent outcome to [the] negotiations." Antoine v. Washington, p. 194.

2. *Agreements with Indians—Ratifying legislation—Construction.*—Legislation ratifying 1891 Agreement whereby Indian tribe had ceded reservation to Government must be construed in light of longstanding canon of construction that wording of treaties and statutes ratifying agreements with Indians is not to be construed to their prejudice. Antoine v. Washington, p. 194.

3. *Indian reservation—Termination by legislation.*—Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty, was terminated and returned to public domain by an 1891 Act which, in ratification of a previously negotiated 1889 agreement between affected Indian tribe and United States, not only opened all unallotted lands to settlement but also appropriated and vested in tribe a sum certain per acre in payment for express cession and relinquishment of "all" of tribe's "claim, right, title, and interest" in unallotted lands; and therefore South Dakota state courts have civil and criminal jurisdiction over conduct of members of tribe on non-Indian, unallotted lands within 1867 Reservation borders. DeCoteau v. District County Court, p. 425.

INDICTMENTS. See **Constitutional Law,** III, 2–3, 5–6; IV, 1.

INDUCTION. See **Constitutional Law**, III, 3, 5.

INFORMAL PROCEDURES. See **Criminal Law**, 2.

INFORMATIONS. See **Constitutional Law**, V, 1–2.

INJUNCTIONS. See **Appeals**, 2; **Federal-State Relations**, 1; **Jurisdiction.**

INSPECTION OF ALIENS. See **Immigration and Nationality Act.**

INSPECTION OF JURY LISTS. See **Jury Selection and Service Act of 1968.**

INTENT TO ASSAULT. See **Conspiracies**, 3; **Criminal Law**, 1.

INTERFERENCE WITH LIBERTY. See **Constitutional Law**, V.

INTERNAL REVENUE CODE.

1. *"John Doe" summons—Bank—Identity of person—Tax liability.*—Internal Revenue Service has authority under §§ 7601 and 7602 of Code to issue a "John Doe" summons to a bank or other depository to discover identity of person who has had bank transactions suggesting possibility of liability for unpaid taxes, in this instance a summons to respondent bank officer during an investigation to identify person or persons who deposited 400 deteriorated $100 bills with bank within space of a few weeks. United States v. Bisceglia, p. 141.

2. *Summonses—Tax investigations—Cash transactions.*—Language of § 7601 of Code permitting Internal Revenue Service to investigate and inquire after "*all* persons . . . who *may* be liable to pay *any* internal revenue tax . . ." and of § 7602 authorizing summoning of "*any* . . . person" for taking of testimony and examination of books and witnesses that may be relevant for "ascertaining the correctness of *any* return, . . . determining the liability of *any* person . . . or collecting *any* such liability . . . ," is inconsistent with an interpretation that would limit issuance of summonses to investigations which have already focused upon a particular return, a particular named person, or a particular potential tax liability, and moreover such a reading of summons power of IRS ignores agency's legitimate interest in large or unusual financial transactions, especially those involving cash. United States v. Bisceglia, p. 141.

INTERSTATE COMMERCE COMMISSION.

Emergency powers—Service order—Freight car shortage.—Service Order No. 1134, promulgated by ICC without notice or hearing pursuant to its emergency powers under § 1 (15) of Interstate Commerce Act, which limited holding time of lumber cars at reconsignment points to five working days and subjected shipper holding car

INTERSTATE COMMERCE COMMISSION—Continued.

at such points for more than that period to sum of rates from origin, to hold point, to destination, was within ICC's power under § 1 (15) to avoid undue detention of freight cars used as places of storage, during an emergency freight car shortage that ICC, exercising its expertise, found to exist. ICC v. Oregon Pacific Industries, Inc., p. 184.

INTERVENING LEGISLATION. See **Mootness**, 2; **Social Security Act**, 1.

INTOXICATING LIQUORS. See **Civil Rights Act of 1871**; **Judicial Review.**

INVASION OF LIBERTY. See **Constitutional Law**, V.

INVASION OF PRIVACY. See **Appeals**, 1; **Constitutional Law**, IV, 1.

INVESTIGATORY INTERVIEWS OF EMPLOYEES. See **National Labor Relations Act**, 3–4.

IOWA. See **Social Security Act**, 2.

"JOHN DOE" SUMMONSES. See **Internal Revenue Code**, 1.

JUDICIAL DETERMINATION OF PROBABLE CAUSE. See **Constitutional Law**, V, 1; **Criminal Law**, 2.

JUDICIAL RECORDS. See **Constitutional Law**, IV, 1.

JUDICIAL REVIEW. See also **Civil Rights Act of 1871**; **Habeas Corpus**; **Procedure.**

School disciplinary proceedings—Relitigation of evidentiary questions—School regulation—Interpretation.—When regulation in question is construed, as it should have been and as record shows it was construed by responsible school officials, to prohibit use and possession of beverages containing any alcohol at school or school activities, rather than as erroneously construed by Court of Appeals to refer only to beverages containing in excess of a certain alcoholic content, there was no absence of evidence to prove charge against respondent students, who were expelled for violating regulation, and who sued petitioner school officials under 42 U. S. C. § 1983 claiming such expulsion infringed respondents' due process rights, and hence Court of Appeals' contrary judgment is improvident. Section 1983 does not extend right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or proper construction of school regulations and was not intended to be a vehicle for federal-court correction of errors in exercise of school officials' discretion that do not rise to level of violations of specific constitutional guarantees. Wood v. Strickland, p. 308.

JURIES. See **Constitutional Law**, VII; **Jury Selection and Service Act of 1968.**

JURISDICTION. See also **Appeals**; **Federal Power Act**, 1–2; **Indians**, 3.

1. *District Court—Tucker Act—Injunction—Appeal.*—District courts' jurisdiction under Tucker Act over "any civil action or claim against United States . . . founded either upon the Constitution or any Act of Congress," did not give District Court here jurisdiction over appellants' claims to enjoin enforcement of certain challenged provisions of customs laws, since Tucker Act empowers a district court only to award damages. Therefore, a three-judge court was improperly convened, and this Court has no jurisdiction over appeal based on District Court's refusal to grant injunctive relief founded on certain constitutional claims. Lee v. Thornton, p. 139.

2. *Enjoining court-martial proceedings—Equitable jurisdiction—Avoidance of intervention.*—When a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in military court system, federal district courts must refrain from intervention, by way of injunction or otherwise. There is nothing in circumstances of this case, where respondent Army captain sued in District Court to enjoin court-martial proceedings on allegedly non-service-connected marihuana charges, to outweigh strong considerations favoring exhaustion of remedies within military court system or to warrant intruding on integrity of military court processes, which were enacted by Congress in Uniform Code of Military Justice in an attempt to balance unique necessities of military system against equally significant interest of ensuring fairness to servicemen charged with military offenses. Schlesinger v. Councilman, p. 738.

3. *Enjoining court-martial proceedings—Subject-matter jurisdiction.*—Article 76 of Uniform Code of Military Justice, which provides that court-martial proceedings "are final and conclusive" and that "all action taken pursuant to those proceedings [is] binding upon all . . . courts of the United States," does not stand as a jurisdictional bar to respondent Army captain's suit in District Court to enjoin petitioner military authorities from proceeding with court-martial proceedings against him on allegedly non-service-connected marihuana charges, and District Court had subject-matter jurisdiction under 28 U. S. C. § 1331, assuming requisite jurisdictional amount. Schlesinger v. Councilman, p. 738.

JURY SELECTION AND SERVICE ACT OF 1968.

Challenge to jury-selection procedures—Right to inspect jury lists.—An unqualified right of a litigant to inspect jury lists is re-

JURY SELECTION AND SERVICE ACT OF 1968—Continued.
quired not only by plain text of provisions of Act, 28 U. S. C. § 1867 (f), allowing parties in a case "to inspect" such lists at all reasonable times during "preparation" of a motion challenging compliance with jury-selection procedures, but also by Act's overall purpose of insuring "grand and petit juries selected at random from a fair cross section of the community," 28 U. S. C. § 1861. Hence, where District Court denied petitioner's motion, prior to his trial and conviction on a federal drug charge, to inspect jury lists in connection with his challenge to grand and petit juries-selection procedures, Court of Appeals' judgment affirming his conviction is vacated, and case is remanded so that he may attempt to support his challenge. Test v. United States, p. 28.

JURY-SELECTION PROCEDURES. See **Constitutional Law**, VII; **Jury Selection and Service Act of 1968.**

JUSTICES OF THE PEACE. See **Abstention.**

JUSTICIABILITY. See **Mootness.**

KNOWLEDGE OF VICTIM'S OFFICIAL IDENTITY. See **Conspiracies**, 3; **Criminal Law**, 1.

LABOR UNIONS. See **National Labor Relations Act.**

LACK OF NOTICE OR HEARING. See **Interstate Commerce Commission.**

LAKE BEDS. See **Water Rights.**

LAKE TRAVERSE INDIAN RESERVATION. See **Indians**, 3.

LARGE CASH TRANSACTIONS. See **Internal Revenue Code**, 2.

LEGISLATIVE REAPPORTIONMENT. See **Appeals**, 3; **Constitutional Law**, II, 1–2.

LIABILITY FOR TAXES. See **Internal Revenue Code.**

LIBERTY RIGHTS. See **Constitutional Law**, V.

LICENSING JURISDICTION OF FEDERAL POWER COMMISSION. See **Federal Power Act.**

LICENSING OF THEATRICAL PRODUCTIONS. See **Constitutional Law**, IV, 2–3.

LOTTERIES. See **Mootness**, 2.

MAINE. See **Constitutional Law**, VI.

MANAGING EDITORS. See **Stays.**

MARGINAL SEA. See **Federal-State Relations**, 2.

MARIHUANA. See **Jurisdiction**, 2–3.

MARITIME BOUNDARIES. See **Federal-State Relations**, 2.

MENS REA. See **Conspiracies**, 3; **Criminal Law**, 1.

MENTAL ILLNESS. See **Criminal Law**, 3–4.

MEN WAGE EARNERS. See **Constitutional Law**, II, 4.

MILITARY COURT SYSTEM. See **Jurisdiction**, 2–3.

MILITARY SELECTIVE SERVICE ACT.

Re-employment of veteran—Vacation benefits.—Provisions of Act that a serviceman who applies for re-employment if still qualified shall be restored to his former position "or a position of like seniority, status, and pay," and that benefits and advancements that would necessarily have accrued by virtue of continued employment will not be denied merely because of veteran's absence in military service, do not apply to claimed benefits requiring more than simple continued status as an employee. In this case these provisions do not entitle petitioner employee to full vacation benefits for years he was in military service, under terms of collective-bargaining agreement that conditioned award of such benefits on receipt of earnings during 25 weeks of previous year, since vacation scheme was intended as a form of short-term deferred compensation for work performed and not as accruing automatically as a function of continued association with company. Foster v. Dravo Corp., p. 92.

MINORITY EMPLOYEES. See **National Labor Relations Act**, 1–2.

MIRANDA WARNINGS. See **Evidence.**

MOOTNESS.

1. *Constitutionality of school rules—Students' class action—Effect of graduation.*—A purported class action by six named plaintiffs, who at time were high school students, challenging constitutionality of certain school rules and regulations, is moot, where all six have graduated from school and District Court neither properly certified class action under Fed. Rule Civ. Proc. 23 (c)(1) nor properly identified class under Rule 23 (c)(3). Indianapolis School Comm'rs v. Jacobs, p. 128.

2. *Intervening legislation—legality of lottery broadcasts.*—In view of enactment, subsequent to Court of Appeals' reversal of Federal

MOOTNESS—Continued.

Communications Commission's denial of relief to licensed New Jersey radio station against application of 18 U. S. C. § 1304 to broadcast of winning numbers in a lawful state-run lottery such as New Jersey has, of 18 U. S. C. § 1307 (a)(2) making § 1304 inapplicable to information concerning a state-authorized lottery broadcast in that State or an adjacent State having such a lottery, case is remanded to Court of Appeals so that it may consider whether case is moot as Government contends, or is not moot because, as intervenor State of New Hampshire contends, § 1307 in violation of First Amendment rights would still not allow broadcasters in Vermont, which has no lottery, to broadcast winning numbers in New Hampshire lottery. United States v. N. J. State Lottery Comm'n, p. 371.

MOTION PICTURES. See **Federal-State Relations**, 1.

MOTIONS CHALLENGING JURY-SELECTION PROCEDURES. See **Jury Selection and Service Act of 1968.**

MULTIMEMBER DISTRICTS. See **Constitutional Law**, II, 2.

MUNICIPAL FACILITIES. See **Constitutional Law**, IV, 2–3.

MUNICIPAL SEWAGE TREATMENT. See **Federal Water Pollution Control Act Amendments of 1972.**

MUSICAL PRODUCTIONS. See **Constitutional Law**, IV, 2–3.

NATIONAL LABOR RELATIONS ACT.

1. *Discriminatory discharge of employees—Remedy under Civil Rights Act of 1964—Unfair labor practice.*—If discharges of minority employees for attempting to bargain with employer over terms and conditions of employment as they affected racial minorities, violate Title VII of Civil Rights Act of 1964, its remedial provisions are available to discharged employees, but it does not follow that discharges also violated § 8 (a)(1) of NLRA, which makes it an unfair labor practice for an employer to interfere with an employee's right under § 7 to engage in concerted action "for the purpose of collective bargaining or other mutual aid or protection." Emporium Capwell Co. v. Community Org., p. 50.

2. *Minority employees—Concerted activity—Employment discrimination—Bypassing union.*—Though national labor policy accords highest priority to nondiscriminatory employment practices, NLRA does not protect concerted activity by minority employees to bargain with their employer over issues of employment discrimination, thus bypassing their exclusive bargaining representative. Emporium Capwell Co. v. Community Org., p. 50.

NATIONAL LABOR RELATIONS ACT—Continued.

3. *Unfair labor practice—Investigatory interview of employee—Denial of union representative's presence.*—Employer violated § 8 (a) (1) of Act because it interfered with, restrained, and coerced individual right of employee, protected by § 7, "to engage in . . . concerted activities for mutual aid or protection . . . ," when it denied employee's request for presence of her union representative at investigatory interview that employee reasonably believed would result in disciplinary action. NLRB v. Weingarten, Inc., p. 251.

4. *Unfair labor practice—Investigatory interview of employee—Denial of union representative's presence.*—Respondent employer's denial of employee's request that her union representative be present at investigatory interview that employee reasonably believed might result in disciplinary action constituted unfair labor practice violative of § 8 (a) (1) of Act because it interfered with, restrained, and coerced individual right of employees protected by § 7 of Act. Garment Workers v. Quality Mfg. Co., p. 276.

NATIONAL SOVEREIGNTY. See **Federal-State Relations**, 2.

NATURAL RESOURCES. See **Federal-State Relations**, 2.

NAVIGABLE WATERS. See **Federal Power Act.**

NEW HAMPSHIRE COMMUTERS INCOME TAX. See **Constitutional Law**, VI.

NEWSPAPER REPORTERS. See **Stays.**

NEWS REPORTS. See **Appeals**, 1; **Constitutional Law**, IV, 1.

NEW YORK. See **Habeas Corpus.**

NEW YORK SOCIAL SERVICES LAW. See **Social Security Act**, 1.

NON-INDIAN LANDS. See **Indians**, 3.

NONRESIDENT TAXPAYERS. See **Constitutional Law**, VI.

NON-SERVICE-CONNECTED OFFENSES. See **Jurisdiction**, 2–3.

NORTH DAKOTA. See **Appeals**, 3; **Constitutional Law**, II, 1–2.

NOTICE. See **Constitutional Law**, I; **Interstate Commerce Commission.**

NUISANCES. See **Appeals**, 2; **Federal-State Relations**, 1.

OBSCENITY. See **Constitutional Law**, IV, 2–3; **Federal-State Relations**, 1.

OCEAN WATERS. See **Federal-State Relations**, 2.

OFFICIAL COURT DOCUMENTS. See **Constitutional Law**, IV, 1.

OFFSHORE SEABED. See **Federal-State Relations**, 2.

OHIO. See **Federal-State Relations**, 1.

OIL RIGHTS. See **Federal-State Relations**, 2.

ONE PERSON, ONE VOTE. See **Constitutional Law**, II, 1–2.

ORDERS OF FEDERAL TRADE COMMISSION. See **Antitrust Acts.**

ORDERS OF INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Commission.**

ORGANIZED CRIME CONTROL ACT OF 1970. See **Conspiracies**, 1.

OUTER CONTINENTAL SHELF LANDS ACT OF 1953. See **Federal-State Relations**, 2.

OWNERSHIP OF LAKE BEDS. See **Water Rights.**

PATERNITY OF CHILDREN. See **Social Security Act**, 1.

PENALTIES. See **Antitrust Acts.**

PERMITS FOR THEATRICAL PRODUCTIONS. See **Constitutional Law**, IV, 2–3.

PETIT JURIES. See **Constitutional Law**, VII; **Jury Selection and Service Act of 1968.**

PICKETING. See **National Labor Relations Act**, 1–2.

POLLUTION. See **Federal Water Pollution Control Act Amendments of 1972.**

PORNOGRAPHY. See **Federal-State Relations**, 1.

POST-GUILTY PLEA APPELLATE REVIEW. See **Habeas Corpus.**

POST-TRIAL DISMISSAL OF INDICTMENTS. See **Constitutional Law**, III, 2–4.

POST-VERDICT RULINGS. See **Constitutional Law**, III, 2–4.

POWERS OF INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Commission.**

PREGNANT WOMEN. See **Social Security Act**, 2.

PRESENCE OF UNION REPRESENTATIVE AT INVESTIGATORY INTERVIEW. See **National Labor Relations Act**, 3–4.

PRESIDENT. See **Federal Water Pollution Control Act Amendments of 1972**, 2.

PRETRIAL DISMISSAL OF INDICTMENTS. See **Constitutional Law**, III, 1, 5–6; **Criminal Appeals Act.**

PRETRIAL PSYCHIATRIC EXAMINATION. See **Criminal Law**, 3.

PRIOR NOTICE OR HEARING. See **Interstate Commerce Commission.**

PRIOR RESTRAINTS. See **Constitutional Law**, IV, 2–3.

PRISON DISCIPLINE DETERMINATIONS. See **Constitutional Law**, I.

PRIVACY. See **Appeals**, 1; **Constitutional Law**, IV, 1.

PRIVILEGES AND IMMUNITIES CLAUSE. See **Constitutional Law**, VI.

PROBABLE CAUSE FOR DETENTION. See **Constitutional Law**, V; **Criminal Law**, 2.

PROCEDURAL DUE PROCESS. See **Procedure.**

PROCEDURAL SAFEGUARDS. See **Constitutional Law**, IV, 2.

PROCEDURE. See also **Abstention; Federal-State Relations**, 1; **Judicial Review.**

Question not decided below—First consideration.—Since District Court in respondent students' action under 42 U. S. C. § 1983, claiming their expulsions for violating school regulation infringed their rights to due process, did not discuss whether there was a procedural due process violation, and Court of Appeals did not decide issue, Court of Appeals, rather than this Court, should consider that question in first instance. Wood v. Strickland, p. 308.

PROHIBITION AGAINST "ACQUIRING" ASSETS. See **Antitrust Acts.**

PROJECT WORKS. See **Federal Power Act**, 2–3.

PROOF OF INTENT TO ASSAULT. See **Conspiracies**, 3; **Criminal Law**, 1.

PROPOSED DECREES. See **Water Rights.**

PROSECUTOR'S INFORMATIONS. See **Constitutional Law**, V.

PSYCHIATRIC TREATMENT. See **Criminal Law**, 3–4.

PUBLICATION OF RAPE VICTIM'S NAME. See **Appeals**, 1; **Constitutional Law**, IV, 1.

PUBLIC DOMAIN. See **Indians**, 3.

PUBLIC NUISANCES. See **Federal-State Relations**, 1.

PUBLIC OFFICIALS. See **Civil Rights Act of 1871; Judicial Review; Procedure.**

PUBLIC RECORDS. See **Constitutional Law**, IV, 1.

PUBLIC SCHOOLS. See **Civil Rights Act of 1871; Judicial Review; Procedure.**

PUBLIC UTILITIES. See **Federal Power Act.**

QUALIFIED GOOD-FAITH IMMUNITY FROM LIABILITY. See **Civil Rights Act of 1871.**

RACIAL DISCRIMINATION. See **National Labor Relations Act**, 1–2.

RADIO BROADCASTS OF LOTTERY INFORMATION. See **Mootness**, 2.

RAILROADS. See **Interstate Commerce Commission.**

RAPE VICTIM'S NAME. See **Appeals**, 1; **Constitutional Law**, IV, 1.

RATIFICATION OF AGREEMENTS WITH INDIANS. See **Constitutional Law**, VIII; **Indians**, 1–2.

RATIONAL BASIS. See **Constitutional Law**, II, 3.

REAPPORTIONMENT PLANS. See **Appeals**, 3; **Constitutional Law**, II, 1–2.

RECONSIGNMENT POINTS. See **Interstate Commerce Commission.**

RECORDS OPEN TO PUBLIC INSPECTION. See **Constitutional Law**, IV, 1.

REDISTRICTING OF PRECINCTS. See **Abstention.**

RE-EMPLOYMENT OF VETERANS. See **Military Selective Service Act.**

REFUSAL TO REPORT FOR INDUCTION. See **Constitutional Law**, III, 3, 5.

REINSTATEMENT OF APPEALS. See **Constitutional Law**, II, 3.

REMAND. See **Mootness**, 2.

REMOVAL OF OFFICEHOLDERS. See **Abstention.**

REPORTERS. See **Stays.**

REPRESENTATIVE CROSS SECTION OF THE COMMUNITY. See **Constitutional Law,** VII.

RESTRAINTS ON LIBERTY. See **Constitutional Law,** V.

RETROACTIVITY. See **Constitutional Law,** I; VII.

RIGHTS TO SEABED AND SUBSOIL. See **Federal-State Relations,** 2.

RIGHT TO BE PRESENT AT TRIAL. See **Criminal Law,** 4.

RIGHT TO COUNSEL. See **Criminal Law,** 2.

RIGHT TO INSPECT JURY LISTS. See **Jury Selection and Service Act of 1968.**

RIGHT TO JURY TRIAL. See **Constitutional Law,** VII; **Jury Selection and Service Act of 1968.**

RIGHT TO LIBERTY. See **Constitutional Law,** V.

RIGHT TO PRIVACY. See **Appeals,** 1; **Constitutional Law,** IV, 1.

RULES OF CIVIL PROCEDURE. See **Mootness,** 1.

SCHOOL DISCIPLINARY PROCEEDINGS. See **Civil Rights Act of 1871; Judicial Review; Procedure.**

SCHOOL OFFICIALS' IMMUNITY FROM LIABILITY. See **Civil Rights Act of 1871.**

SCHOOL RULES AND REGULATIONS. See **Civil Rights Act of 1871; Judicial Review; Mootness,** 1; **Procedure.**

SCIENTER. See **Conspiracies,** 3; **Criminal Law,** 1.

SEABED. See **Federal-State Relations,** 2.

SEALED GRAND JURY TRANSCRIPTS. See **Stays.**

SEARCHES AND SEIZURES. See **Habeas Corpus.**

SELECTION OF JURIES. See **Constitutional Law,** VII; **Jury Selection and Service Act of 1968.**

SELECTIVE SERVICE LAWS. See **Constitutional Law,** III, 3, 5.

SERVICE-CONNECTED OFFENSES. See **Jurisdiction,** 2–3.

SERVICEMEN. See **Jurisdiction,** 2–3; **Military Selective Service Act.**

SEWAGE TREATMENT. See **Federal Water Pollution Control Act Amendments of 1972.**

SEX DISCRIMINATION. See **Constitutional Law**, II, 4.

SHORELANDS. See **Water Rights.**

SIGNIFICANT STATE INTERESTS OR POLICIES. See **Constitutional Law**, II, 1–2.

SINGLE-MEMBER DISTRICTS. See **Constitutional Law**, II, 2.

SIOUX INDIANS. See **Indians**, 3.

SISSETON-WAHPETON TRIBE. See **Indians**, 3.

SIXTH AMENDMENT. See **Constitutional Law**, VII.

SOCIAL SECURITY ACT. See also **Constitutional Law**, II, 4.

1. *Aid to Families with Dependent Children—Amendment—Resolution of conflict with state law.*—Amendment, subsequent to this Court's noting probable jurisdiction of appeal from judgment of three-judge District Court, of § 402 (a) of Act resolves question below of conflict between § 402 (a) and provision of New York Social Services Law requiring recipient, as a condition of eligibility for benefits under AFDC program, to cooperate to compel absent parent to contribute to child's support. Lascaris v. Shirley, p. 730.

2. *Aid to Families with Dependent Children—Dependent child—Unborn children.*—Term "dependent child," as defined by § 406 (a) of Act to be "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother," or certain other designated relatives, and (2) who is under age of 18, or under age of 21 and a student, does not include unborn children, and hence States receiving federal financial aid under AFDC program are not required to offer welfare benefits to pregnant women for their unborn children. Burns v. Alcala, p. 575.

SOLITARY CONFINEMENT. See **Constitutional Law**, I.

SOUTH DAKOTA. See **Indians**, 3.

SOVEREIGN RIGHTS. See **Federal-State Relations**, 2.

SPECIAL MASTERS. See **Water Rights.**

STATE COURTS. See **Federal-State Relations**, 1; **Indians**, 3.

STATE ELECTION LAWS. See **Appeals**, 3; **Constitutional Law**, II, 1–2.

STATE INCOME TAXES. See **Constitutional Law**, VI.

STATE INTERESTS. See **Constitutional Law**, II, 2.

STATE LEGISLATURES. See **Appeals**, 3; **Constitutional Law**, II, 1–2.

STATE LOTTERIES. See **Mootness**, 2.

STATE POLICIES. See **Constitutional Law**, II, 1.

STATE PRISONERS. See **Constitutional Law**, I.

STATES' RIGHTS. See **Federal-State Relations**, 2.

STAYS.

State contempt proceedings—Newspaper reporters.—Application for stay of further state-court proceedings against applicant newspaper reporters and managing editor, who were adjudged in contempt for refusing to answer investigating judge's questions as to how they had obtained access to a certain sealed grand jury transcript, is granted pending referral of application to full Court, since applicants may be irreparably deprived of constitutional rights if proceedings continue and they have stated their intention to seek certiorari from state appellate courts' denial of extraordinary relief. Patterson v. Superior Court of California (DOUGLAS, J., in chambers), p. 1301.

STEAM POWER. See **Federal Power Act.**

STUDENT NEWSPAPERS. See **Mootness.**

STUDENTS. See **Civil Rights Act of 1871; Judicial Review; Mootness; Procedure.**

SUBMERGED LANDS ACT OF 1953. See **Federal-State Relations**, 2.

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SUMMONSES. See **Internal Revenue Code.**

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SUPPRESSION OF EVIDENCE. See **Habeas Corpus.**

SUPREME COURT. See also **Appeals; Jurisdiction**, 1.

1. Presentation of Attorney General, p. v.
2. Proceedings in memory of Mr. Justice Whittaker, p. VII.
3. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Fifth Circuit, p. 957.
4. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Third Circuit, p. 998.
5. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Seventh Circuit, p. 998.

SURPLUS WATER. See **Federal Power Act.**

SURVIVORS' BENEFITS. See **Constitutional Law,** II, 4.

SUSPECTS IN POLICE CUSTODY. See **Evidence.**

SUSPENSION OF TRIAL. See **Criminal Law,** 4.

SYSTEMATIC EXCLUSION OF WOMEN FROM JURY. See **Constitutional Law,** VII.

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1. *"Concerted activities . . . for mutual aid or protection."* § 7, National Labor Relations Act, 29 U. S. C. § 157. NLRB v. Weingarten, Inc., p. 251.

2. *"Continuing failure or neglect to obey."* § 11 (*l*), Clayton Act, 15 U. S. C. § 21 (*l*); § 5 (*l*), Federal Trade Commission Act, 15 U. S. C. § 45 (*l*). United States v. ITT Continental Baking Co., p. 223.

3. *"Dependent child."* § 406 (a), Social Security Act, 42 U. S. C. § 606 (a). Burns v. Alcala, p. 575.

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4. *"Drawn in question."* 28 U. S. C. § 1257 (2). Cox Broadcasting Corp. v. Cohn, p. 469.

5. *"Entered the United States without inspection."* § 241 (a) (2), Immigration and Nationality Act, 8 U. S. C. § 1251 (a) (2). Reid v. INS, p. 619.

6. *"Final judgment or decree."* 28 U. S. C. § 1257. Cox Broadcasting Corp. v. Cohn, p. 469.

7. *"Laws of the United States . . . made in Pursuance."* Supremacy Clause, U. S. Const. Art. VI, cl. 2. Antoine v. Washington, p. 194.

8. *"Project works."* § 4 (e), Federal Power Act, 16 U. S. C. § 797 (e). Chemehuevi Tribe of Indians v. FPC, p. 395.

9. *"Sums."* § 205 (a), Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. § 1285 (a) (1970 ed., Supp. III). Train v. City of New York, p. 35.

U. S. GOVERNMENT PRINTING OFFICE : 1976 O - 567-852